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Leading by Example: Why the First Circuit Should Adopt a Medical Peer-Review Privilege

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LEADING BY EXAMPLE: WHY THE FIRST CIRCUIT SHOULD ADOPT A MEDICAL PEER-REVIEW PRIVILEGE

INTRODUCTION

Suppose you represent a hospital in Maine, Massachusetts, New Hampshire, or Rhode Island. You assist your client in developing policies and procedures that help the hospital provide the highest quality of patient care. You are familiar with the peer-review process, a mechanism whereby a professional review body evaluates the soundness of a physician's medical decisions in any given situation.

One hurried morning, your client calls about a recent emergency room incident and a subsequent determination by the hospital's peer-review committee not to dismiss the physician involved. The hospital is concerned about a possible malpractice lawsuit and that the information discussed in the peer-review meeting could expose the hospital and physician to liability. Although your client wants to know whether the peer-review information would be disclosed during litigation, the answer is unclear and may depend on the forum—state or federal—in which the action is brought. In a state court, the outcome is more predictable because the judge simply must decide whether the state's medical peer-review statute protects the specific requested information from discovery. However, the applicable law that governs a federal court's analysis is determined by the court's jurisdiction—diversity or federal question—and, if it is the latter, then supplemental state law claims impact whether the federal court might recognize a medical peer-review evidentiary privilege.

One example of a federal court resolving the issue is a 2009 case from the United States District Court for the District of Rhode Island, in which the court held that the state's peer-review statute should apply and the peer-review information a plaintiff requested from a hospital was privileged because the information did not support her federal law claim.[1] In *Bennett v. Kent County Memorial Hospital*,[2] the plaintiff brought state negligence claims and federal claims under the Emergency Medical

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[1] *See* Bennett v. Kent Cnty. Mem'l Hosp., 623 F. Supp. 2d 246, 255 (D.R.I. 2009) (discussing court's reasoning for denying plaintiff's motion to compel evidence); *see also infra* notes 87-89 and accompanying text (reviewing *Bennett*).

[2] 623 F. Supp. 2d 246.

Treatment and Active Labor Act ("EMTALA"), arguing that the hospital failed to provide appropriate medical tests and to stabilize her mother while receiving emergency care.[3] The defendant objected to answering questions during a deposition regarding peer-review discussions.[4] The court allowed the defendant to assert the state's medical peer-review privilege; the statute's confidentiality provision persuaded the court that such confidentiality was necessary for an effective peer-review process.[5] The court noted, however, that the "issue of what privilege law should apply in federal question cases with supplemental state law claims remains unresolved."[6] Under different circumstances, some district courts have refused to recognize the privilege.[7]

The unpredictability of whether federal courts will apply the state law privilege highlights the dilemma that hospitals, physicians, and other healthcare providers face when performing peer review and trying to protect confidentiality.[8] This uncertainty is only exacerbated by the fact that all fifty states and the District of Columbia have legislatively enacted some form of a medical peer-review privilege.[9] Consensus among the states indicates that the privilege's purpose—to improve healthcare quality and risk management by encouraging open discussion among physicians—serves important public interests.[10] Congress echoed this sentiment when it

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[3] *Id.* at 247-48; *see also* 42 U.S.C. § 1395dd (2006) (requiring hospital emergency department to provide appropriate medical screening examination).

[4] *Bennett*, 623 F. Supp. 2d at 249.

[5] *Id.* at 255 (stating non-recognition of the privilege would jeopardize integrity of the process). "Reporting systems in health care facilities typically serve two core functions: to hold providers accountable for their performance and, alternatively, to impart certain information that will increase general safety in connection with medical care." David L. Fine, 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, 817-18 (2005).

[6] *Bennett*, 623 F. Supp. 2d at 252-53 (citing Guzman v. Mem'l Hermann Hosp. Sys., No. H-07-3973, 2009 WL 427268, at *3 (S.D. Tex. Feb. 20, 2009)).

[7] *See* Krolikowski v. Univ. of Mass., 150 F. Supp. 2d 246, 248-49 (D. Mass. 2001) (stating that in federal discrimination cases, courts typically do not recognize the state privilege); *see also* Marshall v. Spectrum Med. Grp., 198 F.R.D. 1, 5 (D. Me. 2000) (finding hospital was unable to assert state evidentiary privilege against disability discrimination claim).

[8] *See* Susan O. Scheutzow & Sylvia Lynn Gillis, *Confidentiality and Privilege of Peer Review Information: More Imagined Than Real*, 7 J.L. & HEALTH 169, 197 (1993) (discussing healthcare facilities' confusion about whether federal courts will protect peer-review activities).

[9] *See* Thomas J. Hurney, Jr. et al., *A Practical Analysis of HCQIA Immunity*, IN-HOUSE DEF. Q. 34, 35 (Fall 2009) (noting all states and District of Columbia have statutes protecting peer-review activities).

[10] *See* Jaffee v. Redmond, 518 U.S. 1, 13 (1996) (emphasizing states' policy decisions to support federal recognition of such state privileges); *see also* Scheutzow & Gillis, *supra* note 8, at 181-82 (describing how peer-review privilege is product of legislative creation rather than common law). The fact that all fifty states decided to enact some form of a peer-review statute

passed the Health Care Quality Improvement Act of 1986 ("HCQIA").[11] However, courts disagree about whether HCQIA includes an evidentiary privilege for peer-review materials.[12]

This Note argues that the Court of Appeals for the First Circuit should become the first circuit to recognize the medical peer-review privilege in cases that include federal and state claims.[13] Doing so would settle the open question of whether this state privilege applies to a federal claim, a question over which district courts are split.[14] Because the Supreme Court has not addressed whether this privilege exists under federal law, courts in the First Circuit are forced to balance the policy interests that the privilege promotes against the probative value of the evidence sought to be admitted on a case-by-case basis.[15]

Part I of this Note provides the common elements of medical peer-review statutes and subsequently compares those laws of the First Circuit states.[16] Part II outlines discovery rules, HCQIA, and how federal courts decide whether to apply a state privilege invoked against a federal claim.[17]

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indicates a similar belief among the legislatures that the public benefits from the protection of medical peer-review participants and information. *See* Ghazal Sharifi, Comment, *Is the Door Open or Closed? Evaluating the Future of the Federal Medical Peer-Review Privilege*, 42 J. MARSHALL L. REV. 561, 572 (2009) (raising concerns that would result from absence of such peer-review privileges).

[11] *See* 42 U.S.C. § 11101(5) (2006) ("There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.").

[12] *See* Sharifi, *supra* note 10, at 566-67 (noting inconsistent treatment of peer-review materials during discovery). Under HCQIA, peer-review participants are granted only immunity, whereas the state laws extend a privilege to the discoverability and admissibility of evidence and protect confidentiality of the peer-review information. *Id.* at 565, 571.

[13] *See* Bennett v. Kent Cnty. Mem'l Hosp., 623 F. Supp. 2d 246, 254 (D.R.I. 2009) (stating First Circuit has not considered the issue); *see also* Sharifi, *supra* note 10, at 571-72 (noting Fourth, Seventh, and Eleventh Circuits have not recognized this federal privilege).

[14] *See In re* Admin. Subpoena Blue Cross Blue Shield of Mass., Inc., 400 F. Supp. 2d 386, 389 (D. Mass. 2005) (stating no court in the First Circuit has recognized a federal medical peer-review privilege); *cf.* Murphy v. United States, No. 06-CV-459-JD, 2008 WL 2568177, at *2 (D.N.H. June 25, 2008) (finding existence of federal quality assurance review privilege).

[15] *See Jaffee*, 518 U.S. at 9-12 (defining common law testimonial privilege); *see also* Lisa M. Nijm, Article, *Pitfalls of Peer Review: The Limited Protections of State and Federal Peer Review Law for Physicians*, 24 J. LEGAL MED. 541, 555 (2003) (describing how federal courts use a balancing test). Federal Rule of Evidence 501 authorizes courts to use "reason and experience" in determining whether to establish a common-law privilege. *See* FED. R. EVID. 501. In *Jaffee*, the Court stated the issue as: "whether a privilege protecting confidential communications . . . 'promotes sufficiently important interests to outweigh the need for probative evidence . . . .'" 518 U.S. at 9-10 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

[16] *See infra* Part I.

