

as if the court said that the five-year clock ran only when the defendant was compliant; otherwise, his rights under § 3-107 were nullified. The U.S. Supreme Court decided *Sell v. U.S* (539 U.S. 166 (2003)) while Mr. Ray was awaiting restoration. It appears that forced medication criteria under *Sell* were met in Mr. Ray's case: the crime was serious, medications would have been substantially likely to render the defendant competent, there were no less intrusive treatments, and medications would have been medically appropriate. Thus, if a *Sell* analysis had been applied, it seems likely that Mr. Ray would have been medicated earlier. In that event, either he would have been restored and brought to trial, or his nonrestorability would have been amply demonstrated to all parties at the five-year mark.

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Are Hospital Records That Document Adverse Events Privileged?

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Documents Created for Internal and External Peer Review of Adverse Events Are Privileged Under Delaware Law

The Supreme Court of Delaware reviewed *Office of the Chief Medical Examiner v. Dover Behavioral Health System*, 976 A.2d 160 (Del. 2009), and a decision was rendered in June 2009. The issue in this case was whether documents created for a health care facility's internal or peer review of an adverse event are discoverable by agencies investigating the adverse event. The Delaware Supreme Court held that documents created for peer review are privileged and need not be turned over to investigating agencies if subpoenaed. The case addressed public policy favoring unfettered discussion between medical providers in reviewing and assessing practices within medical facilities.

Facts of the Case

Joseph Heverin, a man with Huntington's chorea, was in the care of Dover Behavioral Health System (DBHS) when he died on February 25, 2008. Mr. Heverin choked on food while eating lunch in the DBHS cafeteria. He was transported to an outside hospital where he was pronounced dead by the attending physician. On the death certificate, the medical examiner, Dr. Judith Tobin, certified that Huntington's chorea caused Mr. Heverin to have difficulty swallowing. She further certified that he died of asphyxia brought on by food aspiration. Delaware law requires the Office of the Chief Medical Examiner (OCME) "to investigate the cause and manner of death of any person who dies when unattended by a physician or in any suspicious or unusual manner" (*Dover*, p 162, citing Del. Code Ann. Tit. 29, § 4706 (2009)).

As part of its investigation, OCME requested a copy of the incident report, which detailed the circumstances surrounding Mr. Heverin's death. DBHS denied the request. OCME then requested all medical records and internal documents pertaining to Mr. Heverin. DBHS produced all medical records, but maintained that two reports were created for internal peer review and, as such, were privileged documents.

Ruling and Reasoning

The court held that, whereas the peer-review privilege prevented OCME from obtaining the specific document created as an incident report intended for peer review, the privilege does not prevent OCME from performing its statutorily mandated duty to investigate deaths unattended by a physician. OCME retains its broad power to investigate death. It may "subpoena witnesses, administer oaths and affirmations, and take affidavits from witnesses as to the facts surrounding Heverin's death" (*Dover*, p 169).

The peer review exception is meant to encourage discussion among medical professionals after adverse events. To encourage these discussions, the Delaware General Assembly legislated immunity from legal liability to members of peer review boards who participate in such discussions and to organizations that perform such reviews. As long as participants act in good faith, they are immune from "claim, suit, liability, damages or other recourse civil or criminal" resulting from their participation (*Dover*, p 163). The law promotes unfettered discussion of a health

care facility's procedures and of individual compliance with professional standards. Without limitations on liability, the legislature feared that critical scrutiny of bad outcomes would be "chilled by the fear of litigation over the analysis itself" (*Dover*, p 164).

OCME appealed the district court's refusal to enforce the administrative subpoena and claimed that neither document it sought to review fell under the peer review exception. OCME believed that one of the subpoenaed documents was not privileged, because it was shared with an outside agency, the Office of Health Facilities Licensing and Certification (OHFLC). OHFLC is a state agency within the Department of Health and Human Services that was created by federal law to manage complaints and incidents at federally certified Medicare agencies. OHFLC has the right to conduct both off-site and on-site review of incidents occurring at Medicare-funded facilities. DBHS is a federally certified Medicare agency and as such is subject to peer review by OHFLC. OHFLC's review of the Heverin incident report was privileged.

In addition to the privilege conferred to people and agencies participating in the discussions, the privilege was also extended to documents produced as a result of the meetings. Such records are not considered public and may not be subject to subpoena or discovery. This privilege applies only if the records remain within the peer review committee; if shared outside the committee, the privilege is waived.

OCME argued that the technician, who composed the incident report that was reviewed by DBHS's internal peer review committee, was not a member of the peer review committee. They stated that the document was merely "furnished to but not created by the peer review committee" and as such the document was not privileged. The court found no merit in this argument, affirming that information, data, reports, and records, both furnished to and created by the peer review committee are privileged.

OCME further argued that its duty to investigate a death is a state-mandated function that trumps the statutory peer review privilege under Del. Code Ann. tit. 24, § 1768 (2005). The court found no basis for this statement under Delaware law and drew distinctions between the Delaware statute and similar statutes in Pennsylvania and California, which have al-

lowed subpoena of peer review materials in specific circumstances.

