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On The Cover

Cruise ships have returned to the terminal at Mobile. They are particularly popular this time of year, so we thought it would be a good time to review legal issues pertaining to the cruise industry.

FEATURE ARTICLES

COLUMNS

Alabama Medical Records:

PART 2

By David G. Wirtes, Jr. and George M. Dent, III

(Part 1 of this article appeared in the November 2016 issue of The Alabama Lawyer.*)*

III. Discovery

A. Discovery of Medical Records

1. State Law

Section 10 of the Alabama Constitution of 1901 guarantees the "Right to Prosecute Civil Cause:"

> That the great, general, and essential principles of liberty and free government may be recognized and established, we declare: ... That no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

Ala. Const. 1901, Section 10.

This section "elucidates this state's commitment to protect an individual's right to attain an adjudication on the merits." Section 13 of the Alabama Constitution of 1901 guarantees a right to a remedy, stating "every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law." Ala. Constitution of 1901, Section 13.

A 1 B 2 C 3

Rule 26(b)(1), *Ala. R. Civ. P.*, states the scope of discovery in Alabama as follows:

> **Rule 26. General Provisions Governing Discovery**
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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Id.[92]

According to the Committee Comments on the 1973 adoption of subdivision (b), "The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the presentation of his case." "In simplest parlance, it was, at an early date, held that discovery cannot be defeated by a cry of 'fishing expedition.'"[93]

Rule 401, *Ala. R. Evid.*, provides the definition of "relevant evidence":

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

A 2010 amendment to Rule 26(b)(2), modeled after amendments to the corresponding federal rule, speaks to discovery of electronically stored information including electronic medical records:

> 2) ***Limitations.***
>
> (A) A party need not provide discovery of electronically stored information from sources that the party identifies to the requesting party as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause for compelling the discovery, considering the limitations of subdivision (b)(2)(B) of this rule. The court may specify conditions for such discovery.

Rule 26(b)(2). The Committee Comments concerning this new language are instructive.[94]

2. Federal Law

Discovery of medical records, including new electronic records, is governed largely by *Fed. R. Civ. P.* 26[95] and 34.[96] The 2006 and 2015 amendments to Rule 26(b) substantially rewrote the rule. The 2015 amendment, with its emphasis upon restricting discovery to what is "proportionate" to claims and defenses, will be construed in forthcoming opinions.

The Advisory Committee's Notes provide insight about what the Supreme Court intends through promulgation of the 2006 and 2015 amendments. The official notes concerning the 2006 amendment ensures medical records are discoverable even when objections based upon claims of privilege are asserted. The official notes to the 2015 amendments ensure continuing discoverability of electronic records, so long as "proportionate" to claims or defenses.[97]

IV. Admissibility

A. State Law

The State of Alabama considers hospital records trustworthy as shown by the codification of a statutory procedure allowing the introduction of certified copies of original hospital records without having to call to trial

or depose records custodians or physicians to authenticate and/or establish an evidentiary foundation. Sections 12-21-5 through 7, *Ala. Code* 1975, provide a practical procedure whereby copies of patients' medical records are admitted in court proceedings without the unnecessary expense and delay in calling the custodian to lay a foundation or predicate for admissibility. Section 12-21-5 covers the admissibility of copies of hospital records,[98] while § 12-21-6 covers "subpoena duces tecum; inspection form; [and] weight" for copies of hospital records."[99] Section 12-21-7 covers certificates of custodians for copies of hospital records.[100]

In practical terms, once the hospital custodian receives a subpoena duces tecum, the custodian must copy the patient's medical records as provided in sections 12-21-6 and -7, and must forward the certified medical records to the court's clerk for admission at trial. Once submitted to the court under this statutory procedure, the records are considered self-authenticating business records. Specifically, medical records come within an exception to the hearsay rule as business records, Rule 803(6), *Ala. R. Evid.*, and they contain statements for purposes of medical diagnosis and treatment, Rule 803(4), *Ala. R. Evid.* Such records come within the omnibus provision of Rule 901(b)(10), *Ala. R. Evid.*, which allows for authentication by any means provided by statute or other rules prescribed by the Alabama Supreme Court, i.e., Rule 902(11), *Ala. R. Evid.*, under which such records are self-authenticating as certified domestic records of a regularly conducted activity.