[17] *See infra* Part II; *see also* Alissa Marie Bassler, Comment, *Federal Law Should Keep Pace With States and Recognize A Medical Peer Review Privilege*, 39 IDAHO L. REV. 689, 691 (2003) ("Currently, federal courts . . . are not applying the [medical peer-review] privilege to either the

Part II also reviews recent First Circuit district court cases that have both recognized and refused to recognize the privilege, and specifically explores the First Circuit's *Hampers* test.[18] Part III discusses the First Circuit's position in relation to its sister circuits, provides suggestions as to how the First Circuit could formulate a federal common law medical peer-review privilege, and, alternatively, proposes congressional action.[19]

I. HISTORY OF THE MEDICAL PEER-REVIEW PRIVILEGE

In the healthcare industry, peer review is the process by which groups or committees of physicians review their colleagues' work.[20] The system provides a critical tool for evaluating physicians' credentials to practice in the hospital, improving their ongoing care through routine assessments, and determining whether to take action after specific quality concerns arise.[21] Because the process requires participation from healthcare professionals within an organization that are qualified to examine their peers, it is likely to create difficult conflicts among co-workers.[22] For instance, participants are concerned about the competing interests of some groups' efforts to obtain peer-review information, such as by plaintiffs in a medical malpractice case, insurance companies making

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federal claims or the state claims [when both state claims and a federal question are presented].").

[18] *See infra* Part II.C (outlining test from *In re* Hampers, 651 F.2d 19, 22 (1st Cir. 1981)). In the First Circuit, district courts use a two-part test for recognizing a state evidentiary privilege: (1) whether the forum state would grant the privilege asserted; and (2) whether the privilege is "intrinsically meritorious." *See Hampers*, 651 F.2d at 22 (citing ACLU v. Finch, 638 F.2d 1336, 1343 (5th Cir. 1981)).

[19] *See infra* Part III.

[20] *Medical Peer Review*, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/medical-peer-review.shtml (last visited Feb. 21, 2011) (describing peer review).

[21] *See* Fine, *supra* note 5, at 811-13 (discussing how peer-review activities can reduce medical error); *see also* Nilavar v. Mercy Health Sys.-W. Ohio, 210 F.R.D. 597, 600 (S.D. Ohio 2002) (arguing peer review serves several important purposes). The evaluative practice helps to root out incompetence in the profession, leading to a higher overall level of health care for patients. *Nilavar*, 210 F.R.D. at 600. It also reassures patients they are receiving proper care when they learn that the institution takes time to review its policies, procedures, and physicians' conduct. *Id. But see* Ilene N. Moore et al., *Rethinking Peer Review: Detecting and Addressing Medical Malpractice Claims Risk*, 59 VAND. L. REV. 1175, 1186-87 (2006) (noting critics allege peer review does not actually adequately improve healthcare quality and safety).

[22] *See* Nijm, *supra* note 15, at 545-46 (outlining potential uses of peer-review information). Individuals performing the review may feel comfortable sanctioning a physician in private, such as by requiring additional training, but fear of subsequent lawsuits by this physician or by her patients can impede whether the peer review is effective. *See* Scheutzow & Gillis, *supra* note 8, at 174 (discussing concerns of peer-review participants).

payment decisions, or other healthcare providers making referrals.[23] To foster candid discussion in medical peer reviews, state legislatures enacted laws to protect the peer-review proceedings and materials.[24]

A. Medical Peer-Review Statutes of the First Circuit

The American Medical Association and scholars explain that good-faith peer review is afforded protection in some combination of the following three ways: (1) "involved individuals and institutions are granted immunity from lawsuits"; (2) "information related to the peer review process is deemed confidential"; and (3) "peer review work product is designated privileged and inadmissible in court."[25] All states within the First Circuit have statutes providing some form of immunity, confidentiality, and an evidentiary privilege to medical peer reviews.[26] In

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[23] *See* Nijm, *supra* note 15, at 545-46 (describing who seeks peer-review information and why).

[24] *See* Moretti v. Lowe, 592 A.2d 855, 857-59 (R.I. 1991) (characterizing legislative intent behind Rhode Island's peer-review statute). There is an "overwhelming public interest" in protecting the confidentiality of peer-review meetings because doctors make life and death decisions every day, and must have access to the most up-to-date information and techniques, which is garnered through the free flow of ideas and advice. *See* Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249, 251 (D.D.C. 1970) (announcing federal peer-review privilege). *But see* Syposs v. United States, 63 F. Supp. 2d 301, 306 n.2 (W.D.N.Y. 1999) (arguing court's creation of a peer-review privilege in *Bredice* was dicta). Furthermore, the privilege and immunity provided by these state statutes curbs malpractice litigation, which trickles down to lower healthcare costs for the consumer because institutions consider the litigation expenses in determining pricing. *See* Saunders v. Tisher, 902 A.2d 830, 834 (Me. 2006) (describing legislative intent of Maine's Health Security Act); *see also* Vranos v. Franklin Med. Ctr., 862 N.E.2d 11, 18 (Mass. 2007) (noting Massachusetts "provide[s] weighty protection to a medical peer review committee's work product and materials").

[25] *Medical Peer Review*, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/medical-peer-review.shtml (last visited Aug. 1, 2010) (listing legal protections for peer reviews); *see* Susan O. Scheutzow, *State Medical Peer Review: High Cost but no Benefit Is it Time for a Change?*, 25 AM. J.L. & MED. 7, 27 (1999) (outlining how medical peer-review statutes may provide three types of protection: privilege, confidentiality, and immunity).

[26] *See* ME. REV. STAT. ANN. tit. 24, §§ 2510-A, 2511 (2000); MASS. GEN. LAWS ch. 111, §§ 204-05 (2003); N.H. REV. STAT. ANN. § 151:13-a (2005); R.I. GEN. LAWS §§ 5-37.3-7, 23-17-25 (2009). New Hampshire's medical peer-review statute includes an example of immunity: "No hospital, trustees, medical staff, employees, or other committee attendees shall be held liable in any action for damages or other relief arising from the providing of information to a hospital committee or in any judicial or administrative proceeding." N.H. REV. STAT. ANN. § 151:13-a(IV). Rhode Island's statute provides an example of confidentiality language and reads, in part: "Confidential health care information before a medical peer review board shall remain strictly confidential, and any person found guilty of the unlawful disclosure of that information shall be subject to the penalties . . . ." R.I. GEN. LAWS § 5-37.3-7(b). The privilege in Maine's statute stipulates that: "[A]ll professional competence review records are privileged and confidential and

general, states that mention confidentiality do so in conjunction with granting a privilege, suggesting that this confidentiality language applies only in the judicial context rather than to any actual requirement that participants keep the information confidential.[27] Of the four First Circuit states, only Rhode Island provides sanctions for peer review participants that do not abide by the confidentiality language.[28] The immunity provisions stipulate immunity from suit, damages, or both.[29]

II. FEDERAL PROTECTION FOR THE MEDICAL PEER-REVIEW PRIVILEGE

Federal Rule of Evidence 501 ("Rule 501") governs the use of privilege in federal litigation.[30] Rule 501 provides that federal courts follow common law where a plaintiff or defendant raises an issue of federal law and a privilege is asserted.[31] In civil suits, where the federal court has diversity jurisdiction, the state law from the forum state should supply the rules for privileges.[32] For example, one federal district court in the Eighth

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are not subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity and are not admissible as evidence in any civil, judicial or administrative proceeding." ME. REV. STAT. ANN. tit. 24, § 2510-A.

[27] *See* Scheutzow & Gillis, *supra* note 8, at 193-95; *see also* Christina A. Graham, Comment, *Hide and Seek: Discovery in the Context of the State and Federal Peer Review Privileges*, 30 CUMB. L. REV. 111, 125 (2000) (explaining discrepancy amongst state statutes regarding degree of protection provided for peer-review documents). For example, the Massachusetts peer-review statute reads, in part:

> [T]he proceedings, reports and records of a medical peer review committee shall be confidential and . . . shall not be subject to subpoena or discovery, or introduced into evidence, in any judicial or administrative proceeding, except proceedings held by the boards of registration in medicine, pharmacy, social work, or psychology or by the department of public health . . . and no person who was in attendance at a meeting of a medical peer review committee shall be permitted or required to testify in any such judicial or administrative proceeding . . . as to the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, deliberations or other actions of such committee or any members thereof.

MASS. GEN. LAWS ch. 111, § 204(a) (2003).

[28] *See* Scheutzow & Gillis, *supra* note 8, at 194-95 (arguing Rhode Island is one of a few states that fully appreciates concept of confidentiality). *See generally* R.I. GEN. LAWS § 5-37.3 (2009) (establishing safeguards for maintaining confidential healthcare information).

[29] Scheutzow & Gillis, *supra* note 8, at 176 (noting range of immunity varies by statute).

