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Quality Assurance Privilege in Nursing Home Litigation: Why Kentucky Should Adopt the Narrow Approach

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NOTES

Quality Assurance Privilege in Nursing Home Litigation: Why Kentucky Should Adopt the Narrow Approach

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INTRODUCTION

Many people probably know someone who has been in a nursing home at one time or another. Some people have even struggled with the difficult decision of whether to put a parent or grandparent into a nursing home for long-term care. Thanks in part to technological and scientific advances in the medical field, people are living longer lives now than ever before.[2] These extended life spans can sometimes create a dilemma regarding how to care for elderly family members who can no longer care for themselves. Some families will opt to care for the elderly person without institutional assistance. Many families, however, for a variety of reasons, will turn to nursing homes for the long-term care of their loved ones.

As of December 31, 2012, more than 1.4 million people were living in nursing homes throughout the United States.[3] This represents approximately 2.8 percent of people over age sixty-five and approximately 10.2 percent of people over age eighty-five.[4] As science and technology continue to advance, these numbers will likely only increase as Americans live longer lives.[5] The Department of Health and Human Services Administration on Aging predicts that the proportion of elderly persons living in America may rise to as high as 20% of the population by the year 2030.[6] While this statistic represents a "triumph of the efforts to extend human life," these elders will "require a disproportionately large share of special services

[1] University of Kentucky College of Law, J.D. expected May 2015.

[2] *Great Life Expectancy News! People are Living Longer, Healthier Lives, Study Says*, HUFFINGTON POST (July 31, 2013, 11:26 AM), http://www.huffingtonpost.com/2013/07/29/life-expectancy_n_3670934.html.

[3] CTRS. FOR MEDICARE & MEDICAID SERVS., DEP'T OF HEALTH & HUMAN SERVS., NURSING HOME DATA COMPENDIUM 2 (2013).

[4] *Id.*

[5] *See* Steven Reinberg, *Americans Living Longer Than Ever: CDC*, U.S. NEWS & WORLD REP. (Jan. 6, 2014, 12:00 PM), http://health.usnews.com/health-news/news/articles/2014/01/06/americans-living-longer-than-ever-cdc (stating that the average American life expectancy increases every year).

[6] *Aging into the 21st Century: Summary*, ADMIN. ON AGING, http://www.aoa.gov/AgingStatistics/futuregrowth/aging21/summary.aspx (last visited Nov. 5, 2014).

and public support."[7] In fact, the Administration on Aging predicts that "[t]he number of persons requiring formal care (mainly nursing home care) . . . will rise sharply . . . ."[8]

Unfortunately for Kentuckians, the care that nursing home residents receive in this state is inferior to the care received in most other states.[9] In a 2013 analysis performed by Families for Better Care, Kentucky ranked fortieth in nursing home care out of all the states in the nation.[10] Criteria for this analysis included the state's average professional nurse hours per resident per day, the percentage of facilities with above average health inspections, the percentage of facilities with deficiencies, and the percentage of facilities with severe deficiencies.[11] In 2013, on a scale of A to F, Kentucky received a D for its quality of nursing home care.[12] In 2014, Kentucky improved ten spots to rank thirtieth of all states and received a C for its quality of nursing home care.[13] Despite these improvements, the quality of nursing home care in Kentucky is still problematic. For example, in 2014, "nearly one in five Kentucky nursing homes still cited a serious deficiency."[14] Further, "Kentucky ombudsmen verified 87 percent of registered ombudsman complaints, indicative of widespread problems."[15] In another study, based on data compiled over the last three years by ProPublica, Kentucky ranked highest in the nation for serious deficiencies per nursing home and third highest in the nation for average fine amount paid by nursing homes.[16]

Not surprisingly, there is a significant amount of nursing home litigation occurring throughout the state. Nursing home litigation is a fairly new and increasingly common phenomenon.[17] In fact, the sheer volume of nursing home litigation in Kentucky has even led some nursing home companies to cease operations in the state altogether.[18] For example, one major nursing home company recently left the state citing "frivolous lawsuits" as the reason for its departure.[19]

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[7] *Id.*

[8] *Id.*

[9] *See* Valarie Honeycutt Spears, *Beshear Says He Will Work to Improve Nursing Home Care in Kentucky*, KENTUCKY.COM (Nov. 19, 2013), http://www.kentucky.com/2013/11/19/2941225/beshear-says-he-will-work-to-improve.html.

[10] *Id.*

[11] Families for Better Care, *Grading Methodology*, NURSING HOME REPORT CARDS, http://nursinghomereportcards.com/grading-methodology/ (last visited Jan. 19, 2015).

[12] Spears, *supra* note 9.

[13] Families for Better Care, *Kentucky*, NURSING HOME REPORT CARDS, http://nursinghomereportcards.com/state/ky/ (last visited Jan. 19, 2015).

[14] *Id.*

[15] *Id.*

[16] Charles Ornstein and Lena Groeger, *Nursing Home Inspect*, PROPUBLICA, http://projects.propublica.org/nursing-homes/ (last updated Oct. 2014).

[17] Michael P. Tremoglie, *Kentucky Nursing Homes Threatened by Litigation*, LEGAL NEWSLINE (July 2, 2012, 7:00 AM), http://legalnewsline.com/in-the-spotlight/236601-kentucky-nursing-homes-threatened-by-litigation.

[18] *See id.*

[19] *Id.*

The company stated that "the combination of a worsening litigation environment and the lack of any likelihood of tort reform" motivated its decision to leave.[20]

Not only has there been a rise in the number of nursing home cases, there has also been a rise in the amount of money awarded in each case.[21] For example, from 1987 to 1994, the average award in nursing home cases nearly doubled.[22] In 2013, a Florida jury awarded the plaintiff in a nursing home case $1.1 billion dollars, the second highest jury award in the country that year.[23] Further, although punitive damages are generally awarded in only five percent of personal injury cases, they are awarded in twenty percent of nursing home cases.[24] Thus, there is seemingly more at stake in nursing home litigation than in other types of personal injury cases. Because there are so many high-stakes nursing home cases in Kentucky, the frequency and cost of which are not likely to decrease in the near future, Kentucky needs to ensure that it has well-defined rules and procedures in place to streamline this litigation.