In *Jackson v. Brown*, 49 Ala. App. 55, 268 So. 2d 837, 841 (Ala. Civ. App. 1972), the court of civil appeals held that the custodian's certificate, including the language quoted above, "was evidence of the reasonableness of the hospital charges, which charges thus were properly before the jury for their consideration as elements of damages."

B. Federal Law

The *Federal Rules of Evidence* allow electronic medical records to be admitted over a hearsay objection if two conditions are satisfied: (1) the record is made "in the course of a regularly conducted activity of a business ..."; and (2) it is "regular practice" to create such a record.[101] Additionally, such records must be authenticated before they may properly be admitted.[102]

V. Exceptions to Discoverability and Admissibility

A. Quality Assurance, Peer Review and Utilization Review Committee Statutes

Healthcare providers often object to the discoverability and admissibility of medical records and assert claims of privileges premised upon Alabama's so-called quality assurance, peer review, and utilization review committee statutes. Close evaluation of the plain language of the governing statutes provides clear insight into how the statutes should be construed. Further, state and federal reported opinions from Alabama and elsewhere construing Alabama's and other states' statutory schemes provide insight.

1. Quality Assurance

Section 22-21-8, *Ala. Code* 1975, governs the "Confidentiality of accreditation, quality assurance credentialing materials, etc."[103] What is this statute intended to do?

a. Definitions of the Terms in § 22-21-8

Section 22-21-8 refers to "accreditation materials" and "quality assurance credentialing materials," "accreditation function" and "quality assurance function," "an employee, adviser, or consultant of an accrediting agency or body," and to "an employee, adviser or consultant of a quality assurance agency or body". What do these words and phrases mean? "Accreditation" is defined as "the act or process of accrediting," while "accredit" is defined as "to give official authorization to or approval of ... to vouch for officially: recognize or clear officially as bona fide, approved, or in conformity with a standard."[104] As an adjective, "credential" is defined as "giving a title or claim to credit or confidence: ACCREDITING–used chiefly in the phrase *credential letters*."[105] As a noun, a "credential" is "something that gives a title to credit or confidence."[106] Thus, "accreditation" is to give official approval of, and "credentialing" is to give a title or a claim, i.e., a credential, to credit or confidence. An accrediting agency or body is therefore one that can give official approval, and a credentialing agency or body is one that can give a title or a claim to credit or confidence, i.e., can issue a credential. What then must a quality assurance credentialing agency or body be?

"Quality" has many definitions, but the ones best fitting the phrase "quality assurance" in § 22-21-8 are "degree of excellence" and "degree of conformance to a standard (as of a product or workmanship)."[107] "Assurance" includes "something that inspires or tends to inspire confidence," "the quality or state of being sure or certain: freedom from doubt: CERTAINTY," and "the quality or state of being sure or safe: SECURITY, SAFETY."[108] "To assure" is "to make safe (as from risks or against overthrow): insure, secure;" "to give confidence to: REASSURE, ENCOURAGE, STRENGTHEN;" "to inform positively: tell earnestly: declare confidently to" and, perhaps most applicable here, "to make certain the coming or attainment of: INSURE."[109]

"Quality assurance credentialing" by a body that exists for that purpose would therefore be to grant a credential, a "title or claim," that the recipient has attained a degree of excellence or conformance to a standard.

This close examination of § 22-21-8's provisions thus reveals two legislative goals: First, the legislature evidently intended a narrow application of the phrase "quality assurance" to a "function" that involves presentation of materials to a "quality assurance or similar agency or similar body" for "evaluation and [or] review" by that body for the sake of determining whether to issue a credential. Second, it is only "evaluation and review" by an accreditation or credentialing body, or preparation of materials to present to such a body for evaluation or review, that are the functions intended to be protected from discovery or admissibility. These legal conclusions are confirmed in the fifth sentence of § 22-21-8, which expressly excepts documents available from original sources and testimony by persons regarding their own knowledge.

b. Construction and Application Of § 22-21-8

The Alabama Supreme Court construed § 22-21-8 in *Ex parte Krothapalli*, 762 So. 2d 836 (Ala. 2000), where it explained that § 22-21-8 was enacted: "[T]o provide for the confidentiality of all written materials and activities concerning the accreditation, quality assurance, or similar function of any hospital, clinic, or medical staff."[110] "It seems clear to us ... that the purpose of a peer-review statute is to encourage full candor in peer-review proceedings and that this policy is advanced only if all documents considered by the committee or board during the peer-review or credentialing process are protected."[111]

In *Ex parte Anderson*, 789 So. 2d 190, 202 (Ala. 2000), the court explained: "Section 22-21-8 ... provides that ... information and documents produced by hospitals, their agencies, or bodies, in furtherance of their official duties and activities in regard to the peer-review process are not discoverable."