[30] *See* FED. R. EVID. 501.

[31] *Id.* Rule 501 reads in part: "[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.*

[32] *Id.* Section 1332, title 28 of the United States Code governs diversity jurisdiction. 28

Circuit applied the forum state's medical peer-review statute to preclude from discovery certain documents relating to the patient's care because the parties were diverse.[33] Whether in state court, or federal court pursuant to diversity of citizenship, the plain language of the state's peer-review statute will supply the rules for the court to apply.[34]

A. The Health Care Quality Improvement Act of 1986 ("HCQIA")

In cases based on federal question jurisdiction, federal courts use their own judgment when considering an evidentiary privilege and are not bound by any specific state laws.[35] As expressed in Rule 501, the Constitution, federal statutes, and Supreme Court precedent should guide courts in determining whether there is a common-law privilege.[36] Without any constitutional protection or Supreme Court cases on point, courts have

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U.S.C. § 1332(a)(1) (2006) ("The district courts shall have original jurisdiction of all civil actions . . . between . . . citizens of different States . . . ."). "[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." FED. R. EVID. 501; *cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (holding federal courts cannot create common law when hearing state law claims under diversity jurisdiction). The rule for broad discovery states: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." FED. R. CIV. P. 26(b)(1).

[33] *See generally* Uhing v. Callahan, No. 08 Civ. 4200, 2010 WL 23059, at *8 (D.S.D. Jan. 4, 2010) (relying on South Dakota's medical peer-review privilege to deny plaintiffs' motions to compel peer-review documents). The United States District Court for the District of South Dakota determined that the "plain language" of the state privilege controlled whether ten disputed documents were subject to discovery. *Id.* Comparing each set of documents' description to the definition of peer-review committee and activities, the court concluded that nine of the ten documents were privileged under the state law. *See id.* at *4-7 (conducting "document-by-document" analysis).

[34] *See* Burrows v. Redbud Cmty. Hosp. Dist., 187 F.R.D. 606, 610-11 (N.D. Cal. 1998) (outlining Rule 501 analysis). "However, state law claims that are pendent to federal question cases are governed by federal privilege law." *Id.* at 611.

[35] *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501.02 (Joseph M. McLaughlin ed., 2d ed. 2009) (noting federal courts can establish new privileges based on changing conditions); *see also* 28 U.S.C. § 1331 (2006) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

[36] FED. R. EVID. 501. Some of the most recognized privileges are the attorney-client privilege, psychotherapist-patient privilege, and marital privilege. *See* 1 JAMES WM. MOORE ET AL., MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE § 4.07 (2009). The medical peer-review privilege is a state-developed law; it is characterized as an "institutional privilege" because, when enacting such statutes, legislatures were motivated by the need to protect the institution of health care, which relied on the peer-review process. *See* Scheutzow & Gillis, *supra* note 8, at 179-82 (describing development of peer-review privilege).

looked to the Health Care Quality Improvement Act of 1986 because it is the only federal law that addresses medical peer review.[37]

As opposed to state medical peer-review statutes that typically include three distinct elements protecting the peer-review process, HCQIA only provides immunity.[38] Under HCQIA, when a "professional review body" meets four statutory requirements, then its participants are immune from damages.[39] Congress was silent about any privilege for peer-review proceedings under HCQIA, and courts presume that the legislature would have addressed the issue if it intended to grant a specific evidentiary privilege.[40]

Consequently, federal courts are left to adopt a privilege as a matter of common law, if at all, and many courts have signaled reluctance in doing so.[41] For instance, in *Syposs v. United States*,[42] the United States District Court for the Western District of New York declined to extend the forum state's medical peer-review privilege to a federal question case arising under the Federal Tort Claims Act ("FTCA").[43] In that case, the

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[37] *See* 42 U.S.C. § 11101(3)-(5) (2006); *see also* Poliner v. Tex. Health Sys., 537 F.3d 368, 369-70 (5th Cir. 2008) (reversing thirty-three million dollar judgment against defendant because it was immune from damages), *cert. denied*, 129 S. Ct. 1002 (2009).

[38] *See* 42 U.S.C. § 11111(a)(1) (2006); *In re* Admin. Subpoena Blue Cross Blue Shield of Mass., Inc., 400 F. Supp. 2d 386, 390 (D. Mass. 2005) ("Congress extended qualified immunity from suit to those conducting such peer reviews."); *see also* Nijm, *supra* note 15, at 550 (delineating HCQIA's elements); sources cited *supra* note 25 (listing protections afforded by state statutes).

[39] *See* 42 U.S.C. § 11111(a)(2).

> [A] professional review action must be taken--
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
> (2) after a reasonable effort to obtain the facts of the matter,
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a) (2006). When applying the statute, courts consider the totality of the circumstances in determining whether the institution acted reasonably during the peer-review process. *See* Hurney, Jr. et al., *supra* note 9, at 39-40, 59 (describing how an institution's peer review effects HCQIA immunity protection).

[40] *See* Scheutzow & Gillis, *supra* note 8, at 182 (finding little support for federal common-law peer-review privileges).

[41] *Compare* Adkins v. Christie, 488 F.3d 1324, 1326 (11th Cir. 2007) (deciding not to recognize privilege in federal discrimination case), *with* Ming Wei Liu v. Bd. of Trs. of Univ. of Ala., 330 F. App'x 775, 777, 779-80 (11th Cir. 2009) (upholding use of privilege to withhold credentialing information), *cert. denied*, 130 S. Ct. 1053 (2010).

[42] 63 F. Supp. 2d 301 (W.D.N.Y. 1999).

[43] *Id.* at 308-09 (holding "neither reason nor experience" warranted a common law federal

malpractice claim raised an issue of federal law because the surgeon practiced at a Veterans Administration Hospital.[44] The court found that the legislative history of HCQIA indicated Congress's explicit rejection of the notion that strict confidentiality of peer reviews was necessary to promote quality health care.[45] Additionally, the court rejected the comparison of the medical peer-review privilege to the psychotherapist privilege delineated in *Jaffee v. Redmond*[46] because the institutional prerogative of confidentiality in peer reviews was not equivalent to the assurance that communications in therapy remain confidential for a patient's effective care.[47]

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peer-review privilege). *But cf.* Smith *ex rel.* Smith v. United States, 193 F.R.D. 201, 208 (D. Del. 2000) (quoting 10 U.S.C. § 1102(a) (2006)) (finding medical quality assurance records were privileged from discovery in medical malpractice suit under FTCA). In *Syposs*, two hospitals that were not parties in a separate medical malpractice case were subpoenaed to compel peer-review documents about a doctor whose surgery was the subject of the other suit. 63 F. Supp. 2d at 302.

[44] *See Syposs*, 63 F. Supp. 2d at 302-03; *see also* Bethel v. U.S. *ex rel.* Veterans Admin. Med. Ctr. of Denver, Colo., 242 F.R.D. 580, 584 (D. Colo. 2007) (refusing to apply "[a] blanket claim of privilege"). The Colorado district court evaluated the medical quality-assurance records to determine if they were privileged. *Bethel*, 242 F.R.D. at 584; *see also* 38 U.S.C. § 5705(a) (2006) ("Records and documents created by the Department [of Veterans Affairs] as part of a medical quality-assurance program . . . are confidential and privileged and may not be disclosed to any person or entity . . . ."). Section 5705 establishes a statutory privilege for documents created by or for the Veterans Administration ("VA") as part of a medical quality-assurance program. *See* § 5705. In *Bethel*, though, the court held that "root cause" analyses were not protected by the VA's quality assurance privilege, neither were the "peer review" documents, purported "morbidity and mortality reviews," and "drug usage evaluations," but a "patient safety report" was protected. *See* 242 F.R.D. at 585-88. In addition to a VA privilege, "[m]ilitary physicians who participate in peer review are given a broader range of privileges and immunities by the Department of Defense than that provided under HCQIA." Teresa L. Salamon, *When Revoking Privilege Leads to Invoking Privilege: Whether There is a Need to Recognize a Clearly Defined Medical Peer Review Privilege in* Virmani v. Novant Health Inc., 47 VILL. L. REV. 643, 653 (2002). *See generally* 10 U.S.C. § 1102 (providing confidentiality of medical quality assurance records).

[45] *Syposs*, 63 F. Supp. 2d at 307. The court acknowledged that federal courts should consider state laws when determining whether a new privilege is justified. *Id.* at 307-08; *see also* Jaffee v. Redmond, 518 U.S. 1, 11-13 (1996) (announcing psychotherapist privilege). However, the court stated that this determination is only one factor of many, and federal courts in a federal question case are not required to defer to state law. *Syposs*, 63 F. Supp. 2d at 308.