One aspect of nursing home litigation that is still unresolved in Kentucky is the way in which Kentucky will interpret the quality assurance privilege. The quality assurance privilege will be defined in more detail in Sections I and II of this note. Briefly, however, the quality assurance privilege means that nursing home documents created in furtherance of improving the quality of resident care at a nursing home facility will be undiscoverable in litigation. Because of the high volume of nursing home cases occurring throughout the state, Kentucky needs to decide sooner rather than later whether it will interpret this privilege in a narrow or broad manner.

This Note will begin in Section I by providing background information on the quality assurance privilege. Section II will define and discuss the quality assurance privilege in greater detail, including a discussion of its origin and purpose. Section III will then discuss the two major approaches interpreting the privilege and examine cases associated with each approach. Section III will also outline Kentucky law and cases that are relevant to the discussion. Finally, Section IV will argue that Kentucky should adopt the narrow approach to the quality assurance privilege for a number of important reasons.

I. BACKGROUND

In 1987, Congress enacted the Federal Nursing Home Reform Act ("FNHRA") as part of the Omnibus Budget Reconciliation Act.[25] One major

[20] *Id.*

[21] Julie A. Braun & Jane M.R. Mulcahy, *From the Guest Editors: Nursing Home Litigation: An Overview*, MARQ. ELDER'S ADVISOR, Fall 2000, at 1, 1.

[22] *Id.*

[23] Margaret Cronin Fisk, *Top 2013 Jury Awards: Price-Fixing, Nursing Home Liability, Defamation*, INS. J. (Jan. 14, 2014), http://www.insurancejournal.com/news/national/2014/01/14/317040.htm.

[24] Braun & Mulcahy, *supra* note 21.

[25] *In re* Subpoena Duces Tecum to Jane Doe, 787 N.E.2d 618, 620 (N.Y. 2003).

purpose of the FNHRA was to "improve the quality of care for . . . nursing home residents."[26] To this end, the FNHRA requires that all nursing home facilities maintain a certain standard of care for their residents.[27] Nursing homes are required to "maintain a quality assessment and assurance committee to identify and develop plans to correct deficiencies in the quality of care provided to residents."[28] In 1990, Congress amended the FNHRA to include the language that provides for the quality assurance privilege.[29] The added language specifically states that "[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."[30]

The quality assurance privilege thus stems from federal statutory law.[31] There are two nearly identical federal statutes that create this privilege.[32] The statutes state:

> A nursing facility must maintain a quality assessment and assurance 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.[33]

As is clear from the text, these statutes require all nursing homes receiving federal funding to maintain quality assurance committees.[34] Generally, these committees consist of a number of different persons from various positions within the facility. The committee investigates events that occur at the nursing home in an effort to learn from the events and to ensure that the quality of care is improved in the future. Broadly, the main purpose of the committee is to "assess and ensure quality within a nursing facility. More specifically, the committee identifies and develops strategies to improve care and correct any existing deficiencies in the quality of care."[35] For example, a quality assurance committee might investigate a

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[26] *Id.* (citing H. R. REP. NO. 100-391, pt. 1, at 452 (1987)).

[27] *See id.*

[28] *Id.* at 621.

[29] *Id.*

[30] *Id.* (citing 42 U.S.C. §§ 1395i-3(b)(1)(B)(ii), 1396r(b)(1)(B)(ii) (2012)).

[31] *See* 42 U.S.C. §§ 1395i-3(b)(1)(B), 1396r(b)(1)(B) (2012).

[32] The statutes are almost identical and both fall under Chapter 7 of Title 42 of the United States Code. 42 U.S.C. § 1395i-3(b)(1)(B) (2012) concerns Medicare requirements, and 42 U.S.C. § 1396r(b)(1)(B) (2012) concerns Medicaid requirements. The sole difference between the quality assurance privilege language in the two statutes is that 42 U.S.C. § 1395i-3(b)(1)(B) refers to a "skilled nursing facility," whereas 42 U.S.C. § 1396r(b)(1)(B) refers to only a "nursing facility."

[33] 42 U.S.C. § 1396r(b)(1)(B) (2012). *See also* 42 U.S.C. § 1395i-3(b)(1)(B) (2012) (using identical statutory language but including the word "skilled" before the first use of the words "nursing facility").

[34] 42 U.S.C. §§ 1395i-3(b)(1)(B), 1396r(b)(1)(B) (2012).

[35] *Id.*

patient's fall and attempt to determine the cause in order to prevent similar occurrences in the future. Or, in the event of an infectious outbreak in a nursing home, the quality assurance committee will work to determine the cause of the infection, to develop a plan to eradicate the infection, and to ensure that such an event does not occur again.[36]

Because quality assurance committees are investigating incidents that frequently lead to litigation and are attempting to determine the causes of such incidents, the committee documents would be very valuable to plaintiffs pursuing a negligence claim against the nursing home. However, because of the quality assurance privilege, litigants are barred from obtaining such documents.[37] Although these documents would provide useful information to plaintiffs, Congress has made a policy determination that it is in the best interest of the public that such information remain confidential. As the Court of Appeals of New York explained in *In re Subpoena Duces Tecum to Jane Doe*, "[t]he cloak of confidentiality covering quality assurance procedures and materials is designed to encourage thorough and candid peer review and thereby improve the quality of care."[38] The confidentiality of this information is believed to "enhance the objectivity of the review process and ensure that the committees may frankly and objectively analyze the quality of health services rendered."[39] Thus, Congress has determined that preventing this material from being discovered will allow nursing homes to be frank and objective in their review of the facility's performance, which will consequently lead to improved care in the future.

Although the federal statutes apply to the entire country, the breadth of the quality assurance privilege depends on the particular state or court where the case is being litigated. In addition to the federally-created privilege, some states also have their own state statutorily-created quality assurance privileges. In general, there are two approaches to interpreting the quality assurance privilege: a narrow approach and a broad approach. The narrow approach holds that only documents actually created by the quality assurance committee are protected by the quality assurance privilege. The broad approach holds that the quality assurance privilege is not limited to documents actually created by the quality assurance committee. As this Note will demonstrate, the narrow approach is the better of the two for a number of important reasons.

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[36] Marilyn Osborn Patterson & Michael F. Sutton, *A Privilege That is Good for Your Health: The Federal Quality Assurance Privilege*, LOUISVILLE B. BRIEFS, Nov. 2011, at 14, 14.

[37] 42 U.S.C. §§ 1395i-3(b)(1)(B), 1396r(b)(1)(B) (2012) ("A State or the Secretary may not require disclosure of the records of such committee . . . .").

[38] 787 N.E.2d 618, 621 (N.Y. 2003) (citation omitted) (internal quotation marks omitted).