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In *Ex parte Cryer*, 814 So. 2d 239 (Ala. 2001), the court held the phrase "medical staff" in § 22-21-8 does not extend to the activities of physicians within their own associations or corporations. The court asked "Did the Legislature intend for the shareholder physicians of a private corporation to qualify as a 'medical staff' under the provisions of § 22-21-8?" It answered "... the Legislature intended only to provide for the confidentiality of all written materials and activities concerning hospitals and clinics, not private associations or corporations or individual physicians."[112]

In *Ex parte St. Vincent's Hosp.*, 652 So.2d 225, 230 (Ala.1994), the court observed: "[t]he discovery sought by Zeneca is not privileged under ... § 22-21-8 .... The Infection Control Committee is a standing hospital committee .... St. Vincent's has produced ... no evidence that a function of that committee was accreditation or quality assurance."[113]

Insight may also be gleaned from how courts in other states treat comparable statutes. For example, *Atkins v. Pottstown Memorial Med. Ctr.*, 634 A. 2d 258 (Pa. Super. 1993) holds an incident report of a patient's fall before surgery at a hospital prepared by the hospital's risk manager was admissible over a claim of quality assurance and peer review privileges.[114]

2. Peer Review

Section 6-5-333, *Ala. Code* 1975, concerns "Dentists, chiropractors, physicians; professional committees."[115]

a. Definition of the Terms in § 6-5-333

Section 6-5-333(d) applies, by its express terms, to "information, interviews, reports, statements, or memoranda" "furnished to" "any committee as defined in this section." Of course, § 6-5-333(b) defines the meaning of "committee." Section 6-5-333(d)'s privilege also applies to "any findings, conclusions, or recommendations resulting from the proceedings of such committees" as defined by § 6-5-333(b). Thus, according to its plain language, this statute renders privileged *only* information provided to, and findings, conclusions and recommendations from such committees of designated licensed Alabama healthcare providers formed or appointed to evaluate the diagnosis or performance of services of the other designated Alabama healthcare providers.

b. Construction and Application of § 6-5-333

In *Ex parte Anderson*, 789 So. 2d 190, 202 (Ala. 2000), the supreme court stated: "[t]his provision mandates that information gathered or formulated within the scope of business conducted by such [peer review] committees is privileged from external review."

In *Ex parte Mendel*, 942 So.2d 829 (Ala. 2006), the court held that the Alabama Dental Review Board constituted a "committee" for the purpose of cloaking its proceedings with the privilege afforded by § 6-5-333.[116]

National commentators stress that such statutory peer review privileges are intended to be limited in scope.[117]

3. Utilization Review

Section 34-24-58, *Ala. Code* 1975, covers "Decisions, opinions, etc., of utilization review committee privileges."[118]

a. Definition of the Terms in § 34-24-58

Unlike §§ 22-21-8 and 6-5-333(d), § 34-24-58 does not contain any provision rendering information, documents or medical records provided to or considered by utilization review committees privileged or confidential.

b. Construction and Application of § 34-24-58

Section 34-24-58 was construed in *Ex parte St. Vincent's Hospital*, 652 So. 2d 225, 230 (Ala. 1994), where the court wrote that the discovery plaintiff sought "is not privileged under ... § 34-24-58. The Infection Control Committee [("ICC")] is a standing hospital committee, coordinated by [], a registered nurse. ... St. Vincent's has produced no evidence that the [ICC] served as a utilization review committee ...." More recently, Chief Justice Roy Moore described the statute in his dissenting opinion in *Lindsay v. Baptist Health System, Inc.*, 154 So. 3d 90 (Ala. 2014):

> Section 34-24-58, *Ala. Code* 1975, protects from legal action the acts of any physicians' committee of a licensed hospital, but only if the committee's decisions were made "in good faith and without malice and on the basis of facts reasonably known or reasonably believed to exist." ... "The qualified immunity, however, is not absolute. In a majority of cases immunity only applies when the investigation is conducted in good faith, without malice, and based upon the reasonable belief that the committee's action is warranted."[119]

Id., 154 So. 3d at 92 (Moore, Chief J., dissenting).