[46] 518 U.S. 1, 5-7.

[47] *Syposs*, 63 F. Supp. 2d at 308-09. The court stated:

> Physicians and hospitals have an overriding professional obligation and economic incentive to improve the quality of medical care they provide thereby potentially reducing malpractice insurance rates and improving profitability regardless of the availability of strict confidentiality. Whatever degree of confidentiality may also be needed to obtain participation in effective peer reviews can be provided by the courts . . . .

Id. at 308.

The *Syposs* court relied on *University of Pennsylvania v. EEOC*,[48] which is the only Supreme Court case that addresses a peer-review privilege, and its context was academic peer review.[49] That case involved an EEOC subpoena directed to the University of Pennsylvania for the tenure-review files of a female professor who was denied tenure and those records of similarly situated male faculty who received tenure.[50] The Court determined that the language in Title VII did not include a privilege for educational institutions.[51] Additionally, the Court was hesitant to establish a common-law privilege where legislative intent and precedent as well as a lack of constitutional foundation did not support the decision.[52]

B. Analysis of the Medical Peer-Review Privilege by Circuit Courts of Appeals

Although the Supreme Court has not addressed the peer-review privilege as it relates to the medical practice, a number of the federal circuit courts of appeals have considered the issue, most recently in the Eleventh Circuit.[53] In *Ming Wei Liu v. Board of Trustees of University of Alabama*,[54] the Eleventh Circuit affirmed a district court's ruling that the University of Alabama, Birmingham ("UAB") was authorized by its state's peer-review

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[48] 493 U.S. 182 (1990).

[49] Syposs v. United States, 63 F. Supp. 2d 301, 307 (W.D.N.Y. 1999) (declining to adopt new privilege for peer-review materials). In *University of Pennsylvania*, a female professor brought a discrimination claim with the Equal Employment Opportunity Commission ("EEOC") under Title VII of the Civil Rights Act of 1964. 493 U.S. at 185.

[50] *See Univ. of Pa.*, 493 U.S. at 185.

[51] *Id.* at 189-90. Title VII does "not carve out any special privilege relating to peer review materials, despite the fact that Congress undoubtedly was aware, when it extended Title VII's coverage, of the potential burden that access to such material might create." *Id.* at 191; *see also In re* Admin. Subpoena Blue Cross Blue Shield of Mass., Inc., 400 F. Supp. 2d 386, 390 (D. Mass. 2005) (comparing absence of peer-review privilege in Civil Rights Act with HCQIA).

[52] *Univ. of Pa.*, 493 U.S. at 192-95. The Court conducted a historical analysis comparing the reasoning for protecting confidentiality of presidential communications, for instance, against the arguments supporting recognition of a peer-review privilege. *Id.* at 194-95.

[53] *See* Ming Wei Liu v. Bd. of Trs. of Univ. of Ala., 330 F. App'x 775, 778 (11th Cir. 2009) (applying Alabama's state peer-review privilege to uphold defendant's refusal to provide discovery material), *cert. denied*, 130 S. Ct. 1053 (2010). The Fourth Circuit and Fifth Circuit Courts of Appeals have also recently considered the applicability of state peer-review statutes to federal claims, but these cases focused on immunity from damages under HCQIA. *See* Wahi v. Charleston Area Med. Ctr., Inc., 562 F.3d 599, 606-07 (4th Cir. 2009) (ruling hospital that suspended physician's medical privileges without a prior hearing was immune from liability), *cert. denied*, 130 S. Ct. 1140 (2010); Poliner v. Tex. Health Sys., 537 F.3d 368, 369-70 (5th Cir. 2008) (reversing thirty-three million dollar judgment against defendant because it was immune from damages), *cert. denied*, 129 S. Ct. 1002 (2009).

[54] 330 F. App'x 775.

statute to refuse sending certain material to another institution.[55] The plaintiff, Dr. Liu, was a cardiologist and tenured professor at UAB before the university suspended his clinical privileges.[56] The university began a peer-review investigation, but Dr. Liu resigned prior to its completion; shortly thereafter, he applied for a position at the University of Southern California Hospital ("USC"), which requested peer-review information from UAB to evaluate Dr. Liu's credentials.[57] The Eleventh Circuit held that UAB's reliance on the state privilege was constitutional and did not violate the Supremacy Clause because the Alabama law "as applied" did not "thwart" the intent of HCQIA.[58] The court of appeals reasoned that HCQIA did not require UAB to provide more peer-review information to a credentialing authority in another state than was mandated.[59]

The Eleventh Circuit arrived at a different conclusion concerning a healthcare entity's use of a state medical peer-review privilege in a federal discrimination case.[60] In *Adkins v. Christie*,[61] the plaintiff, an African-

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[55] *See id.* at 778-79. In addition to his Fourteenth Amendment due process and equal protection claims, Dr. Liu alleged that his former employer's refusal to provide the peer-review information to a prospective employer "violated the Supremacy Clause of the United States Constitution by obstructing the 'essential purpose' of the HCQIA." *Id.* at 777.

[56] *See id.* at 776-78 (laying out facts of claim).

[57] *See id.* at 777. As required under HCQIA, "certain information relating to the professional competence and conduct of physicians" is collected in a National Practitioner Data Bank ("NPDB"). *See* 45 C.F.R. § 60.1 (2005). The university reported Dr. Liu's resignation during the peer-review investigation to the NPDB. *Liu*, 330 F. App'x at 777. Dr. Liu's prospective employer, USC, wanted to inspect the peer-review report. *Id.* The director of cardiovascular research at UAB did not offer USC the material, but "sent a 'recommendation letter' to USC stating that Dr. Liu was placed on probation and was being investigated because his 'performed procedures, planned procedures, certain aspects of medical care, and his hospital chart documentation were not within the standard of care at [UAB].'" *Id.* The court did not address whether UAB's use of the privilege outside of the litigation context was appropriate because the district court declined to exercise its supplemental jurisdiction over the pending state law claims after finding UAB's conduct did not violate any of Dr. Liu's federally protected rights. *Id.* at 777-78 & n.3.

[58] *Liu*, 330 F. App'x at 779 (stating Alabama's peer-review privilege supplemented the federal law). The court found that HCQIA did not preempt state law where the intent of both the federal and state statutes was the same: to address an increasing amount of medical malpractice claims, "'to facilitate the frank exchange of information among professionals conducting peer review inquiries without the fear of reprisals in *civil lawsuits*,'" and to ensure some minimal protection against incompetent doctors easily moving their practice from state to state. *Id.* at 779-80 (emphasis in original) (quoting Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1322 (11th Cir. 1994)).

[59] *See id.* at 779 (concluding use of peer-review privilege is consistent with HCQIA); *see also* 42 U.S.C. § 11133(a)(3) (2006) (requiring healthcare entities report certain information about physicians when professional review actions are taken).

[60] *See* Adkins v. Christie, 488 F.3d 1324, 1326 (11th Cir. 2007) (vacating district court's grant of summary judgment because plaintiff was limited in conducting discovery).

American physician who worked at the Houston Medical Center, alleged that his employer terminated his privileges because of his race.[62] The district court limited Adkins's discovery request for documents relating to the "peer review of *all* physicians at the hospital" during the years Adkins was on staff because such material was privileged under Georgia law.[63] The court of appeals agreed with the defendant's argument that the privilege serves important interests, but ultimately concluded that the evidentiary privilege was unwarranted in federal civil rights cases.[64] In declining to recognize the state's medical peer-review privilege, the court reasoned that the plaintiff sought documents critical to establishing his claim of racial discrimination.[65]

The Eleventh Circuit's holding in *Adkins* was persuaded by Fourth and Seventh Circuit Courts of Appeals' decisions.[66] The Seventh Circuit was the first to consider the privilege and, similar to the Eleventh Circuit, concluded that the public interests in enforcing federal antitrust law were "too strong to permit the exclusion of relevant and possibly crucial evidence"; such a holding implies that the claim arose out of the peer-review process.[67] In *Virmani v. Novant Health Inc.*,[68] the Fourth Circuit confronted the same federal discrimination issue as the *Adkins* court.[69]

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[61] 488 F.3d 1324.

[62] *See id.* at 1324-26 (setting out facts of claim). Adkins believed that his suspension and subsequent termination was based on the recommendation of the hospital's peer review committee, which conducted a biased and unfair evaluation. *See id.*

[63] *Id.* at 1327.