[39] *Id.* (citation omitted) (internal quotation marks omitted).

II. ANALYSIS: THE TWO APPROACHES TO THE QUALITY ASSURANCE PRIVILEGE

A. The Narrow Approach

The narrow approach generally holds that only documents actually created by the quality assurance committee are protected by the quality assurance privilege. This approach is well outlined in the Missouri Supreme Court case *State ex rel. Boone Retirement Center, Inc. v. Hamilton*.[40] In *Boone*, a federal grand jury issued a subpoena *duces tecum* to Boone Retirement Center.[41] The grand jury sought documents related to an investigation by the Missouri Division of Aging, which revealed "a large number of deficiencies relating to the quality of care residents were receiving" and "a pattern of neglect" by the facility.[42] The grand jury, investigating whether or not residents of the facility had been the victims of criminal neglect, sought "any and all quality assurance records, reports and/or attachments, reflecting materials generated by or presented to the Boone Retirement Center Quality Assurance Committee" for a certain period of time.[43] This was a case of first impression for the Missouri Supreme Court and ultimately turned on whether or not the grand jury qualified as a "state" under the federal statutes.[44] However, the court made an important observation regarding the quality assurance privilege:

> In refusing to obey the subpoena for records of its quality assurance committee, Boone also refused to produce "materials . . . presented to the Boone Retirement Center Quality Assurance Committee" as required by the subpoena. The statute limits the scope of the privilege to "records of such committee." This statutory privilege is exceedingly narrow. It protects the committee's own records—its minutes or internal working papers or statements of conclusions—from discovery. No honest reading of the statute, however, can extend the statute's privilege to records and materials generated or created outside the committee and submitted to the committee for its review.[45]

The court emphasized that the writ of prohibition protecting the facility from producing certain records did "*not* extend to records and materials generated or created by persons or entities operating outside the quality assurance committee."[46]

Another case adopting the narrow approach is *Jewish Home of Eastern Pennsylvania v. Centers for Medicare and Medicaid Services* ("*JHEP*").[47] In *JHEP*, the Pennsylvania Department of Health conducted a random survey of a nursing home facility on two different dates and found twenty regulatory deficiencies.[48]

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[40] 946 S.W.2d 740, 742–43 (Mo. 1997).
[41] *Id.* at 741.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 742.
[45] *Id.* at 743.
[46] *Id.*
[47] 693 F.3d 359, 362 (3d Cir. 2012).
[48] *Id.* at 360.

Because of these deficiencies, the Centers for Medicare and Medicaid Services imposed substantial monetary fines on the facility totaling almost $30,000.[49] The nursing facility appealed these fines, arguing that the penalties were invalid because they were "based on quality assurance documents that should not have been disclosed."[50] The quality assurance records at issue were event report forms and witness interview statements.[51] The United States Court of Appeals for the Third Circuit examined the federal statutes and concluded that the documents at issue were not protected by the quality assurance privilege.[52] Specifically, the Third Circuit held that

> the documents in question were contemporaneous, routinely-generated incident reports that were part of the residents' medical records and were not minutes, internal papers, or conclusions generated by the Quality Assurance Committee. The [administrative law judge] found that the Event Reports were given to JHEP's Quality Assurance Committee at the time of the surveys and were not produced by or at the behest of the Quality Assurance Committee.[53]

Although this case mentions that the administrative law judge used the "by or at the behest of" test (indicating use of the broad approach), the Third Circuit conclusively stated that "[t]he language of 42 U.S.C. § 1396r(b)(1)(B) . . . limits the scope of protection from discovery to the records generated by the Quality Assurance Committee."[54] Thus, the Third Circuit adopted the narrow approach and upheld the fines imposed on the facility.[55]

A number of other courts have also adopted the narrow approach to the quality assurance privilege. For example, in *Brown v. Sun Healthcare Group, Inc.*, the plaintiff sued the defendant nursing home facility on behalf of her deceased husband.[56] The defendant facility refused to produce incident reports in discovery, arguing in part that the documents were protected by the federal quality assurance privilege.[57] Considering this issue for the first time, the United States District Court for the Eastern District of Tennessee found the reasoning in *Boone* persuasive and adopted the narrow approach.[58] Specifically, the court stated that the quality assurance privilege "applies only to the committee's own records, including its minutes, internal working papers, and statements of conclusions, not to documents generated outside the committee and submitted to the committee for its review."[59]

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[49] *Id.*
[50] *Id.* at 361.
[51] *Id.*
[52] *Id.* at 362.
[53] *Id.*
[54] *Id.* (citing State *ex rel.* Boone Ret. Ctr., Inc. v. Hamilton, 946 S.W.2d 740, 743 (Mo. 1997)).
[55] *Id.*
[56] No. 3:06-CV-240, 2008 WL 1751675, at *1 (E.D. Tenn. Apr. 14, 2008).
[57] *Id.* at *1, *3–4.
[58] *Id.* at *4.
[59] *Id.*

These cases illustrate the narrow approach to the quality assurance privilege. Generally, the narrow approach can be summarized as protecting only those documents that are actually generated by the quality assurance committee itself. Under the narrow approach, documents that are created outside of the committee and submitted to the committee for its review are not protected. Although numerous courts have adopted the narrow approach, a number of other courts have adopted the broader approach to the privilege, which holds that documents created outside the committee can qualify for the quality assurance privilege.

B. The Broad Approach

In contrast to the narrow approach described above is the broad approach to the quality assurance privilege. This approach is outlined succinctly in *In re Subpoena Duces Tecum to Jane Doe.*[60] In *Doe*, a New York grand jury issued subpoenas seeking records from three different nursing home facilities as part of an investigation of resident care by the Medicaid Fraud Control Unit.[61] The facilities argued that the requested documents, including "incident/accident reports, monthly skin condition and pressure sore reports, monthly weight reports, infection control reports and lists of any facility-acquired infections" were protected by the quality assurance privilege.[62] The Court of Appeals of New York ultimately found that some of the requested documents were protected while some of the documents were not.[63]

With regard to the incident/accident reports and the infection control reports required to be maintained by federal and state regulations, the court held that "the fact that a quality assurance committee reviews such information for quality assurance purposes does not change the essential purpose of the document. A facility may not create a privilege where none would otherwise exist merely by assigning the duty for compliance or compilation to a quality assurance committee."[64] Thus, the court held that those documents were not privileged.[65] However, the court held that the monthly skin condition and pressure sore reports, monthly weight reports, and lists of any facility-acquired infections, none of which were required to be maintained pursuant to state or federal regulations, were protected by the privilege.[66]