4. Medical Records Are Discoverable from Original Sources Even when Privileged by §§ 22-21-8, 6-5-333(d) or 34-24-58

All information, interviews, reports, statements or memoranda furnished to any committee as defined in this section, and any findings, conclusions or recommendations resulting from the proceedings of such committee are declared to be privileged.

The statutes provide that medical evidence used or considered by accreditation, peer review and quality assurance committees are discoverable and admissible when obtained from sources *other than such committees*. Section § 22-21-8(b) specifies that:

> ... Information, documents or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were presented or used in preparation of accreditation, quality assurance or similar materials, nor should any person involved in preparation, evaluation, or review of such materials be prevented from testifying as to matters within his knowledge, but the witness testifying should not be asked about any opinions or data given by him in preparation, evaluation, or review of accreditation, quality assurance or similar materials.

Id. Likewise, § 6-5-333(d) states:

> All information, interviews, reports, statements or memoranda furnished to any committee as defined in this section, and any findings, conclusions or recommendations resulting from the proceedings of such committee are declared to be privileged. The records and proceedings of any such committee shall be confidential and shall be used by such committee and the members thereof only in the exercise of proper functions of the committee and shall not be public records nor be available for court subpoena or for discovery proceedings. Nothing contained herein shall apply to records made in the regular course of business by a hospital, dentist, dental auxiliary personnel, chiropractor, chiropractic auxiliary personnel, physician, physician auxiliary personnel or other provider of health care and information, documents or records otherwise

> available from original sources are not to be construed as immune from discovery or use in any civil proceedings merely because they were presented during proceedings of such committee.

Id. Section 34-24-58, by contrast, contains no provision shielding information, documents or medical records used or considered by utilization review committees with any privilege or confidentiality.

In *Ex parte Krothapalli*, 762 So. 2d 836, 839 (Ala. 2000), the court construed § 22-21-8(b) to mean that documents obtainable from original sources are indeed discoverable and admissible as evidence at trial: "Accordingly, § 22-21-8 does not protect information if it is obtained from alternative sources. Hence, a plaintiff seeking discovery cannot obtain directly from a hospital review committee documents that are available from the original source, but may seek such documents from the original source." This language from *Ex parte Krothapalli* was quoted favorably in *Ex parte Qureshi*, 768 So. 2d 374, 380 (Ala. 2000): "Neither our decision in *Krothapalli* nor our holding here today prevents [the plaintiff] from obtaining documents that originated from sources other than Vaughan Regional's credentialing committee." The court expressly adopted the reasoning of the Arizona Court of Appeals in *Humana Hospital Desert Valley v. Superior Court*, 154 Ariz. 396, 742 P.2d 1382 (App. 1987), which recognized, in pertinent part, that: "... information which is available from original sources is not immune from discovery or use at trial merely because it was used by a medical review committee."[120] Therefore, even though documents, information, or medical records may have been used by a peer review or quality assurance committee, that fact does not exempt the materials from discovery or from use at trial.

In *Ex parte Anderson*, 789 So. 2d at 199, the court likewise held:

> ... discovery of information regarding Dr. Anderson's privileges is barred by § 6-5-333(d), *Ala. Code* 1975, ... [but] records made in the regular course of business, exclusive of official committee functions, and otherwise available from their original sources are discoverable and not privileged. Thus, [plaintiff] is not entitled to discover records or documents prepared by a hospital or other health-care provider unless they were prepared in its regular course of business; however, she is not precluded from seeking the same from Dr. Anderson as the original source.

