

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA and the
COMMONWEALTH OF MASSACHUSETTS,

Plaintiffs,
ex rel.

LISA WOLLMAN, M.D.

v.

MASSACHUSETTS GENERAL HOSPITAL, INC.,
THE MASSACHUSETTS GENERAL HOSPITAL'S
PHYSICIAN'S ORGANIZATION, and
PARTNERS HEALTHCARE SYSTEM, INC.,

Defendants.

CIVIL ACTION NO.
15-11890-ADB

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF/RELATOR'S
MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS WITHHELD
ON THE BASIS OF THE MASSACHUSETTS PEER REVIEW PRIVILEGE**

November 3, 2020

DEIN, U.S.M.J.

I. INTRODUCTION

Plaintiff/Relator Lisa Wollman, M.D., a former anesthesiologist at Massachusetts General Hospital ("MGH") has brought a *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, and the Massachusetts False Claims Act ("MFCA"), Mass. Gen. Laws ch. 12, § 5B against MGH, Massachusetts General Physicians Organization ("MGPO"), and Partners Healthcare System ("Partners") (collectively the "Defendants" or "MGH"). Dr. Wollman alleges that the Defendants fraudulently billed Medicare and Medicaid for overlapping and concurrent

surgeries that required two patients to be under anesthesia at the same time. (See Memorandum and Order on Defendants’ Motion to Dismiss (Docket No. 102) (“MTD Order”)¹ at 3). Specifically, Dr. Wollman alleges that the “Defendants’ widespread use of Concurrent Surgery (1) endangered patients by placing them under ‘unnecessarily prolonged administrations of anesthesia’ that are not ‘reasonable and necessary’ and thus not reimbursable; (2) violated informed consent regulations by using a ‘relatively non-descript informed consent form and routinely t(aking) other affirmative steps to conceal the practice of concurrent and overlapping surgeries from patients that resulted in a lack of informed consent;’ (3) violated record-keeping regulations because ‘surgeons falsified or failed to keep accurate records to conceal their practices;’ and (4) caused government payors to pay for work that teaching physicians did not do, either because they were not ‘immediately available’, did not designate qualified backup surgeons, were not present for ‘key or critical’ parts of surgery, or never appeared in the hospital room at all.” (Pl. Mem. re Stern Report (Docket No. 122-1) at 1).²

This matter is presently before the court on “Plaintiff-Relator’s Motion to Compel Production of Certain Withheld Documents” (Docket No. 203) pursuant to which the Relator is seeking to compel the production of documents withheld on the basis of a peer review

¹ The MTD Order is published as United States v. Gen. Hosp. Corp., 394 F. Supp. 3d 174 (D. Mass. 2019).

² The relevant pleadings addressing the Plaintiff’s motion to compel presently before this court include “Relator’s Memorandum of Law Supporting Her Motion to Compel Production of Certain Withheld Documents” (Docket No. 204) (“Rel. PR Mem.”); “Defendants’ Opposition to Plaintiff-Relator’s Motion to Compel Production of Documents Withheld on the Basis of the Massachusetts Peer Review Privilege” (Docket No. 210) (“Def. PR Opp.”) and “Relator’s Reply Memorandum in Further Support of Her Motion to Compel Production of Certain Withheld Documents” (Docket No. 211) (“Rel. PR Reply”).

privilege. For purposes of this motion, it is undisputed that the documents at issue would be protected from production in state court by the Massachusetts peer review privilege as set forth in Mass. Gen. Laws ch. 111, § 204. (Rel. PR Mem. at 2-3; Def. PR Opp. at 6-7). The issue presently before the court is whether this court will apply a peer review privilege in the instant federal proceedings.