The Court of Appeals of New York reviewed the Missouri Supreme Court's adoption of the narrow approach in *Boone* and explicitly rejected that holding.[67] The *Doe* court

[60] 787 N.E.2d 618, 622–23 (N.Y. 2003).
[61] *Id.* at 619.
[62] *Id.* at 619–20.
[63] *Id.* at 622–23.
[64] *Id.* at 622.
[65] *Id.*
[66] *Id.* at 622–23.
[67] *Id.*

> decline[d] to adopt the *Boone* standard because the federal statute does not restrict quality assurance records to only those reports created by quality assurance committee members themselves. We read the language "records of such committee" as encompassing within its parameters any reports generated by or at the behest of a quality assurance committee for quality assurance purposes. Of course, where the committee simply duplicates existing records from clinical files, no privilege will attach. However, 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 such committee" and are entitled to protection from disclosure pursuant to federal law.[68]

As is evident from the court's language, the broad approach differs from the narrow approach in that the broad approach permits documents not created by the quality assurance committee itself to benefit from the quality assurance privilege.[69] The broad approach allows facilities to stretch the quality assurance privilege to documents that would not be protected under the narrow approach, such as documents generated by persons outside the committee or compilations of multiple existing records created at the request of a quality assurance committee member.[70]

Some courts have interpreted the quality assurance privilege even more broadly than the Court of Appeals of New York did in *Doe*. In *Evans v. Quaboag on the Common, Inc.*, the Massachusetts Superior Court concluded that the federal statutes went so far as to protect documents created by a state agency and subsequently given to the quality assurance committee for its review.[71] In *Evans*, the plaintiff sued the defendant nursing home alleging that the nursing home caused the plaintiff's decedent to suffer a fractured hip and die as a result of contracting sepsis.[72] During discovery, the plaintiff sought Quality Indicator reports from the defendant, which the court explained were "surveys generated by the Massachusetts Department of Public Health" that "analyze[d] information from individual patient profiles provided by care facilities."[73] These surveys "measure[d], among other things, the prevalence of patient issues, such as in this case, the prevalence of falls and the incidents of new fractures, against a statewide average so that corrective actions [could] be implemented."[74] Defendants objected to the production of these Quality Indicator reports, relying in part on the federal quality assurance privilege.[75] The court briefly discussed the two competing approaches of *Boone* and *Doe*, concluding that the broader reading of *Doe* was more appropriate and in line with the principle "of cloaking quality assurance materials in

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[68] *Id.* at 623 (internal citation omitted).

[69] *See id.*

[70] *See id.*

[71] Memorandum and Order on Plaintiff's Motion to Compel Discovery at *3, Evans v. Quaboag on the Common, Inc., 26 Mass. L. Rptr. 372 (Mass. Super. Ct. Dec. 7, 2009) (No. 200601287D), 2009 WL 5698096.

[72] *Id.* at *1.

[73] *Id.*

[74] *Id.*

[75] *Id.*

confidentiality to encourage thorough and candid peer review." [76] The Massachusetts Superior Court held:

> Although the Quality Indicator reports that the plaintiff seeks were not prepared "by or at the behest of" Quaboag's quality assurance committee, the reports are generally compiled for the purpose of assisting nursing facilities in determining whether certain areas related to patients' quality of care need to be addressed. In this regard, Quality Indicator reports are not merely documents that are incidentally included in a nursing home's quality assurance committee review process, but rather they are generated for the express purpose of aiding the committee in achieving its goals. The fact that the reports are not made available to the public bolsters the conclusion that they are intended primarily for the benefit of quality assurance committees.
>
> In light of the foregoing, the court finds that the Quality Indicator reports are part and parcel of Quaboag's quality assurance review process, and are thus protected from disclosure . . . .[77]

The Massachusetts Superior Court's interpretation is an extremely broad reading of the quality assurance privilege, as the *Evans* court held that even documents created by a state agency can fall under the quality assurance privilege. Notably, the *Evans* court conceded that the Quality Indicator reports created by the state were not generated "by or at the behest of" the quality assurance committee.[78] Yet, the court still determined that due to the committee's use of the documents, the documents were protected by the quality assurance privilege as records of the quality assurance committee.[79]

A number of states that have their own quality assurance privilege statutes have also interpreted the privilege in a broad manner. For example, in *Beverly Enterprises-Florida, Inc. v. Ives*, the plaintiff sued the defendant claiming that the defendant's nursing home facility was negligent in the care of the decedent, ultimately leading to her wrongful death.[80] The trial court entered an order permitting discovery of "various evaluations and surveys, together with supporting reports and documents" related to the nursing home.[81] The District Court of Appeals of Florida interpreted the state's statutorily-created quality assurance privilege and rejected an interpretation where "documents, information, or records in the possession of the committee are not protected if they originated from sources outside the board or committee proceedings."[82] The *Ives* court determined that "[i]f the legislature intended the privilege to extend only to documents created by the board or committee, then surely that is what it would have said."[83] The court believed that "[v]irtually all of the information considered during the peer review

[76] *Id.* at *2–3.
[77] *Id.* at *3 (footnote omitted) (citations omitted).
[78] *Id.*
[79] *Id.*
[80] 832 So. 2d 161, 162 (Fla. Dist. Ct. App. 2002).
[81] *Id.*
[82] *Id.* at 163.
[83] *Id.*

process originates from outside sources" and that a narrow approach "would effectively eliminate the protections granted by the statute."[84] Thus, the court held that documents generated outside of the quality assurance committee could still be privileged under the quality assurance privilege.[85] Consequently, the court determined that the order permitting discovery of the documents at issue was improper, and it quashed the trial court's order.[86]

Florida is not the only state that has interpreted its quality assurance privilege broadly. Alabama has a broad quality assurance privilege as well. In *Ex parte Fairfield Nursing & Rehabilitation Center, L.L.C.*, two plaintiffs were suing the same nursing home defendant, alleging medical malpractice and wrongful death.[87] The plaintiffs requested "any and all incident reports and/or complaints involving Brenda Roby" and "incident reports regarding Myrtis Hill from June 1992 to Present."[88] The trial court ordered the defendant to produce the requested documents.[89] However, the Alabama Supreme Court overturned that decision, holding that Alabama's quality assurance privilege statute did not "limit the privilege to materials created solely *at the direction of*" a quality assurance committee.[90] The court noted that Alabama's statute stated that the confidentiality provided by the statutory quality assurance privilege