The *Anderson* Court rejected Dr. Anderson's argument:

> that the statutory framework ... serves to absolutely insulate him, his documents, and other information concerning the Trotter case, whether obtained from him personally, from the hospital, or from other committees. We do not completely agree. His contention regarding the material gathered from the hospital or review committees is correct; documents from those sources generated pursuant to hospital or committee business [are] absolutely not discoverable. ... However, the information and documents that specifically concern the Trotter incident and that can be obtained from Dr. Anderson himself as an "original source" are discoverable.[121]

5. The Party Opposing Discovery Bears the Burden of Proving Privilege and Prejudice

Rule 501, *Ala. R. Evid.*, provides in full:

> Except as otherwise provided by the Constitution or statute or by these or other rules promulgated by the Supreme Court of Alabama, no person has a privilege to:
>
> (1) Refuse to be a witness;
> (2) Refuse to disclose any matter;
> (3) Refuse to produce any object or writing; or
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Id. All privileges are to be strictly construed. "[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed."[122] The public has the right "to every man's evidence, and exemptions from the general duty to give testimony that one is capable of giving are distinctly exceptional."[123]

In *Ex parte Fairfield Nursing Center, L.L.C.*, 22 So. 3d 445, 448-50 (Ala. 2009), the court reaffirmed the principle that a party asserting a privilege as a reason for withholding documents sought in discovery has the burden of proving its existence and the prejudice that would be caused by their production:

> In *Ex parte Coosa Valley Health Care, Inc.*, 789 So. 2d 208 (Ala. 2000), this court reaffirmed the principle that the party asserting the privilege under § 22-21-8 has the burden of proving the existence of the privilege and the prejudicial effect of disclosing the information.[124]

In that case, "Fairfield offered the affidavits of Donna Guthrie, the executive director of its facility, and Janie Dawson, the former director of nursing at the facility."[125] Based upon that *unopposed* evidentiary showing, the supreme court sustained a finding of privilege: "We agree with Fairfield that the evidence presented in the affidavits submitted in support of the assertion of the privilege is substantially similar to the evidence presented in the affidavits in *Kingsley* [*v. Sachitano*, 783 So. 2d 824 (Ala. 2000)] and *Ex parte Qureshi*[, 768 So. 2d 374 (Ala. 2000)]."[126]

An "affidavit must be made on personal knowledge, must set forth facts that would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated."[127] "Where it appears from the face of an affidavit that the affiant had no personal knowledge of the matters to which he deposed and that he must have secured his information concerning those matters from others, then the affidavit is based on hearsay and should not be admitted."[128]

6. Privileges May Be Waived

Ala. R. Evid. 510, which covers "Waiver of Privilege by Voluntary Disclosure," provides: "A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged." *Id.* Professor Charles W. Gamble's "Author's Statement of the Rule"

explains: "Even after a privilege attaches, its protection may be waived by the holder or a predecessor holder. Waiver customarily arises through the holder's disclosure, or consenting to disclosure, of the privileged matter to a third party."[129] ▲

"Even after a privilege attaches, its protection may be waived by the holder or a predecessor holder. Waiver customarily arises through the holder's disclosure, or consenting to disclosure, of the privileged matter to a third party."