After careful consideration of the written and oral arguments of the parties, this court holds that the peer review privilege does not apply in the instant case alleging health care billing fraud. Nothing herein, however, constitutes a ruling on whether the requested documents are relevant, or whether any other privileges apply. The Defendants shall modify their privilege log, if necessary, to reflect which documents on the log are still being withheld following this Order.³

II. ANALYSIS

The peer review privilege, under Massachusetts law, “protects from disclosure any proceedings, reports, and records of a medical peer review committee, as well as any additional documents or information prepared in order to comply with risk management or quality assurance programs established by the state.” Tep v. Southcoast Hosps. Grp., Inc., Civil Action No. 13-11887-LTS, 2014 WL 6873137, *2 (D. Mass. Dec. 4, 2014) (citing Mass. Gen. Laws ch. 111, §§ 204, 205). “[T]he fundamental purpose of the peer review privilege statute is to

³ The Defendants contend that they have claimed the privilege for four categories of documents: (1) “communications regarding specific cases for medical peer review”; (2) “safety reporting documents”; (3) “overarching analyses of surgical quality and safety outcomes”; and (4) “meeting minutes and records of committee meetings for peer review purposes.” (Def. PR Opp. at 3-4). While the Defendants contend that the documents requested are not relevant, at oral argument they asked that the court rule on the application of the peer review privilege to the instant case, and not on the issue of the relevancy of the documents.

promote quality health care.” Krolikowski v. Univ. of Mass., 150 F. Supp. 2d 246, 249 (D. Mass. 2001). Thus, the medical privilege is intended “to promote candor and confidentiality . . . and to foster aggressive critiquing of medical care by the providers peers.” Gargiulo v. Baystate Health, Inc., 826 F. Supp. 2d 323, 324 (D. Mass. 2011), objections overruled, 279 F.R.D. 62 (D. Mass. 2012) (internal punctuation and citation omitted). The privilege stems from ““a perceived medical malpractice crisis and doubts about the efficacy of self-regulation by the medical profession.”” Id. (quoting Carr v. Howard, 426 Mass. 514, 517, 689 N.E.2d 1304, 1306 (1998)).

“No peer review privilege exists in the Federal Rules of Evidence[.]” Tep, 2014 WL 6873137, at *2. Where, as here, a case presents a federal question, “federal common law” applies to both federal and state law claims. Id. (citation omitted). The First Circuit has determined that two questions must be answered in the affirmative in order to recognize a state evidentiary privilege in the federal common law. First, would Massachusetts courts recognize such a privilege? In re Hampers, 651 F.2d 19, 22 (1st Cir. 1981). Here, it is undisputed that Massachusetts law has a medical peer review privilege, and for the purposes of this motion the parties agree that the privilege would apply to the documents being withheld on the basis of the privilege. See Mass. Gen. Laws ch. 111, §§ 204, 205; (Rel. PR Mem. at 2-3; Def. PR Opp. at 6-7).

The second question which must be answered is whether the privilege is “intrinsically meritorious?” In re Hampers, 651 F.2d at 22 (internal punctuation and citation omitted). To make this determination, a court must answer four inquiries favorably to the party seeking to invoke the privilege: 1) “whether the communications originate in a confidence that they will

not be disclosed”; 2) “whether this element of confidentiality is essential to “the full and satisfactory maintenance of the relation between the parties”; 3) whether the relationship “is a vital one, which ought to be sedulously fostered”; and 4) whether “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.” Id. at 23 (internal punctuation and citations omitted); Tep, 2014 WL 6873137, at *4.

The first three inquiries favor applying the privilege in this case. In Massachusetts, medical peer review committee proceedings, reports, and records “shall be confidential.” Mass. Gen. Laws ch. 111 § 204(a). This confidentiality is essential as “[p]hysicians would be far less willing candidly to report, testify about, and investigate concerns of patient safety if their actions would be subject to later scrutiny and possible litigation.” Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367, 396, 822 N.E.2d 667, 691 (2005). Finally, it is common sense that relationships that effectively promote patient safety ought to be “sedulously fostered.” In re Hampers, 651 F.3d at 23 (internal quotation omitted); Tep, 2014 WL 6873137, at *4.

The final inquiry prevents this court from recognizing the peer review privilege in the instant case. It “essentially weighs the federal interest generally favoring disclosure against the state interest in the asserted privilege.” Tep, 2014 WL 6873137, at *4 (internal punctuation and citation omitted). “It makes a difference whether the federal interest in seeking full disclosure is a weak or strong one.” In re Hampers, 651 F.2d at 22. In this case, the nature of the FCA claim and relevant federal laws leads to the conclusion that the important federal interest in prosecuting health care billing fraud weighs strongly in favor of disclosure.

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