[64] *See id.* at 1328-29 (finding interest in civil rights cases outweighs privilege's public good). The court weighed the interests for protecting evidence against the corresponding and overriding goal that discovery is essential to determine whether employment discrimination has occurred. *See id.*

[65] *See id.* at 1329 (suggesting lack of discovery would prevent claim altogether). The Eleventh Circuit noted that the interests at issue in this type of case are different from those in a malpractice case. *Id.* at 1330.

[66] *Adkins*, 488 F.3d at 1329-30 (supporting holding with cases from Fourth and Seventh Circuits); *see also* Virmani v. Novant Health Inc., 259 F.3d 284, 293 (4th Cir. 2001) (denying privilege in federal discrimination case); Mem'l Hosp. for McHenry Cnty. v. Shadur, 664 F.2d 1058, 1063 (7th Cir. 1981) (rejecting privilege in federal civil antitrust context).

[67] *See Shadur*, 664 F.2d at 1063 (declining to recognize hospital's disciplinary proceedings were privileged under Illinois's medical peer-review statute). The court of appeals noted that the case included pendent state claims to which the information sought would also be relevant, but determined "it would be meaningless to hold the communication privileged for one set of claims and not the other . . . . [F]ederal law control[s] on the question of privilege in a federal antitrust action, notwithstanding the presence of a pendent state claim." *Id.* at 1061 n.3 (citation omitted). It is important to recognize that even though *Shadur* is on point, the case was decided before HCQIA was enacted in 1986. *See* 42 U.S.C. § 11101 (2006).

[68] 259 F.3d 284 (4th Cir. 2001).

[69] *See id.* at 285-86 (listing allegations of racial discrimination). Virmani also brought state

Virmani argued that his employer treated non-Indian physicians differently and disciplined them less harshly.[70] Guided by the Supreme Court's decision in *University of Pennsylvania*, the court of appeals conducted a Rule 501 analysis and declined to recognize a state evidentiary privilege for peer-review documents where the discovery of such material was essential for establishing the disparate treatment claim.[71]

C. *First Circuit Precedent of the Privilege*

Although the *Virmani* court failed to resolve the confusion generated by federal courts' refusal to recognize or grant a state medical peer-review privilege, the First Circuit Court of Appeals has not yet taken a stance on the issue.[72] Some district courts within the circuit have contemplated whether a state medical peer-review privilege applies in a case asserting federal and state law claims; for instance, in *Marshall v. Spectrum Medical Group*,[73] the plaintiff brought a federal law claim alleging discrimination under the Americans with Disabilities Act ("ADA") and state law claims.[74] The court relied on the framework outlined in *In re Hampers*,[75] in which the First Circuit adopted a "series of inquiries" for courts to consider when balancing the interests of a state-afforded privilege against federal disclosure.[76] In *Marshall*, the United States District Court for the District of Maine evaluated whether a Maine state court would recognize the peer-review privilege, which would satisfy the first aspect of the *Hampers* test.[77] In order to determine the merit of the state medical peer-review privilege, the second part of the *Hampers* test, the court

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claims for intentional infliction of emotional distress and negligent infliction of emotional distress. *Id.* at 286.

[70] *See id.* at 285-86 (summarizing plaintiff's claim).

[71] *See id.* at 288-89 (finding peer-review evidence crucial to establishing claim).

[72] *See* Bennett v. Kent Cnty. Mem'l Hosp., 623 F. Supp. 2d 246, 254-55 (D.R.I. 2009); *see also* Salamon, *supra* note 44, at 667, 669-70 (quoting Jaffee v. Redmond, 518 U.S. 1, 12-13 (1996)) (explaining *Virmani* court failed to follow state trends under "reason and experience" analysis).

[73] 198 F.R.D. 1 (D. Me. 2000).

[74] *Id.* at 2. The plaintiff sought information from a third party, Eastern Maine Medical Center, concerning his credentialing file and peer review. *Id.*

[75] 651 F.2d 19 (1st Cir. 1981).

[76] *See Marshall*, 198 F.R.D. at 3-5 (explaining *Hampers* framework); *Hampers*, 651 F.2d at 22 (describing balancing interests as "weighing the importance of the disclosure sought in the federal prosecution against the potential injury caused a state by disclosure"); *see also supra* note 18 (outlining two-part *Hampers* test).

[77] *Marshall*, 198 F.R.D. at 4.

utilized "Wigmore's classic utilitarian formulation."[78] The *Bennett* court more clearly explained Wigmore's four-prong analysis as:

> [W]hether (1) the communications originated with the expectation of nondisclosure; (2) confidentiality is essential to maintaining the relationship between the parties; (3) the relationship is vital and should be fostered; and (4) "the injury that would inure to the relation by the disclosure of the communications (would be) greater than the benefit thereby gained for the correct disposal of litigation."[79]

Applying this standard, the court in *Marshall* compelled disclosure of the material because the plaintiff alleged abuse within the peer-review process itself; the proffered interests for applying the state privilege were lacking.[80]

The *Marshall* case is often cited for the proposition that courts should refuse to enforce a state medical peer-review privilege in the federal employment discrimination context.[81] Because the first aspect of the *Hampers* test is satisfied by the fact that every state court within the First Circuit's jurisdiction would apply a peer-review privilege, federal courts typically rely on the second prong when deciding not to recognize the privilege.[82] Furthermore, the first three elements of the merit analysis are

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[78] *See id.* (citing ACLU v. Finch, 638 F.2d 1336, 1344 (5th Cir. 1981)).

[79] Bennett v. Kent Cnty. Mem'l Hosp., 623 F. Supp. 2d 246, 253 (D.R.I. 2009) (alteration in original) (quoting *Hampers*, 651 F.2d at 23).

[80] *See* Marshall v. Spectrum Med. Grp., 198 F.R.D. 1, 5 (D. Me. 2000). The court stated, "This case is not directly about the quality of patient care . . . . The articulated justification for confidentiality in medical peer review matters is that patient care will suffer if a physician's candid comments are subsequently used in malpractice or other cases to form a basis of liability." *Id.*

[81] *See, e.g.*, Thayer v. E. Me. Med. Ctr., No. 1:09-CV-19-B-S, 2009 WL 1686673, at *2 (D. Me. June 16, 2009); *In re* Admin. Subpoena Blue Cross Blue Shield of Mass., Inc., 400 F. Supp. 2d 386, 391 (D. Mass. 2005); Krolikowski v. Univ. of Mass., 150 F. Supp. 2d 246, 248 (D. Mass. 2001); *see also* Sonnino v. Univ. Kan. Hosp. Auth., 220 F.R.D. 633, 645 (D. Kan. 2004) (refusing to apply state's medical peer-review privilege to a federal gender discrimination claim); Mattice v. Mem'l Hosp. of S. Bend, 203 F.R.D. 381, 386 (N.D. Ind. 2001) (holding peer-review material concerning anesthesiologist's ADA claim were not privileged).

[82] *See* Scheutzow, *supra* note 25, at 9 (noting all states offer some type of protection to the peer-review process). A state court reviewing whether peer-review documents are confidential will look to see if they fall within the privilege on its face. *See* Vranos v. Franklin Med. Ctr., 862 N.E.2d 11, 20 & n.16 (Mass. 2007) (holding certain memoranda, documents, minutes, and correspondence were privileged); *see also* Moretti v. Lowe, 592 A.2d 855, 858 (R.I. 1991) (clarifying privilege applies only to records and proceedings of peer-review committees, not to participants). "The aim of the inquiry is to determine whether the document was created by, or otherwise as a result of a 'medical peer review committee.'" *Vranos*, 862 N.E.2d at 20 n.16

generally covered by the legislative intent of the state peer-review statutes.[83] Thus, the balancing between state interests promoting a privilege and federal interests favoring disclosure is the essence of the *Hampers* test.[84] Federal district courts in Maine and Massachusetts have concluded that peer-review material should be discoverable in the context of sex discrimination claims as well as in cases alleging healthcare fraud.[85] The courts were likely persuaded by the fact that the government could not conduct an investigation without gaining access to statements made in the peer review, documents relied on in the peer-review process, or agreements stemming from it.[86]

When both federal and supplemental state claims are raised in the complaint, and the former arises from the Emergency Medical Treatment and Active Labor Act ("EMTALA"), some federal courts *have* applied the state's medical peer-review privilege.[87] For instance, in *Bennett*, the court determined that even though the peer-review report might be relevant to the plaintiff's state tort action, a medical malpractice claim, state law would not permit admittance; the court also extended the privilege to the plaintiff's EMTALA claim.[88] The district court reasoned that applying a

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(citing Carr v. Howard, 689 N.E.2d 1304, 1314 (Mass. 1998)).