Endnotes

92. Rule 401, Ala. R. Evid., provides the definition of "relevant evidence":
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
93. Committee Comments on 1973 Adoption of Rule 26(b), Ala. R. Civ. P., quoting *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 80, 82 (D.C. N.Y. 1938).
94. COMMITTEE COMMENTS TO AMENDMENT TO RULE 26 EFFECTIVE FEBRUARY 1, 2010
1. Introduction
The amendment to Rule 26 is a part of the comprehensive revisions to Rules 16, 26, 33(c), 34, 37, and 45 to accommodate the discovery of electronically stored information ("ESI"). The 2006 amendments to the Federal Rules of Civil Procedure ("FRCP") and the FRCP Advisory Committee Notes served as the Committee's benchmark, although many sources were consulted, including caselaw and the Uniform Rules Relating to Discovery of Electronically Stored Information published by the National Conference of Commissioners on Uniform State Laws. These Committee Comments quote many of the Federal Advisory Committee Notes to the 2006 amendments to the FRCP at length, but there are additional Federal Advisory Committee Notes, not quoted here, that should also be consulted. ...
95. See new Rule 26(b)(1) through (2).
96. See new Rule 34, Fed. R. Civ. P.
97. For additional insights, see Vargas, Damian, ELECTRONIC DISCOVERY: 2006 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 34 Rutgers Computer & Tech. L.J. 396 (2008).
98. See Ala. Code § 12-21-5 (1975), pertaining to "Copy of hospital records–Admissibility."
99. See Ala. Code § 12-21-6 (1975), pertaining to "Copy of hospital records–Subpoena duces tecum; inspection form; weight."
100. See Ala. Code § 12-21-7 (1975), pertaining to "Copy of hospital records–Certificate of custodian."
101. Fed. R. Evid. 803(6). See also, Fed. R. Civ. P. 34(b)(2)(E) ("[A] party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.").
102. Fed. R. Evid. 901(a).
103. See Acts 1981, No. 81-801, p. 1409, now codified as Section 22-21-8, Ala. Code 1975. Ala. Code §22-21-8 (1975).
104. *Webster's Third New International Dictionary (Unabridged)* (1993).
"Accreditation materials" and "similar materials" are also exempted, but "similar materials" must be "of the same nature or class as those named in the specific list." *Ex parte Mitchell*, 989 So. 2d 1083, 1091 (Ala. 2008) (stating the rule of *ejusdem generis*). Thus, for example, peer review proceedings to grant or retain a physician's staff privileges are in the nature of credentialing the physician. A hospital's ordinary personnel files, its bylaws, and its rules and regulations are not prepared for presentation to an accreditation agency or a credentialing body and so are outside the scope of § 22-21-8.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 837.
111. *Id.* at 839. See, also, *Ex parte Fairfield Nursing and Rehabilitation Center, LLC*, 22 So. 3d 445 (Ala. 2009).
112. *Id.* at 245.
113. *Id.* at 230.
114. See Julius W. Cohn, J.D., David C. Start, M.D., *Medical Malpractice–Use of Hospital Records*, 22 Am. Jur. Proof of Facts 2d 1, § 10.3 (1980 and Supp. 2016) (cataloguing cases); see also Annot., William D. Bremer, "Scope and Extent of Protection from Disclosure of Medical Peer Review Proceedings Relating to Claim in Medical Malpractice Action," 69 A.L.R. 5th 559 (originally published in 1999). The introduction shows that such statutes apply to matters presented to, evaluated by, and reviewed by medical review committees.
115. See Ala. Code §6-5-333 (1975), pertaining to peer review committees, quality control committees and the like.
116. This was so, even though the Alabama Administrative Procedures Act requires that public agencies like the Dental Board must make all final orders, decisions and opinions available for public inspection and copying (except those expressly made confidential or privileged by statute or order of court). The supreme court nevertheless held that § 6-5-333(d) rendered privileged any Dental Review Board materials that constitute final orders.
117. 81 Am. Jur.2d Witnesses, § 502 Peer Reviews; Academic Peer Review Privilege–Medical or Healthcare Peer Review Privilege (Nov. 2015), states:
The peer review privilege was enacted to prohibit discovery of records of internal proceedings where one member of the healthcare profession presents evidence of negligence or incompetence against another. The purpose of the peer review privilege is to promote candor and foster aggressive critiquing of medical care by the provider's peers and to encourage healthcare professionals to monitor the competence and professional conduct of their peers in order to safeguard and approve the quality of patient care. But the privilege does not extend so far as to permit the concealment of routinely accumulated information. The peer review privilege must not be permitted to become a shield behind

which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden.

118. *Ala. Code* 34-24-58 (1975), "Decisions, opinions, etc., of utilization review committee privileges" states:

(a) The decisions, opinions, actions and proceedings rendered, entered or acted upon in good faith and without malice and on the basis of facts reasonably known or reasonably believed to exist of any committee of physicians or surgeons, acting as a committee of the Medical Association of the State of Alabama, or any state, county or municipal medical association or society, or as a committee of any licensed hospital or clinic, or the medical staff thereof, undertaken or performed within the scope and function of such committee as legally defined herein shall be privileged, and no member thereof shall be liable for such decision, opinion, action or proceeding.

(b) Within the words and meaning of this section, a committee shall include one formed or appointed as a utilization review committee, or similar committee, or committee of similar purpose, to evaluate or review the diagnosis or treatment or the performance of medical services which are performed with respect to private patients or under public medical programs of either state or federal design, with respect to any physical or mental disease, injury or ailment or to define, maintain or apply the professional or medical standards of the association, society, hospital, clinic or medical staff from, by or for which it was appointed.

119. *Id.*, 154 So. 3d at 92, quoting George E. Newton, II, *Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection*, 52 Ala. L. Rev. 723, 730 (2001).