> shall apply to materials prepared by an employee, advisor, or consultant of a hospital, clinic, or medical staff and to materials prepared by an employee, advisor or consultant of an accrediting, quality assurance or similar agency or similar body and to any individual who is an employee, advisor, or consultant of a hospital, clinic, medical staff or accrediting, quality assurance or similar agency or body.[91]

As is evident from the text, Alabama's quality assurance privilege was written very broadly. The plaintiffs in *Fairfield* argued to the court that this language and a broad interpretation of the privilege would effectively bar discovery in nursing home cases because almost every document has some relation to the quality of patient care.[92] Despite the validity of this argument, the court was unpersuaded, stating that the

> contention . . . overlooks the particular facts of the *unopposed* evidence Fairfield presented in these cases in support of its assertion of the privilege—i.e., the testimony in the affidavits indicating that the requested documents are not kept in the ordinary course of business and do not become a part of a resident's medical chart.[93]

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[84] *Id.*
[85] *Id.*
[86] *Id.* at 164.
[87] 22 So. 3d 445, 446 (Ala. 2009).
[88] *Id.*
[89] *Id.*
[90] *Id.* at 452.
[91] *Id.* (emphasis omitted).
[92] *Id.* at 453–54.
[93] *Id.* at 454.

Although the court's rationale may have been a response to the facts of that particular case, the court did not address the more important concern – that such a broad privilege will stifle discovery in many nursing home cases throughout the state of Alabama.

As is evident from the case law discussed above, states and courts are conflicted on the proper breadth of the quality assurance privilege. Some states and courts have chosen the narrow approach to the quality assurance privilege, while other states and courts have adopted the broad approach. Kentucky has not yet spoken on the matter, but it needs to do so soon in order to streamline the growing amount of nursing home litigation arising across the state.

C. Kentucky's Current Approach (or Lack Thereof) to the Quality Assurance Privilege

Despite the growing number of nursing home cases throughout the state, Kentucky has not yet addressed the scope of the quality assurance privilege. Although at least one circuit court has explicitly adopted the narrow approach, neither the Kentucky Supreme Court nor the Kentucky Court of Appeals has spoken on the issue, despite two recent opportunities for the Court of Appeals to do so.[94]

In *Breshers v. Richmond Health Facilities-Madison LP*, plaintiff filed an action in Madison Circuit Court alleging negligence as a result of the care her mother received at a nursing home facility.[95] During discovery, two defendants, Richmond Health Facilities-Madison, LP ("Richmond Health"), and Extendicare, Inc. ("Extendicare"), were ordered to produce certain documents. [96] Both defendants objected to the production of the documents and separately petitioned the Court of Appeals for a writ of prohibition, creating two separate cases in the Court of Appeals.

In *Richmond Health Facilities-Madison, LP v. Clouse*, defendant objected to the production of various documents, including Mock Surveys and Responsive Plans of Correction, Corporate Quality Validation Surveys, Electronic Indicator Reports, Decubitus Ulcer Reports, and 800-Hotline/Corporate Compliance Hotline Reports.[97] Defendant Richmond Health argued that the documents were protected by the quality assurance privilege.[98] Following a hearing, Richmond

[94] The Hardin Circuit Court has expressly stated its approval of the narrow approach to the quality assurance privilege. Memorandum and Order on Plaintiff's Motion to Compel Discovery at *1, Noe v. Sun Healthcare Group, Inc., No. 13-CI-00693 (Hardin Cir. Ct. Aug. 11, 2014) (citing State *ex rel.* Boone Ret. Ctr., Inc. v. Hamilton, 946 S.W.2d 740 (Mo. 1997)) ("This Court is persuaded by the decision of the Missouri Supreme Court which does not recognize the privilege when the information is in the hands of anyone other than the review committee.").

[95] Richmond Health Facilities-Madison, LP v. Clouse, No. 2014-CA-001634-OA (Ky. Ct. App. Dec. 22, 2014).

[96] *Id.*; Extendicare, Inc. v. Clouse, No. 2014-CA-001710-OA (Ky. Ct. App. Feb. 9, 2015).

[97] *Id.* at 2-3.

[98] *Id.* at 5.

Health was ordered to produce documents.[99] Richmond Health filed a motion for protective order to prevent production of the documents, which was denied, and subsequently filed a petition for writ of prohibition to the Kentucky Court of Appeals.[100]

At the Court of Appeals, Richmond Health argued in part that the requested documents were protected by the quality assurance privilege.[101] However, the Kentucky Court of Appeals disagreed.[102] The court began by noting that "[i]n Kentucky, evidentiary privileges are disfavored and strictly construed"[103] and that "[t]he party asserting a privilege has the burden of proving its applicability."[104] The court then cited the two federal statutes creating the quality assurance privilege and provided a brief discussion of both *Boone* and *Doe*.[105] Ultimately, however, the court determined that it "need not determine the scope of the federal quality assurance privilege because Richmond Health has failed to carry its burden of proving the applicability under any standard."[106]

Similarly, in *Extendicare, Inc. v. Clouse*, defendant objected to the production of various documents, including Mock Surveys and Responsive Plans of Correction, Regional Director of Clinical Service Visit Reports and Responsive Plans of Correction, Corporate Quality Validation Surveys and Responsive Plans of Correction, Weekly and Monthly Electronic Indicator Reports and Responsive Plans of Correction, Decubitus Ulcer Reports, and Quality Indicator Reports.[107] In an order that was identical in many portions to the Richmond Health order, the court began by noting that evidentiary privileges are disfavored and are strictly construed in Kentucky.[108] The court then quoted the quality assurance statutes and discussed the competing positions of *Boone* and *Doe*.[109] The court noted that the Kentucky Supreme Court has not interpreted these statutes.[110] However, using identical language as that used in the Richmond Health order, the Court of Appeals held that it "need not determine the scope of the federal quality assurance privilege because Extendicare has failed to carry its burden of proving the applicability under any standard."[111]

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[99] *Id.* at 2.

[100] *Id.* at 3.

[101] *Id.* at 5.

[102] *Id.*

[103] *Id.* (citing Collins v. Braden, 384 S.W.3d 154, 159 (Ky. 2012)).

[104] *Id.* (citing Stidham v. Clark, 74 S.W.3d 719, 725 (Ky. 2002)).

[105] *Id.* at 5-6.

[106] *Id.* at 7.