[83] *See Blue Cross Blue Shield*, 400 F. Supp. 2d at 391 (discussing chapter 111, section 204(a) of the Massachusetts General Laws in context of *Hampers* analysis); *see also* Smith v. Alice Peck Day Mem'l Hosp., 148 F.R.D. 51, 55-56 (D.N.H. 1993) (focusing on fourth element in second prong of *Hampers* test to refuse recognizing state privilege).

[84] *Marshall*, 198 F.R.D. at 4; *see Krolikowski*, 150 F. Supp. 2d at 248-49 (assessing fundamental purpose of privilege on one side and access to information on the other).

[85] *See Thayer*, 2009 WL 1686673, at *2 (permitting discovery of evidence sought in disparate treatment case stemming from medial peer review); *Krolikowski*, 150 F. Supp. 2d at 249-50 (recognizing "substantial costs of gender discrimination" weigh heavily on decision not to apply privilege); *Blue Cross Blue Shield*, 400 F. Supp. 2d at 392 (holding federal interest in investigating and enforcing healthcare fraud outweighs state privilege interests).

[86] *See Thayer*, 2009 WL 1686673, at *2; *Krolikowski*, 150 F. Supp. 2d at 249; *see also Blue Cross Blue Shield*, 400 F. Supp. 2d at 388, 392; *In re* Dep't of Justice Subpoena Baptist Mem'l Hosp., No. 04-MC-018-DV, 2004 WL 2905391, at *3 (W.D. Tenn. June 22, 2004) (refusing to recognize privilege in healthcare fraud case).

[87] *See* Bennett v. Kent Cnty. Mem'l Hosp., 623 F. Supp. 2d 246, 253 (D.R.I. 2009); *see also* Guzman v. Mem'l Hermann Hosp. Sys., No. H-07-3973, 2009 WL 427268, at *9 (S.D. Tex. Feb. 20, 2009) (holding peer-review documents irrelevant to EMTALA claim and state privilege applies to state claims). In *Bennett*, the plaintiff acted as the Administratrix of her mother's estate and brought a medical negligence action. 623 F. Supp. 2d at 248.

[88] *Bennett*, 623 F. Supp. 2d at 254-55. Since the peer-review report concerned the standards of care provided to the plaintiff, it likely would not elicit whether she received disparate treatment compared to other similarly situated patients to establish her EMTALA claim. *Id.* The court noted that the crux of the plaintiff's case depended on the "alleged failure of the attending physician to order a CAT scan during the decedent's initial visit to the Kent emergency room," which supported only a negligence claim and was thus protected by the state's peer-review

claim-by-claim relevance approach was appropriate because it followed Rule 501 and there is no binding authority addressing what privilege law applies in a federal question case with supplemental state law claims.[89] Therefore, if peer-review documents are relevant to both the federal and state claims, then the documents at issue are not privileged because federal privilege law controls, but when evidence is relevant only to the state claim, state law provides the rule of decision and generally courts recognize the state's medical peer-review privilege.[90]

III. THE STANDARD FOR MEDICAL PEER-REVIEW IN FEDERAL COURT

Proponents of the medical peer-review privilege fear that the trend of non-recognition in federal courts will have a negative impact on the effectiveness of the peer-review process.[91] A broad interpretation of the decisions by federal appellate courts would support their concerns about unrestricted access to peer-review information.[92] Alternatively, opponents of the privilege argue that non-recognition of the privilege will act as a check on physicians and institutions that perform peer review, especially those without formal protocol to avoid potential bias within the committee.[93] Critics also contend that there is a lack of evidence confirming that peer review accomplishes its purported goal of improving the quality of health care.[94] Despite varying opinions about the peer-review process's effectiveness, hospital administrators, physicians, and nurses

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privilege. *Id.* at 254.

[89] *See id.* at 252-53; *see also Guzman*, 2009 WL 427268, at *5-6 (explaining Fifth Circuit law and "claim-by-claim relevance approach").

[90] *See Guzman*, 2009 WL 427268, at *7.

[91] *See* Sharifi, *supra* note 10, at 584 (arguing plaintiffs could attach federal claims to personal injury claims to invoke federal court jurisdiction). Similarly, federally-funded or federally-operated physicians and institutions could face more obstacles if peer-review information is not privileged in basic tort claims. *See id.* at 583-84; *see also supra* note 44 and accompanying text (evaluating peer-review process in Veterans Administration Hospital).

[92] *See* Sharifi, *supra* note 10, at 584.

[93] *See id.* at 585; *see also* Hurney, Jr. et al., *supra* note 9, at 39-41 (listing ways to protect the peer review process). Hurney, Jr. et al. suggest that organizations should create a peer-review culture, ensure procedural due process, educate reviewers and support the process, determine if outside peer review is appropriate, and document the process. *Id.* at 40-41. "An institution that conducts a physician peer review should give the affected physician complete access to patient records and to the specific criticisms against him or her, to make the process fair, compliant with due process, and transparent." *Id.* at 39-40.

[94] *See* Fine, *supra* note 5, at 827. *But see* Moore et al., *supra* note 21, at 1205-06 (arguing empirical evidence suggests peer review helps physicians improve their patient complaint files).

generally believe in the self-assessment tool and rely on the mechanism to keep apprised of peer performance.[95] In weighing the various arguments, this Note suggests that the First Circuit should address the confusion stemming from inconsistent enforcement of the medical peer-review privilege in federal courts by establishing that—except for a few specific claims, which must pass a threshold inquiry—peer review records will be protected in cases asserting both federal and state claims.[96]

A. Lessons Learned From Federal Cases

It is evident that federal courts believe the interests in enforcing laws against antitrust violations, employment discrimination, and fraud outweigh any public policy benefits favoring a privilege for medical peer reviews.[97] The Fourth Circuit in *Virmani* and Eleventh Circuit in *Adkins* allowed disclosure of peer-review information because they were persuaded that the race discrimination claims arose out of the process itself.[98] This outcome is proper because physicians who use the process for economic gain or to discriminate against competent practitioners should not be afforded protection.[99] However, the peer-review mechanism is effective when conducted in good faith.[100] If physicians who engage in peer review

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[95] *See supra* note 24 and accompanying text; *see also* Bassler, *supra* note 17, at 691-92 (describing evolution and purpose of peer review).

[96] *See* Sharifi, *supra* note 10, at 592-93 (proposing judicial solution to preserving state privilege protections while recognizing federal policy considerations).

[97] *See generally* Adkins v. Christie, 488 F.3d 1324, 1331 (11th Cir. 2007) (denying privilege in racial discrimination case); Mem'l Hosp. for McHenry Cnty. v. Shadur, 664 F.2d 1058, 1063 (7th Cir. 1981) (denying privilege in antitrust case); *In re* Admin. Subpoena Blue Cross Blue Shield of Mass., Inc., 400 F. Supp. 2d 386, 393 (D. Mass. 2005) (denying privilege in connection with healthcare fraud case). "The Supreme Court has several times refused to recognize a privilege when doing so would inhibit a federal investigation." *Blue Cross Blue Shield*, 400 F. Supp. 2d at 392.

[98] *See Adkins*, 488 F.3d at 1329; Virmani v. Novant Health Inc., 259 F.3d 284, 288-89 (4th Cir. 2001); *see also supra* notes 62-66, 69-71 and accompanying text.

[99] *See* Salamon, *supra* note 44, at 674. Furthermore, the *Virmani* court failed to follow state trends recognizing the privilege and failed to guarantee a reliable peer review privilege that "would be no substantial cost to federal policy . . . because Congress has already approved federal peer review privilege in other contexts. . . . Furthermore, consistent with many state statutes, the court could allow disclosure when a physician challenges an adverse peer review outcome." *See id.* at 670-71 & n.179 (discussing laws that permit discovery where claims arise from peer-review decisions affecting physicians' staff privileges).