120. *Ex parte Qureshi*, 768 So. 2d at 374. Quoting *Humana Hospital Desert Valley v. Superior Court*, 154 Ariz. at 400, 742 P.2d at 1386, quoting, in turn, *Shelton v. Morehead Mem. Hosp.*, 318 N.C. 76, 347 S.E. 2d 824 (1986).

121. 789 So. 2d at 203 (citations omitted). The court arguably got off track in *Fairfield Nursing*, stating: "The language of § 22-21-8 does not require that a quality-assurance 'committee' exist, nor does it limit the privilege to materials created solely *at the direction of* such a committee." 22 So. 3d at 452 (emphasis in original). As shown above, § 22-21-8 *does* require that the materials in question have been prepared for, produced to or presented to an agency or body with an accreditation or quality assurance credentialing function. Although the *Fairfield Nursing* Court correctly noted that the word "committee" does not appear in § 22-21-8, it failed to take into consideration that § 22-21-8 pertains only to materials prepared for, produced to or presented to an accrediting or credentialing "agency or body."

122. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

123. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1100 (5th Cir.), *cert. denied*, 401 U.S. 974 (1970), on remand, 56 F.R.D. 499 (S.D. Ala. 1971).

124. *Id.*, 22 So. 3d at 448 citing *Ex parte Coosa Valley*; 789 So. 2d at 219-20 (citing *Ex parte St. Vincent's Hosp.*, 652 So. 2d 225, 230 (Ala. 1994)). In *Ex parte Coosa Valley Health Care, Inc., supra*, the Supreme Court reiterated that a healthcare provider seeking to invoke the privilege of § 22-21-8 bears the burden of proving that the privilege exists *and* of the prejudicial effect any disclosure would have:

Coosa Valley also argues that the information at issue was not discoverable because, Coosa Valley says, it is "quality-assurance information" and is therefore privileged under § 22-21-8, Ala. Code 1975. However, as this court noted in *Ex parte St. Vincent's Hospital*, 652 So. 2d 225, 230 (Ala. 1994), the burden of proving that a privilege exists and proving the prejudicial effect of disclosing the information is on the party asserting the privilege. Coosa Valley has offered no evidence to show that the information sought was maintained for purposes of quality assurance or for any other purpose covered by § 22-21-8. Compare *Ex parte Qureshi*, 768 So. 2d 374 (Ala. 2000); *Ex parte Krothapalli*, 762 So. 2d 836 (Ala. 2000) (in each of those cases, the petitioner submitted evidence in the form of affidavits establishing that the information sought by the discovery requests was privileged). Accordingly, Coosa Valley did not meet its burden of proving that the information sought by the discovery requests was privileged.

Id. at 219.

125. *Id.*, at 448.

126. *Ex parte Fairfield Nursing*, 22 So. 3d at 450.

127. *Sanders v. Smitherman*, 776 So. 2d 68, 72 (Ala. 2000).

128. *Home Bank of Guntersville v. Perpetual Federal Sav. and Loan Ass'n*, 547 So. 2d 840, 841 (Ala. 1989), quoting *Williams v. Dan River Mills, Inc.*, 286 Ala. 703, 246 So. 2d 431 (1971).

129. Charles W. Gamble, *Gamble's Alabama Rules of Evidence*, § 510, p. 154 (1995).

David G. Wirtes, Jr.

David Wirtes is a member of Cunningham Bounds LLC of Mobile, where he focuses on strategic planning, motion practice and appeals.

Wirtes is licensed in all state and federal courts in Alabama and Mississippi, the Fifth and Eleventh Circuit Courts of Appeals and the United States Supreme Court.

He is a long-time member of the Alabama Supreme Court's Standing Committee on the Rules of Appellate Procedure *and has served on that court's Standing Committee on the* Rules of Civil Procedure.

George M. Dent, III

George Dent practices at Cunningham Bounds LLC in Mobile. He received his undergraduate degree from Yale in 1978 and his J.D. from the University of Alabama in 1981. He has been practicing at Cunningham Bounds since January 1999. He is a member of the Alabama State Bar, and is admitted to practice in the Southern District of Alabama, the Eleventh Circuit and the United States Supreme Court. He was appointed to the Supreme Court of Alabama Standing Committee on the Rules of Civil Procedure *in 1999 and, in 2007, was appointed chair of the committee.*