[107] Extendicare, Inc. v. Clouse, No. 2014-CA-001710-OA, 2-3 (Ky. Ct. App. Feb. 9, 2015).

[108] *Id.* at 5.

[109] *Id.* at 6-7.

[110] *Id.* at 6.

[111] *Id.* at 7. Interestingly, the two opinions, while identical in many portions, were authored by two separate panels of judges. The Richmond Health opinion was authored by Judges Kramer, Lambert, and Taylor, while the Extendicare opinion was authored by Chief Judge Acree and Judges Clayton and Jones.

Notably, however, the Court of Appeals in this order added extra language that was not present in the earlier Richmond Health order. The Court of Appeals stated:

> The federal statutes protect documents compiled by a "quality assistance and assurance committee." Extendicare has not demonstrated that the documents at issue were produced by a quality assistance and assurance committee or at its behest as defined by the federal statutes. Blanket assertions of privilege, without more, are insufficient to establish a privilege under Kentucky law. Therefore, we cannot conclude that the trial court abused its discretion by ordering the production of the documents at issue.[112]

It is somewhat concerning that the Court of Appeals used the language "produced by a quality assistance and assurance committee *or at its behest* as defined by the federal statutes."[113] However, it is also notable that in the preceding sentence, the court stated that the statutes protect documents *compiled by* a quality assurance committee.[114] The court did not define what it meant by "compiled by" a quality assurance committee.[115] Nor did it explain whether its use of the "at its behest" language was an endorsement of that language or merely an allusion to the two different approaches.[116] Because the Court of Appeals explicitly declined to determine the scope of the quality assurance privilege, it seems likely that this language was an allusion to the two competing approaches as opposed to an endorsement of the broad approach. Because the court ultimately determined that Extendicare had not met its burden under either standard, the court denied the petition for writ of prohibition.[117]

Richmond Health has appealed this decision, and it is likely that Extendicare will appeal this decision as well. Hopefully the Supreme Court will take this opportunity to determine the scope of the quality assurance privilege in Kentucky. However, currently neither the Supreme Court nor the Court of Appeals has addressed the federal statutory privilege, and Kentucky does not have a statutorily-created or common law quality assurance privilege of its own.

Although Kentucky has not yet addressed the scope of the quality assurance privilege, it is clear that the Kentucky legislature is aware of the strain these cases are placing on the court system. In response to the increasing number of nursing home cases, Kentucky has considered procedures to help ease the pressures these cases are creating on the courts. In 2013, the state legislature considered a bill that would require medical review panels to hear evidence of proposed claims against nursing homes (and other medical facilities) before a plaintiff would be able to file a

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[112] *Id.* at 7 (internal citation omitted).
[113] *Id.* (emphasis added).
[114] *Id.* (emphasis added).
[115] *Id.*
[116] *Id.*
[117] *Id.* at 9.

lawsuit.[118] Following a hearing, the panel would issue an opinion regarding whether or not the evidence supported a claim against the nursing home (or other medical facility).[119] The opinion would not be binding, but it would be admissible in a court proceeding.[120] The panels would be comprised of three physicians and one attorney.[121] Proponents of the measure argued that employing such a panel would result in fewer lawsuits entering the court system, allowing nursing homes to focus resources on patient care instead of on defending litigation.[122] Opponents of the bill argued that the bill would merely make it more difficult for families to seek justice through the judicial system.[123] The bill, SB9, passed the Senate 23-12, but was never voted on in the House.[124] In 2014, a similar bill, SB119, was considered, which passed the Senate 23-13, but was never voted on in the House.[125] It is unclear whether such a bill will ultimately pass in Kentucky, but consideration of the bill shows that the legislature is aware of the problems arising due to the increasing amount of nursing home litigation.

Although it is clear that both the legislature and the governor are aware of the burden nursing home litigation is creating on the courts,[126] Kentucky has failed to address the quality assurance privilege. Because of the circumstances outlined in Section I of this Note, it is imperative that Kentucky resolve this issue sooner rather than later in order to help streamline nursing home litigation. Once Kentucky makes a determination regarding this privilege, plaintiffs, defendants, and courts will save time and expense, as they will no longer be forced to participate in discovery battles over whether documents reviewed by the quality assurance committee are privileged or not.

Although Kentucky does not currently have its own statutorily-created quality assurance privilege, it does have a somewhat similar privilege known as the "peer review privilege." The peer review privilege is established by Kentucky Revised Statute 311.377.[127] This statute governs the practice of "peer review," which occurs when doctors review fellow doctors' behavior after certain events have occurred.[128]

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[118] Jack Brammer, *Senate Panel Approves Medical Review Panels for Nursing Home Complaints*, KENTUCKY.COM (Feb. 6, 2013), http://www.kentucky.com/2013/02/06/2505476/senate-panel-approves-medical.html.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] SB9 13RS, KENTUCKY LEGISLATIVE RESEARCH COMMISSION, http://www.lrc.ky.gov/record/13rs/sb9.htm (last visited Jan. 19, 2015).

[125] SB119 14RS, KENTUCKY LEGISLATIVE RESEARCH COMMISSION, http://www.lrc.ky.gov/record/14RS/sb119.htm (last visited Jan. 19, 2015).

[126] Spears, *supra* note 9.

[127] KY. REV. STAT. ANN. § 311.377(2) (West 1990) ("At all times in performing a designated professional review function, the proceedings, records, opinions, conclusions, and recommendations of any committee, board, commission, medical staff, professional standards review organization, or other entity . . . shall be confidential and privileged and shall not be subject to discovery, subpoena, or introduction into evidence . . . .").

[128] *See, e.g., Medical Peer Review*, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/physician

For example, after a surgery results in a negative outcome, a peer review committee might investigate the operating doctor's procedures to determine whether he acted in accordance with his duties as a surgeon. The peer review committee would also work to ensure that any mistakes made during the surgery do not occur again in the future. The peer review privilege established by KRS 311.377 protects from discovery documents created by the peer review committee but only in certain circumstances as described below.

