Peer-Review Disclosure: Can Federal Law Trump State Sovereignty?

Samson Gurmu, MD
Fellow in Forensic Psychiatry

Kenneth J. Weiss, MD
Clinical Associate Professor and Associate Director
Forensic Psychiatry Fellowship Program

Department of Psychiatry
Perelman School of Medicine
University of Pennsylvania
Philadelphia, PA

Protection and Advocacy Agency Seeking Access to Privileged Peer Review Hospital Records Permitted to Proceed in a Federal Lawsuit Against State Officials in Charge of Mental Hospitals

The U.S. Supreme Court, in *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632 (2011), reversed and remanded an earlier decision by the U.S. Court of Appeals for the Fourth Circuit that held that state sovereign immunity bars the Virginia Office for Protection and Advocacy (VOPA) from suing state officials in federal court. The issue was whether officials in another Virginia agency could withhold otherwise privileged peer review information from VOPA, which was complying with federal law.

Facts of the Case

Under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act, 42 U.S.C. §§ 15001-15115 (2010)), the federal government provides a framework for states to receive funding to improve community services, such as medical care and job training, for individuals with developmental disabilities. This funding to an individual state is contingent on the establishment of a state Protection and Advocacy (P&A) system to ensure the rights of those with disabilities. A related 2006 federal law, the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act, 42 U.S.C. §§ 10801-10851 (2010)), expands the responsibility of the P&A system to include the mentally ill and increases federal funding accordingly. These laws stipulate that P&A systems have authority to investigate reported incidents of abuse and neglect of the developmentally disabled or mentally ill. Federal law provides for states to appoint either a private nonprofit entity or a state agency as its P&A system; Virginia chose the latter, with VOPA performing the P&A functions with independent litigation powers.

In 2006, while investigating patient deaths and injuries at state mental health hospitals, VOPA asked the state officials in charge of those hospitals to produce any relevant records including risk management or mortality review conducted by the hospitals with respect to those patients. State officials, citing a state law privilege protecting such material from disclosure, refused to provide access.

In 2008, VOPA sued the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services and the directors of two state hospitals in U.S. District Court for the Eastern District of Virginia. VOPA argued that the state officials' refusal to grant access to peer review records constituted a violation of the DD and PAIMI Acts. It sought an injunction requiring state officials to refrain from interfering with VOPA's right of access and to produce the records in question. Despite state officials' protestation for dismissal on the grounds of the state's sovereign immunity under the Eleventh Amendment, the district court held that the suit was permissible under *Ex parte Young*, 209 U.S. 123 (1908). Historically the *Young* exception to sovereign immunity permits "private" plaintiffs to seek relief in federal court.

The U.S. Court of Appeals for the Fourth Circuit reversed the district court holding of state officials' immunity under the Eleventh Amendment. However, the Fourth Circuit reviewed the lower court's decision only with regard to sovereign immunity and not to state peer review privilege.

Ruling and Reasoning

In 2011, the Supreme Court of the United States reversed and remanded the decision of the appeals court in a six-to-two opinion, citing *Young* as permitting a state agency to sue in federal court for relief against its own state officials' conduct. Thus, the Court disagreed with the appellate decision to remand the case to the lower court for dismissal.

In its decision, the majority noted that a P&A system established under the DD and PAIMI Acts "shall have the authority to investigate incidents of abuse and neglect . . . if the incidents are reported to

the system or if there is probable cause to believe that the incidents occurred" (*Stewart*, p 1636). According to DD Act requirements a P&A system must be given access to "all records" of individuals who may have been abused, as well as "other records that are relevant to conducting an investigation." The Court cited federal law giving such a system authority to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of" (*Stewart*, p 1636) its charges.

In its analysis, the Court noted that the Eleventh Amendment provides sovereign immunity to states against suits in federal courts brought by citizens of another state or subjects of a foreign state. There are limitations to the sovereign immunity principle. For example, the privilege of the sovereign not to be sued without its consent can only be waived "at its pleasure" or in those rare instances where Congress abrogates it by appropriate legislation. Congress can suspend immunity only under Section 5 or the Fourteenth Amendment and not through its usual Article I authority to regulate commerce. The *Young* exception also provides a mechanism to delimit state sovereignty to ensure "supremacy of federal law."

In deciding whether the *Young* exception allowed VOPA to sue Virginia state officials in Federal Court, the Court referred to the "straightforward inquiry" test it utilized in an earlier case, *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002). The test determines whether the plaintiff is seeking "prospective" relief from a violation of federal law; that is, that the injunction would abate the violation of the law going forward. If so, then *Young* would apply. In this instance the court found that VOPA alleged a violation of federal laws and sought prospective, not retroactive, relief, thus satisfying the straightforward inquiry test. While noting that VOPA is a state agency and not a private entity, the Court rejected Virginia's claim that VOPA's identity as a state actor invalidated *Young*. Instead, the validity of a *Young* exception does not depend on the identity of the plaintiff. Although it recognized that VOPA's claims were amenable to a *Young* exception and the relief it sought was prospective, the Court also underlined that *Young* cannot be used to "obtain an injunction requiring the payment of funds from the State's treasury" (*Stewart*, p 1639) or to acquire state lands.

Discussion

In deciding the VOPA case, the Supreme Court considered the principle of sovereign immunity and the legal exceptions that would allow a state entity to be brought to court by its own agencies. While this outcome hinged on technical constitutional reasoning, it has implications for psychiatrists and for health systems that engage in self-monitoring peer review processes. Traditionally, peer review processes have been considered privileged and the information generated not discoverable in lawsuits seeking damages. Indeed, state statutes and federal regulations based on congressional legislative history prohibit access to peer review records, which are considered privileged.

VOPA, under the federal DD and PAIMI Acts, is authorized to access "all records" of individuals whom it determines it has probable cause to believe may have been abused. These include, potentially, records of peer review processes such as risk management conferences or mortality reviews. Even though Virginia's code § 51.5-39.4(4) prohibits VOPA's access to peer review records, recent decisions by various federal appellate courts suggest that DD and PAIMI Acts assert supremacy over state statutes. Consequently, it is likely that such records are no longer shielded from being handed over to P&A systems. What, then, becomes of such information? Would providers participate in a peer review process willingly and honestly if they thought disclosures could someday be used in court? VOPA, under both state and federal laws, is required to maintain confidentiality of accessed records. It could be argued that, since this information is required mainly to fulfill advocacy and investigative functions, it would not be released to outside parties seeking to hold professionals liable for negligence. However, under Virginia law, once cases are closed, information maintained by VOPA becomes subject to Virginia's Freedom of Information Act (FOIA), as long as no complainant or person with mental illness or disability is identified without consent. The FOIA does not protect the identity of individual employees or providers. It thus raises a possibility of expanding the pool of individuals with access to peer review material and of heightening the sense of vulnerability of peer review participants. The impact of this decision on institutional peer review process and consequently on quality of health care remains to be seen.