[100] *See* Mark D. Abruzzo, *Peer Review May Not Be Confidential When Fairness of Process Is at Issue*, THE CENTER FOR PEER REV. JUST. (Nov. 1999), http://www.peerreview.org/confidential.htm (reporting one doctor, "believes that doctors who misuse peer review and act in bad faith *should* be sued") (emphasis added).

understand that the material from the meetings will only be discoverable in discrimination or anti-competition litigation, they will still feel comfortable participating in and being honest about the performance of others.[101]

Moreover, in cases of healthcare fraud, it is usually a third-party hospital that invokes the privilege because prosecutors seek information from the hospital's peer review for use against the physician who allegedly engaged in fraudulent activity.[102] This situation differs from those where the claim arises from the process because the alleged criminal fraud would have occurred prior to the peer review.[103] In this scenario, the government would have access to other sources of admissible evidence to carry its burden of proof, including the same material submitted to an internal medical peer-review committee.[104] Therefore, the prosecution could only have access to the contents of the peer review if it could satisfy an initial burden to prove that the peer-review communications and reports were relevant to the fraud investigation.[105] The purpose of the state privileges does not conflict with the important government interests in prosecuting fraudulent conduct, and thus courts have properly applied Rule 501 in this context as well.[106]

When federal courts apply federal common-law privileges to federal and state claims, they are choosing to recognize "an amorphous rule" of evidence while ignoring the Rule's guidance that "reason and experience" means courts should consider states' proscribed purposes behind legislative enactment of a privilege.[107] Whenever a federal question claim is raised, federal courts have held that federal common law controls any claim of privilege, and have not recognized a federal common-law

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[101] *See* Sharifi, *supra* note 10, at 592.

[102] *See Blue Cross Blue Shield*, 400 F. Supp. 2d at 387-89 (providing background facts and stating court's only issue is whether to enforce subpoena).

[103] *See In re* Admin. Subpoena Blue Cross Blue Shield of Mass., Inc., 400 F. Supp. 2d 386, 387 (D. Mass. 2005) (stating action arose out of federal criminal investigation).

[104] *See* N.H. REV. STAT. ANN. § 151:13-a(II) (2005) ("[I]nformation, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil or administrative action merely because they were presented to a quality assurance program . . . .").

[105] *See Blue Cross Blue Shield*, 400 F. Supp. 2d at 392 ("[T]he government should not be Hampered in its investigation so long as it shows the documents sought could likely be relevant."). The *Blue Cross Blue Shield* court found that the documents the government sought would "provide substantial assistance" in the government's investigation. *See id.*

[106] *See* FED. R. EVID. 501; *Blue Cross Blue Shield*, 400 F. Supp. 2d at 392-93. The medical peer-review privilege seeks to protect peer-review information from being used in "medical malpractice litigation and litigation surrounding libel or slander." Sharifi, *supra* note 10, at 564.

[107] *See* FED. R. EVID. 501; Bassler, *supra* note 17, at 702 (suggesting courts are not following Rule 501 when refusing to recognize state privilege).

medical peer-review privilege; however, the information discussed in a peer-review process should not be disclosed simply because it has some relevance in the litigation.[108] In *Liu*, for instance, the court stated that HCQIA's lack of a privilege could not preempt the state law protection provided in Alabama's peer-review statute.[109] In essence, the court allowed the defendant to invoke the state privilege to refuse sending credentialing files of a former employee to another institution, which the plaintiff argued violated his federal rights.[110] Similar to the court's outcome in *Liu*, in other cases, "such as medical malpractice and defamation actions, which do not arise out of the peer-review process, the applicable state law will govern, thus requiring the federal courts to apply state privilege laws."[111]

B. The First Circuit Should Respond

Suppose that the *Bennett* petitioner appealed the district court's decision to deny her motion to compel certain testimony, and the First Circuit accepted further appellate review to address whether the lower courts properly recognized a state's medical peer-review privilege.[112] To evaluate this issue the First Circuit would follow the two-part test adopted in *Hampers*: (1) "whether the courts of [Rhode Island] would recognize such a privilege," and (2) "whether the state's asserted privilege is intrinsically meritorious," which is analyzed under Wigmore's four criteria.[113] The court of appeals would likely determine Rhode Island has recognized the medical peer-review privilege, satisfying the first prong.[114] Before considering the second prong, though, the court could go further by

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[108] Bassler, *supra* note 17, at 701.

[109] *See* Ming Wei Liu v. Bd. of Trs. of Univ. of Ala., 330 F. App'x 775, 779-80 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1053 (2010). Although there were pendent state claims in that case, the court declined to consider them once the federal claims were dismissed. *Id.* at 778 n.3.

[110] *See supra* note 58 and accompanying text (describing court's reasoning for applying state statute).

[111] Sharifi, *supra* note 10, at 588.

[112] *See* Bennett v. Kent Cnty. Mem'l Hosp., 623 F. Supp. 2d 246, 250 (D.R.I. 2009) (describing appellant's argument). Assuming plaintiff would raise the same issue on appeal to the First Circuit, then "Bennett suggests that, because she has asserted a claim under the federal EMTALA statute and neither federal common law nor federal statutory law recognize a 'peer-review privilege,' [the physician] should be compelled to respond to Bennett's deposition questions." *Id.*

[113] *See In re* Hampers, 651 F.2d 19, 22-23 (1st Cir. 1981) (internal quotation marks omitted).

[114] *See Bennett*, 623 F. Supp. 2d at 254. The district court stated: "Under [Rhode Island's] peer-review privilege, a hospital is entitled to withhold all records and proceedings before the peer-review board . . . . [T]he statutes creating the peer-review privilege are to be strictly construed." *Id.* (citations omitted) (internal quotation marks omitted).

addressing the argument that a lack of uniformity among state statutes supports non-recognition of the privilege in federal courts.[115] Since the four state statutes within the First Circuit's boundaries are very similar to one another, a model medical peer-review privilege might read as follows: All proceedings, reports, and records of a medical peer-review committee are privileged and confidential and therefore not subject to discovery or subpoena, and are not admissible as evidence in any civil, judicial, or administrative proceeding.[116]

The First Circuit likely would review the issue by using a claim-by-claim relevance approach.[117] In its reasoning for affirming the district court's holding, the court of appeals could tackle the interest balancing that is inherent in the second prong of the *Hampers* test.[118] In support of the plaintiff's case, the court could consider the argument opposing assertion of the privilege: "The American tort system is premised upon an ideology of free flowing information that ultimately leads to just findings in any particular case."[119]

District courts have a variety of mechanisms to ensure that many of the documents sought under the peer-review privilege remain confidential, including in-camera review, redaction of extraneous information, and protective orders, while retaining the plaintiff's ability to access material that will prove his or her claim.[120] In addition to the policy interests promoting disclosure of requested peer-review information, critics of the privilege often cite a lack of correlation between peer review and improved healthcare quality.[121] However, empirical tools can measure quality of

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[115] *See* Nijm, *supra* note 15, at 556; Salamon, *supra* note 44, at 669.

[116] *See supra* notes 26-27 and accompanying text (quoting relevant sections of medical peer-review statutes for Maine, Massachusetts, New Hampshire, and Rhode Island).

[117] *See Bennett*, 623 F. Supp. 2d at 254-55 (determining Rhode Island privilege applied to federal claim); *see also supra* notes 89-90 and accompanying text (discussing *Guzman*). The First Circuit would likely agree with the court's reasoning that the information sought would be irrelevant to the federal EMTALA claim, and since the essence of the case concerns medical malpractice, the Rhode Island peer-review privilege protects the physician's testimony. *See Bennett*, 623 F. Supp. 2d at 254-55.

[118] Marshall v. Spectrum Med. Grp., 198 F.R.D. 1, 4 (D. Me. 2000).

[119] Fine, *supra* note 5, at 829. "[P]romoting liberal discovery policies at the expense of a peer review privilege achieves the greater public good because, absent specific statutory language otherwise, liberal discovery policies promote justice by allowing the juries an opportunity to hear a more balanced 'truth.'" Graham, *supra* note 27, at 139.

[120] *See* Adkins v. Christie, 488 F.3d 1324, 1329 (11th Cir. 2007); *see also* Graham, *supra* note 27, at 139. It might not even be necessary for the court to employ these protective options when the peer-review information sought might already be discoverable, under some circumstances, as a business record. *See Adkins*, 488 F.3d at 1329.

[121] Fine, *supra* note 5, at 827. Fine argues that, "no exhaustive study has linked the

care, and recent evidence suggests that the peer-review process helps physicians at high risk of malpractice claims learn from peers.[122]

Federal courts' recognition of the privilege will alleviate the practical concerns that inhibit physician participation in quality management and assurance programs—primarily, the fear of personal rejection by one's peers, financial loss from decreases in referrals, and civil liability.[123] The need for physicians to evaluate peers without concern that their candid assessments will be used against them is a public good comparable to the Supreme Court's decision to protect the confidential communications between a therapist and patient that foster successful psychiatric treatment.[124] In *Virmani*, the Fourth Circuit conducted the same balancing test used in *Jaffee* and *University of Pennsylvania* to determine that the interests in discrimination claims for disclosing evidence outweigh the interests for protecting peer-review confidentiality.[125] The First Circuit, in a hypothetical *Bennett* appeal, could differentiate its balancing analysis from that in *Virmani* and *University of Pennsylvania* because Bennett's federal EMTALA claim did not arise from the peer-review process and the purposes for protecting peer review in health care are different than those in the academic setting.[126] Hospitals are required to have risk management practices in place and physicians are a critical part of the process; without

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imposition of medical peer review statutes of any kind with a reduction in medical error occurrences." *Id.*

[122] *See* Moore et al., *supra* note 21, at 1205.