At first glance, the peer review privilege would seem to protect documents similar to those protected by the quality assurance privilege. However, the two privileges may not be so analogous, as Kentucky has made a policy decision that the peer review privilege does *not* apply in medical malpractice cases:

> [T]he peer review privilege created by KRS 311.377(2) is limited to suits against peer review entities . . . . "[T]he General Assembly's intent and purpose in enacting KRS 311.377(2) was *not* to hinder an aggrieved patient's search for the truth in a medical malpractice suit against a negligent physician or hospital. The Preamble to the 1990 Act plainly states that it was enacted for the protection of peer review participants. Appellants, in their capacity in the cases at bar as party -defendants in a medical malpractice suit, are not included in this class because they have not been sued for any action taken in the course of performing a peer review. Simply put, the statute was not enacted for the protection of defendants in a medical malpractice suit."[129]

Thus, the court held that peer review documents are available to plaintiffs in medical malpractice and negligence suits.[130] The peer review privilege only applies in suits against peer review entities.[131] Apparently, the Kentucky legislature made a policy decision that peer review efforts and the overall quality of health care would not be hindered by the discoverability of these documents in negligence and medical malpractice actions.

Kentucky's extremely narrow stance on the peer review privilege seems to indicate that Kentucky would be more inclined to adopt a narrow approach to the quality assurance privilege as well. As Section III of this Note will illustrate, this would be the best approach for Kentucky.

III. WHY THE NARROW APPROACH IS BETTER FOR KENTUCKY

Kentucky should adopt the narrow approach to the quality assurance privilege for a number of reasons. First, public policy dictates generally that all privileges should be narrowly interpreted. Litigation is a search for the truth, and withholding documents based on privilege complicates that objective. Second, the narrow approach ensures that only documents that are truly quality assurance committee

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-resources/legal-topics/medical-peer-review.page (last visited Nov. 5, 2014).

[129] Saleba v. Schrand, 300 S.W.3d 177, 183 (Ky. 2009) (quoting Sisters of Charity Health Sys., Inc. v. Raikes, 984 S.W.2d 464, 469–70 (Ky. 1998)).

[130] *See id.*; KY. REV. STAT. ANN. § 311.377(2) (West 1990).

[131] Sisters of Charity Health Systems, Inc. v. Raikes, 984 S.W.2d 464, 470 (Ky. 1998).

documents will be protected. It also ensures that plaintiffs will not be denied their Section 14 right of judicial remedy for injury.[132] Third, there is no evidence that the narrow approach will lead to a decline in patient care, and the narrow approach is consistent with similar Kentucky approaches to privilege.[133]

A. Public Policy Dictates That Privileges Be Interpreted Narrowly

The Rules of Evidence govern which evidence is and is not admissible in a particular case. Under Federal Rule of Evidence 402, all relevant evidence is admissible unless it falls under an exception.[134] Kentucky has codified the same rule in Kentucky Rule of Evidence 402.[135] The Rules of Evidence are highly inclusive, and exceptions are interpreted narrowly.

Litigation is intended to be a search for the truth. This is one reason that America has an adversarial system of litigation, although its effectiveness in truth-finding is sometimes questioned.[136] When documents are withheld from discovery based on privilege, the search for the truth is hindered because relevant information becomes unavailable to litigants. As Professor Robert Lawson noted, privileges "knowingly sacrifice the truth (or at least possible sources of it) because it is felt that some other public interest overrides the need for truth."[137] Although a privilege can undermine the search for the truth, sometimes a policy decision favoring privilege is made because the privilege is deemed to be more important than the resultant loss of information. In this case, Congress has seemingly determined that ensuring good health care through honest and open quality review supersedes the ability of some litigants to obtain certain documents.[138] However, it seems clear from the language of the statute that Congress did not intend that all documents reviewed by the quality assurance committee be protected. Adopting a narrow approach to the quality assurance privilege will ensure that only those documents that are truly entitled to protection will be excluded from discovery.

Kentucky has a very limited number of privileges. Such privileges include the attorney-client privilege,[139] the work product privilege,[140] the husband-wife privilege,[141] the religious privilege,[142] the counselor-client privilege,[143] and the

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[132] *See* KY. CONST. § 14.

[133] *See* KY. R. EVID. 503-507.

[134] FED. R. EVID. 402.

[135] KY. R. EVID. 402.

[136] *See, e.g.*, Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 121-22 (1987).

[137] Robert G. Lawson, *Interpretation of the Kentucky Rules of Evidence – What Happened to the Common Law?*, 87 KY. L.J. 517, 530 (1999) (citing Ronan E. Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 347 (1959)).

[138] 42 U.S.C. §§ 1395i-3(b)(1)(B), 1396r(b)(1)(B) (2012).

[139] KY. R. EVID. 503.

[140] KY. R. CIV. P. 26.02(3)(a).

[141] KY. R. EVID. 504.

[142] KY. R. EVID. 505.

[143] KY. R. EVID. 506.

psychotherapist-patient privilege.[144] Notably, Kentucky does not have a physician-patient privilege.[145]

It is evident from Kentucky's small number of privileges, as well as its approach to the peer review privilege, that Kentucky favors a narrow view of privilege and generally facilitates the free flow of information in litigation. In fact, the Supreme Court of Kentucky has stated as much. In *Sisters of Charity Health Systems, Inc. v. Raikes*, the Kentucky Supreme Court explained that "broad claims of 'privilege' are disfavored when balanced against the need for litigants to have access to relevant or material evidence."[146] Accordingly, the court emphasized, "claims of privilege are carefully scrutinized," and there is a "necessarily narrow construction of statutory privilege."[147] The Court even went so far as to state that there is a "nearly universal rule that privileges should be strictly construed, because they contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'"[148] Clearly, Kentucky has made a concise statement that its few limited privileges will be interpreted narrowly.[149] The quality assurance privilege should be no different.

Because Kentucky's public policy dictates that a narrow approach to privilege is favored, Kentucky should adopt the narrow approach to the quality assurance privilege.

B. The Narrow Approach Ensures That Only Documents That Are Truly Quality Assurance Documents Will Be Privileged, Protects Plaintiffs' Constitutional Rights, and Expedites Litigation

If Kentucky adopts the broad approach to the quality assurance privilege, discovery will be stifled because nearly every document created by a nursing home facility can be said to relate to the quality of patient care.[150] If the documents created outside the quality assurance committee are protected by the privilege just by virtue of being reviewed by the committee, a nursing home could send all documents to the committee for review in order to attach the privilege to all documents. Further, if documents created "at the behest of" the committee are protected by the privilege, a quality assurance committee could direct non-committee members to create documents totally irrelevant to the committee's function, yet those documents would still be protected by the privilege.[151] However, the quality assurance privilege is not designed to protect every document created by

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[144] KY. R. EVID. 507.

[145] *See* Stidham v. Clark, 74 S.W.3d 719, 727 (Ky. 2002).