Discussion

The peer review privilege codified in Del. Code Ann. tit. 24, § 1768 protects records created for internal and external peer review from subpoena and discovery in civil, criminal, and administrative proceedings. The legal immunity granted to individuals and agencies participating in the peer review process promotes the public policy of critical examination of errors in medicine. Limitations on discovery of peer review records do not inhibit an investigatory agency like OCME from performing its statutorily mandated duty to investigate deaths.

Allowing OCME to read the incident report prepared by Mr. Heverin's attendant could have saved time and money in the investigation. However, it is likely that even if the report were supplied, OCME would have had additional questions for the attendant, necessitating an in-person interview or responses to interrogatories. The peer review privilege does not protect the attendant from investigation of the incident. As such, restriction of peer review documents does not seem to place an undue burden on the investigation of deaths by OCME.

In contrast, there are cases in which a government agency's failure to provide information stymies an investigation. As David Kocieniewski notes in "I.R.S. Sits on Data Pointing to Missing Children" (*New York Times*, November 13, 2010), each year about 200,000 children are abducted by family members. In some cases the abductor files a tax return claiming the child as an exemption and provides a mailing address for the return. Privacy laws protecting taxpayer information prevent it from being shared with criminal investigators at the state and local level, where most cases are investigated. If the case is in federal court, a judge may subpoena the information, but such requests are rarely granted. Specific legal exceptions allow the IRS to turn over information to agencies involved in determining child support payments and whether an individual qualifies for federal benefits. A similar information-sharing exception is needed to help locate missing children claimed as an exemption on an IRS tax return. If the IRS were to provide critical information not otherwise available, such as the preferred mailing address of a person accused of kidnapping, public policy would be served by speeding the recovery of

missing children and reuniting families. These contrasting situations of governmental investigation of death and kidnapping illustrate the challenge balancing the public policy interest in identifying wrongdoers and individual privacy interests.

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The Admissibility of Prior Criminal and Psychiatric History in Civil Sexually Violent Predator Commitment Hearings

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The Supreme Court of Kansas Affirms the Judgment of the District Court and the Court of Appeals That Civil Commitment Hearings May Include Victim Testimony, Psychiatric Testimony, and Evidence of Nonsexual Prior Crimes in Determining the Disposition of Defendants Convicted of Sexual Offenses

In the case *In re Care and Treatment of Miller*, 210 P.3d 625 (Kan. 2009), the Kansas Supreme Court agreed with the decision of the district court to allow the state to present multiple types of evidence in commitment proceedings held to determine Miller's designation as a sexually violent predator (SVP) under the Kansas Sexually Violent Predator Act (Kan. Stat. Ann. § 59-29a01 et seq. (2003)—hereafter referred to as the Act). The contested evidence presented at the hearing included a prior sexual conviction, testimony by a former victim, testimony from a treating doctor at the penitentiary regarding behavior in the institution, and prior criminal history, including arrests for nonviolent crimes and those in which the charges were ultimately dropped. Citing relevant case law, the Kansas Supreme Court rejected each claim made by the defense and affirmed the decision of the lower courts, ruling that Mr. Miller had been properly committed.

Facts of the Case

In 1980, Richard A. Miller abducted a 15-year-old. He was charged and ultimately pleaded guilty to charges of aggravated sodomy in addition to two other charges. While on parole in 1992, he was arrested for burglary and attempted rape, and although he was ultimately convicted on the burglary charge, the attempted rape charge was dropped. While incarcerated in the state penal system, he was evaluated and treated for polysubstance dependence, including alcohol, cannabis, amphetamines, and opioids. His diagnosis also included antisocial personality disorder. He was also noted to manifest sexually inappropriate behavior in prison, including stalking female employees, persistent aggressive behavior toward a female therapist, and purposeful masturbation within view of female corrections employees.

The state later brought proceedings against Mr. Miller to commit him under the Act. During the proceedings, the court allowed live in-court testimony from his victim and from a detective who investigated an act of aggravated sodomy that Mr. Miller had committed in 1980, for which he was subsequently convicted. This testimony was allowed despite Mr. Miller's motion to stipulate to the evidence. He also unsuccessfully sought to suppress the presentation of evidence stemming from the 1992 arrest in which he was convicted of burglary and was also charged but not convicted of attempted rape. The court heard testimony from a woman who found that Mr. Miller had broken into the basement of her duplex while she was bathing. She subsequently escaped, presumably avoiding rape. The court heard testimony from state psychologist Dr. Ryan David Donahue, who recited Mr. Miller's numerous prior criminal charges to the court, including some charges that had been dismissed for lack of evidence and misidentification. Dr. Donahue testified to acts of lewd and lascivious conduct and indecent liberties that Mr. Miller allegedly committed in 1976, for which he was never convicted. He testified to the aforementioned inappropriate behavior of Mr. Miller toward women in prison. He also testified that he had administered two screening tests to Mr. Miller that indicated that he was at high risk of committing future sex offenses. During the proceedings, Mr. Miller sought (unsuccessfully) to limit Dr. Donahue's testimony. Both Dr. Donahue and Mr. Miller's psychiatrist, William Logan, testified that