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# Supreme Court to address med-mal privilege, administrative hearings

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Two cases on the Illinois Supreme Court's upcoming docket have the potential to significantly affect procedural issues in medical-malpractice actions and administrative hearings.

In *Klaine v. Southern Illinois Hospital Services*, No. 118217, the court will determine whether documents related to a physician's application for privileges to practice at a particular hospital are privileged from production.

Carol Klaine filed a medical- malpractice action against Dr. Frederick Dreesen alleging that she sustained injuries after undergoing surgery. She also lodged a claim against Southern Illinois Hospital System for negligent credentialing of Dreesen.

During discovery, Klaine sought production of Dreesen's application for staff privileges at the hospital, which included information about his work history, claims history and insurance history as well as the history of decisions and recommendations on his prior applications for privileges.

The hospital claimed that the application documents were privileged under the Health Care Professional Credentials Data Collection Act, 420 ILCS 517/15(h).

Following an in camera review of the documents, the circuit court ruled that they were not privileged and ordered the hospital to produce them. The hospital instead sought an order of "friendly contempt" and filed an interlocutory appeal under Supreme Court Rule 304(b)(5).

The 5th District Appellate Court affirmed. Guided by the premise that discovery privileges are disfavored and must be strictly construed, it found that the act states only that credentialing information is "confidential," not that it is privileged from discovery.

In contrast, it held, the Medical Studies Act, 735 ILCS 5/8-2102, provides that qualifying documents are privileged and "not discoverable in any action of any kind in any court."

The court explicitly declined to follow the 1st District Appellate Court's holding in *TTX Co. v. Whitley*, 295 Ill.App.3d 548, 555 (1998), which construed a similarly worded statute as protecting confidential information from disclosure unless specifically authorized elsewhere in the statute.

On appeal to the Illinois Supreme Court, the hospital argues that the appellate court narrowly focused its

analysis on the distinction between the words "confidential" and "privileged" and did not interpret the meaning of the act as a whole.

The court's decision in *Klaine* could lead to an increase in the number of negligent credentialing claims filed against hospitals, whether in pursuit of the claim on the merits or simply to expand the scope of discovery in claims against doctors.

In *Stone Street Partners v. City of Chicago Department of Administrative Hearings*, No. 117720, the court will decide whether non-attorney corporate representatives may appear on behalf of their employers in administrative proceedings.

The 1st District Appellate Court ruled that they cannot.

After Stone Street was cited by the city for building code violations, a non-attorney, Keith Johnson, entered an appearance on its behalf. At the administrative hearing, Johnson presented certain evidence, but the hearing officer issued fines against Stone Street. Several years later, the city filed a lien against the property to collect the fines.

Upon notice of the lien, Stone Street moved to vacate the order, arguing that Johnson was not an attorney or an employee of Stone Street, and therefore, he was not authorized to act on Stone Street's behalf.

The department dismissed for lack of jurisdiction, ruling that it only had jurisdiction to vacate default judgments and that while Johnson may not have been an authorized representative, Stone Street was not in default. The circuit court affirmed.

The appellate court held that the hearing officer erred in allowing Johnson to appear for Stone Street.

It found that administrative hearings are essentially judicial proceedings that involve the practice of law in which only licensed attorneys may participate.

The court rejected the city's contention that the character of administrative proceedings and the insignificant values at stake make it different from practicing law in the circuit court.

It determined that the methods used in both types of proceedings are the same: Both require drafting motions, interpreting laws, determining whether to call witnesses, how to conduct examinations and analyzing the admissibility of evidence, among other things.

In its petition for leave to appeal, the city argues that the appellate court's decision has an "enormous" impact on existing law and practice. First, it holds that appearing in an administrative proceeding is per se the practice of law, without regard to whether the action involved any legal knowledge or skill.

Additionally, as a practical matter, the city notes that this decision places an enormous burden on companies to retain counsel to appear on administrative matters valued at less than the cost of legal fees. That has the unfortunate consequence of discouraging companies from defending violations based purely on a business decision.

Furthermore, because the court held that the prior administrative order was invalid, the floodgates are now open to companies such as Stone Street that are moving to invalidate fines imposed in all cases where non-attorney representatives appeared at the administrative hearing.

Recently, in *Downtown Disposal Services v. City of Chicago*, 2012 IL 112040, the Supreme Court ruled that a complaint for administrative review in the circuit court filed by a non-attorney constitutes the unauthorized practice of law. The court will now have to decide whether the concerns raised by the city are significant enough to require different treatment in administrative hearings. For all of the reasons cited by the city, and more,

businesses will be watching this case closely.