[146] 984 S.W.2d 464, 468–69 (Ky. 1998) (quoting Meenach v. Gen. Motors Corp., 891 S.W.2d 398, 402 (Ky. 1995)).

[147] *Id.* at 469.

[148] *Id.* at 468 (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

[149] *See id.* at 468–69.

[150] *See Ex parte* Fairfield Nursing & Rehab. Ctr., L.L.C., 22 So. 3d 445, 453–54 (Ala. 2009).

[151] 787 N.E.2d 618, 623 (N.Y. 2003).

a nursing home facility.[152] Such a privilege would clearly be detrimental to the public good and would likely violate Section 14 of the Kentucky Constitution. Section 14 states, "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."[153] As the Kentucky Supreme Court noted in *Raikes* (discussing Kentucky's peer review privilege), one

> reason for caution in construing the scope of the [peer review privilege] . . . is that [the plaintiffs'] right to bring suit for their underlying medical malpractice claims is protected by Section 14 of the Kentucky Constitution. While the right to discover and present evidence is not likewise expressly protected by the Constitution, significant degradation of these rights could deny litigants, in an action protected by Section 14, due course of law as provided by that section.[154]

The same is true of the quality assurance privilege. The quality assurance privilege was created for a specific purpose – to enable the quality assurance committee to conduct its business confidentially.[155] Adopting the narrow approach allows the committee to achieve this aim, while still permitting plaintiffs to obtain documents to which they are entitled. As noted above, in a nursing home setting, almost all documents created at the facility will in some way relate to the quality of patient care. An ambitious nursing home defendant could thus claim privilege over a wide range of documents, and a plaintiff might be prevented from effectively presenting his or her case as a result. Adopting the narrow approach to the quality assurance privilege will ensure that the plaintiffs' constitutional rights under Section 14 are protected.

Further, the *in camera* argument exposes another flaw of the broad approach. One benefit of determining the scope of the quality assurance privilege will be to reduce time and money spent battling over whether certain documents are protected by the quality assurance privilege or not. However, under the broad approach, courts will still be required to determine on a case-by-case, document-by-document basis which documents are privileged and which are not. Thus, litigants and courts will still spend a significant amount of time and resources determining which documents are protected by the quality assurance privilege. In contrast, if Kentucky adopts the narrow approach, litigation will be expedited and time and resources will be saved as the narrow approach creates a bright-line rule that is easy to follow and apply. Under the narrow approach, only documents that are actually created by the quality assurance privilege will be protected.[156] Therefore, there will be no *in camera* review required and no time and resources wasted battling over which documents are protected by the privilege.

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[152] *See* 42 U.S.C. §§ 1395i-3(b)(1)(B), 1396r(b)(1)(B) (2012).

[153] KY. CONST. § 14.

[154] *Raikes*, 984 S.W.2d at 469.

[155] *See* 42 U.S.C. §§ 1395i-3(b)(1)(B),1396r(b)(1)(B) (2012).

[156] 946 S.W.2d 740, 743 (Mo. 1997).

Proponents of the broad approach might argue that plaintiffs will still be protected under the broad approach because courts can conduct an *in camera* review of disputed documents and determine whether or not they are entitled to protection. However, this does not effectively solve the problem. If Kentucky adopts the broad approach to the quality assurance privilege, some litigants would likely not even reach an *in camera* review. Some litigants would likely be deterred from seeking justice altogether if they knew they could not obtain a significant amount of evidence due to the quality assurance privilege. Plaintiffs' lawyers would also likely be more hesitant to accept nursing home cases if they knew they would not be permitted to discover a substantial amount of relevant evidence.

Because the narrow approach ensures that only documents that are truly quality assurance documents are privileged, protects plaintiffs' Section 14 rights, and expedites litigation, Kentucky should adopt the narrow approach to the quality assurance privilege.

C. There Is No Evidence That the Narrow Approach Will Create A Decline In Quality of Care, and the Narrow Approach Is In Line with Similar Privileges

Some proponents of the broad approach might argue that if Kentucky adopts the narrow approach, its quality of care will deteriorate because committees will not be honest in quality assessment for fear of litigation. However, there is no evidence that this proposition is true. As of 2005, no study substantiating such claims had been performed,[157] and it does not appear that such a study has been performed since that time. Without hard data, it is merely a conjecture to state that Kentucky's quality of care will deteriorate if the narrow approach is adopted.

Further, as noted above, Kentucky has already rejected this argument in the similar context of the peer review privilege. Kentucky has an extremely narrow approach to its peer review privilege, which is the most similar Kentucky privilege to the quality assurance privilege.[158] The Kentucky legislature and courts have already made a policy decision regarding peer review documents that the quality of peer review assessment, and ultimately overall health care, will not be altered enough to justify preventing plaintiffs from obtaining relevant evidence.[159] It would not make sense for Kentucky to adopt such a narrow approach to the peer review privilege while adopting a broad approach to the quality assurance privilege. If Kentucky were to do so, plaintiffs suing a hospital would be permitted to discover peer review documents while plaintiffs suing a nursing home would not be permitted to discover quality assurance documents, even though the documents might be very similar. A plaintiff suing a hospital would be entitled to far more discovery than a plaintiff suing a nursing home, merely because of the difference in

[157] Note, *The Medical Peer Review Privilege in Massachusetts: A Necessary Quality Control Measure or an Ineffective Obstruction of Equitable Redress?*, 38 SUFFOLK U. L. REV. 811, 814 (2005).

[158] *See supra* Part III.C.

[159] *See* Saleba v. Schrand, 300 S.W.3d 177, 183 (Ky. 2009).

the type of facility involved. Even if the care the two plaintiffs received was almost identical, the plaintiffs would still be entitled to different documents. Thus, whether the plaintiff was receiving care in a hospital or a nursing home could in many instances be dispositive of the plaintiff's case. This is not an equitable result, and it is certainly not sensible. It could even lead to strategic behavior to avoid nursing homes in favor of hospitals or other medical facilities. Because the types of documents covered by the quality assurance privilege and the peer review privilege are similar, Kentucky should make a similar policy decision with regard to the quality assurance privilege and adopt the narrow approach.

CONCLUSION

Due to the rising amount of nursing home litigation, the increasing amount of money at stake, and the fact that such cases are not likely to disappear anytime soon, Kentucky must decide sooner rather than later how it will interpret the quality assurance privilege. As outlined above, Kentucky should adopt the narrow approach to the quality assurance privilege and hold that only documents actually created by the quality assurance committee itself are protected by the quality assurance privilege.