[123] Fine, *supra* note 5, at 819 n.58.

[124] *See* Salamon, *supra* note 44, at 655-56; *see also* Sharifi, *supra* note 10, at 579-80 (discussing Court's reasoning in *Jaffee*).

[125] Virmani v. Novant Health Inc., 259 F.3d 284, 287-93 (4th Cir. 2001); *see* Salamon, *supra* note 44, at 665 & n.148 (discussing balancing questions the Court analyzed in *Jaffee* and *Univ. of Pa.*).

[126] *See* Bennett v. Kent Cnty. Mem'l Hosp., 623 F. Supp. 2d 246, 254-55 (D.R.I. 2009) (noting plaintiff's claim focuses on inadequate care rather than improper peer review); *see also* Univ. of Pa. v. EEOC, 493 U.S. 182, 191-93 (1990) (refusing to accept university's argument for creating a privilege against disclosure of peer-review materials). The Court reviewed Title VII's legislative history to determine that tenure decisions should not be exempt from enforcement procedures because the EEOC must be able to investigate if discrimination occurred in the peer review. *See id.* at 191-92; *see also supra* note 51 and accompanying text (explaining court's reasoning). Rhode Island's medical peer-review privilege protects the type of information sought by the plaintiff for establishing both her federal EMTALA claim and state malpractice claims; in this type of case, the defendant can cite to a consensus among the states to support that courts should recognize the privilege whereas the University of Pennsylvania's argument for establishing an academic peer-review privilege lacked persuasive justification. *See Univ. of Pa.*, 493 U.S. at 198-201 (relying on a favorable interpretation of Title VII or First Amendment right to academic freedom); *Bennett*, 623 F. Supp. 2d at 253 (applying Rhode Island's peer-review statute); *see also supra* note 10 and accompanying text (discussing uniformity among states concerning medical peer-review privilege).

peace of mind that these mechanisms will be protected in litigation, participants are less likely to engage in peer review.[127]

Furthermore, disclosing peer-review information may lead to a resurgence of medical malpractice actions if plaintiffs circumvent state protections by joining federal claims to personal injury lawsuits.[128] Despite federal courts' hesitation to grant a blanket privilege, the inconsistencies in the case law confuse those involved in peer review: "If the hospitals and peer review committee members become too accustomed to expansive [state] privileges, and then find that a federal question pulls them into federal court, they will likely be ill-equipped to protect the integrity of their review process."[129] Therefore, the First Circuit should send a clear message to physicians and institutions performing peer review: When conducted in good faith, peer-review records will be confidential and privileged from discovery in any state or federal case unless the claim arises out of the process itself or relates to the prosecution of healthcare fraud.[130] In such a case where the complaint alleges employment discrimination stemming from peer review, antitrust violations, or fraud, the plaintiff or prosecution should have an initial burden to establish that the information sought in discovery or by subpoena—i.e., that material which is typically privileged by state law—will be relevant to proving the federal claim.[131]

C. Legislative Option: Amend HCQIA

An alternative to the First Circuit's judicial approach for resolving federal courts' inconsistent application of the medical peer review privilege is for Congress to amend HCQIA.[132] On the one hand, when the legislature

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[127] *See* Bassler, *supra* note 17, at 691-92 ("[T]he Joint Commission on Accreditation of Health Care Organizations (JCAHO) . . . requires hospitals to have a continuing method to evaluate physicians."); *see also supra* notes 20-24 and accompanying text (discussing statutory enactment of confidentiality and privilege to encourage physician peer review).

[128] *See* Sharifi, *supra* note 10, at 582-86 & n.141 (suggesting federal courts could disclose peer-review information for state personal injury claims). A common law medical peer-review privilege could help to alleviate forum shopping. Bassler, *supra* note 17, at 712.

[129] Graham, *supra* note 27, at 130-31. "Unfortunately, the plethora of contradictory federal district court decisions cannot be so easily reconciled." *Id.* at 138.

[130] *See* Sharifi, *supra* note 10, at 592 (proposing judicial action); *see also* Graham, *supra* note 27, at 139 (suggesting Supreme Court should address peer review under HCQIA).

[131] *See In re* Admin. Subpoena Blue Cross Blue Shield of Mass., Inc., 400 F. Supp. 2d 386, 392 (D. Mass. 2005) (noting government interests should not be "Hampered").

[132] *See* Nijm, *supra* note 15, at 556 (calling on Congress to enact laws establishing uniformity in protections of peer-review process).

enacted HCQIA, courts interpreted that it only granted immunity because an explicit evidentiary privilege for peer-review material was omitted from the statutory language.[133] Conversely, Congress could have simply decided confidentiality protections were implicit in the law.[134] Courts chose to fashion different methods of protection rather than follow the guidance of state privileges.[135] It seemed federal courts feared that these privileges were too broad and would destroy a litigant's case; however, the protections actually suppress very little information.[136] Under a new HCQIA, Congress would clarify that federal courts are required to assess whether the HCQIA privilege should apply to a specific piece of discovery.[137]

CONCLUSION

As the attorney representing a hospital's potential medical malpractice defense, you must return your client's call and provide advice on the matter. This Note has discussed the trend in federal courts to grant disclosure of requested peer-review material and to refuse recognizing the medical peer-review privilege when a federal claim arises directly from that process. The First Circuit has not addressed the confusion that is generated from state statutes' and state courts' broad protections for those privileges compared to the narrow interpretation of federal common-law privileges. Medical peer-review statutes give peace of mind to physicians participating in peer reviews—individuals who are concerned about the legal consequences of their actions. Physicians who act in good faith during peer review and follow the proper procedures and state laws could experience adverse consequences if they are unexpectedly subjected to federal court jurisdiction.

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[133] *See, e.g.*, *Blue Cross Blue Shield*, 400 F. Supp. 2d at 390-91 (stating Congress did not create a federal evidentiary privilege); Nilavar v. Mercy Health Sys.-W. Ohio, 210 F.R.D. 597, 602 (S.D. Ohio 2002) (discussing extent of HCQIA provisions); Syposs v. United States, 63 F. Supp. 2d 301, 308 (W.D.N.Y. 1999) (noting absence of privilege in HCQIA).

[134] *See* Virmani v. Novant Health Inc., 259 F.3d 284, 291 (4th Cir. 2001) ("[W]e cannot conclude that Congress actually considered and rejected a privilege for medical review materials when enacting the HCQIA . . . .").

[135] *See* Adkins v. Christie, 488 F.3d 1324, 1329 (11th Cir. 2007) (suggesting redaction, in-camera review, and protective orders as useful tools for protecting confidentiality); *see also* FED. R. EVID. 501 (enabling federal courts to interpret principles of common law).

[136] *See supra* note 120 and accompanying text (discussing minimal impact of peer-review privilege on discovery).

[137] *See* case cited *supra* note 33 and accompanying text (analyzing whether each discovery request is privileged).

Peer review is a well-established practice, as reflected by the adoption of statutes in every state protecting it. The purpose of these laws is to encourage candid conversations about the performance of other practitioners, which leads to the overall improvement of quality health care. If the First Circuit were to address whether the privilege should be recognized federally, then it could determine that the interests favoring disclosure of peer-review information do not outweigh the public factors. With thousands of healthcare providers in the region, the First Circuit might be more persuaded by "reason and experience" to heed the states' message supporting a medical peer-review privilege. Despite the reforms Congress implemented to achieve a more universal healthcare system, the legislature seems to deny federal protection for one of the field's most important mechanisms for ensuring the highest quality of care in the world. Furthermore, the lobbying groups that act on behalf of medical doctors might not fund politicians that ignore physicians' reasonable requests for confidentiality in peer reviews.

While on the phone with your client, you will convey that the type of information the plaintiff would seek likely only supports a state malpractice claim, and that the peer-review discussion of the physician's surgery should be protected since the patient's claim did not arise out of the peer review. Ultimately, though, you will still feel uneasy about predicting whether a federal court will apply the medical peer-review privilege to your client's peer-review activities.

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