

No. 09-0960

**Appellate Court of Illinois
First Judicial District**

Joseph Kamelgard, M.D.,

Petitioner-Appellant,

v.

American College of Surgeons,

Respondent-Appellee.

Appeal from the Circuit Court of Cook County, Illinois
County Department, Law Division, No. 08 L 13473
The Honorable Deborah M. Dooling, Judge Presiding.

***Amicus Curiae* Brief of American Medical Association and
Illinois State Medical Society, In Support of the American College of Surgeons and
Arguing in Favor of Affirmance**

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Identification and Interest of *Amici Curiae*

Amicus the American Medical Association (“AMA”), an Illinois non-profit corporation, is the largest professional association of physicians and medical students in the United States. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these still remain its core purposes. Its members practice in every state, including Illinois, and in every specialty.

Founded in 1840, the Illinois State Medical Society (“ISMS”) is a professional organization of over 12,000 members that represents and unifies its physician members as they practice the science and art of medicine in Illinois. The ISMS represents the interests of member physicians, advocates for patients and promotes the patient-physician relationship, the ethical practice of medicine, and the betterment of public health.*

While *amici* do not directly provide medical services, they do establish professional standards for their own members and for the medical community generally. Such standards include guidance in the proper rendition of medical expert testimony, which *amici* deem to be an aspect of the practice of medicine. *Amici* adhere to Ethical Opinion 9.07 of the American Medical Association *Code of Medical Ethics* (available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion907.shtml>), which states, in relevant part, as follows:

* *Amici* file this brief in their own persons and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts.

“Organized medicine, including state and specialty societies, . . . can help maintain high standards for medical witnesses by assessing claims of false or misleading testimony and issuing disciplinary sanctions as appropriate.”

Amici believe that medical peer review, including medical associations’ review of their members’ adherence to ethical standards, is an important adjunct to public health. As the Illinois General Assembly has recognized by enacting the Illinois Medical Studies Act, 735 ILCS §§ 5/8-2101, *et seq.* (“IMSA”), peer review operates most effectively when the information provided to the peer review body is kept confidential. *Amici* therefore believe that the interests of the people of Illinois are best served if this Court recognizes the application of IMSA to medical society ethical proceedings, such as the action at bar.

Statement of the Issue as to Which *Amicus* Brief is Directed

The issue to which this *amicus* brief is directed, and the principal substantive issue in the case, is whether the names of the three bariatric surgeons that the American College of Surgeons (“ACS”) selected to assist in its peer review investigation are privileged from disclosure under the IMSA. *Amici* maintain that those names are privileged.

Dr. Kamelgard’s brief has obfuscated the issue by characterizing it as one involving “the manifest weight of the evidence”. *See* Kamelgard’s brief, at 3, stating first “issue presented”. Inasmuch as the lower court reached its decision based on the parties’ legal memoranda, without a substantial dispute as to the underlying facts, neither the evidence nor the manifest weight of that evidence is in serious question.

Statutes Involved

735 ILCS § 5/8-2101. Information obtained. All information ... or other data ... of the ... Illinois State Medical Society [or] allied medical societies ... used in the course of internal quality control ... or for improving patient care ... shall be privileged, strictly confidential and shall be used only for ... the evaluation and improvement of quality care.

735 ILCS § 5/8-2102. Admissibility as evidence. Such information, records, reports, statements, notes, memoranda, or other data, shall not be admissible as evidence, nor discoverable in any action of any kind in any court or before any tribunal, board, agency or person.

Statement of Facts Pertinent to *Amicus* Brief

The facts are set forth in Judge Dooling's Memorandum and Order of March 20, 2008 and in Magistrate Judge Denlow's Report and Recommendation of May 4, 2009, both of which are included in the Appendix to Dr. Kamelgard's Brief . (The relevant facts in Judge Dooling's Memorandum and Order are at pp. A-2 and A-3; the relevant facts in Magistrate Judge Denlow's Report and Recommendation are at A-18 and A-19). Dr. Kamelgard's Brief does not dispute these judges' factual statements, although it does dispute the inferences and legal conclusions that can be drawn from those facts.

The ACS is a not-for-profit scientific and educational association of surgeons, founded in 1913 and headquartered in Chicago. Dr. Kamelgard, a New Jersey bariatric surgeon, has been an ACS member since 1996. He is currently an ACS Fellow.

When physicians join the ACS, they are advised that they are required to comply with the professional and ethical standards set forth in the *ACS Fellowship Requirements*,

Fellowship Pledge, and *Statements on Principles*. Applicants are further informed that, by applying to the ACS they agree to be bound by ACS standards and are subjecting themselves to an evaluation of their practice by their peers. The ACS Central Judiciary Committee (“CJC”) serves as the ACS peer review committee and ensures compliance with the professional and ethical standards of the ACS.

The *Statement on Principles* contains the *Code of Professional Conduct* and a *Statement on the Physician Acting as an Expert Witness*, including guidelines for the behavior and qualifications of ACS Fellows when testifying as expert witnesses. The *Statement on the Physician Acting as an Expert Witness* specifically states that such testimony by ACS Fellows is subject to independent peer review. All of this information is posted on the ACS web site.

In 2005, Dr. Kamelgard testified as an expert witness for the plaintiff in a medical malpractice lawsuit brought in Brooklyn, New York. The jury found in favor of the defendant, Dr. Jerry Macura, in that case.

In 2006, ACS notified Dr. Kamelgard that it had received a complaint against him, based on his expert testimony in the medical malpractice suit. The complaint alleged that, when Dr. Kamelgard testified against Dr. Macura, he was not actively involved in the clinical practice of the specialty at the time of trial, which was asserted to be a violation of the ACS bylaws and ethical standards. The complaint was referred to the CJC of the ACS for investigation and further handling. Because Dr. Kamelgard’s testimony in the underlying malpractice suit concerned bariatric surgery, the CJC staff consulted with three bariatric surgeons, all ACS Fellows, to provide technical guidance.

In October, 2006, the CJC reviewed the complaint and the findings of the consulting experts. It then notified Dr. Kamelgard that he was charged with unprofessional conduct for having communicated false information to the public, and it set a hearing date. However, the hearing date was subsequently postponed, and at its next regularly scheduled meeting the CJC decided that it would take no further action against Dr. Kamelgard. Dr. Kamelgard was notified of this decision (although according to his brief, at p. 1, “the charges were never formally dropped”). Pursuant to the peer review procedures of the CJC, all of the information and documents related to the investigation against Dr. Kamelgard were to be kept confidential.

Dr. Kamelgard then sued the ACS in a pre-suit discovery action pursuant to Illinois Supreme Court Rule 224. He sought, *inter alia*, to discover the names of the consulting bariatric surgeons. This suit was dismissed, but Dr. Kamelgard appealed and was able to have the dismissal reversed and remanded. Following remand, the trial court again dismissed his case, holding, in part, that the identities of the bariatric surgeons are privileged under the IMSA. Dr. Kamelgard has again appealed, and the present *amicus* brief is submitted as part of that appeal.

Argument

The Identities of the ACS Consulting Experts are Privileged From Discovery under the Illinois Medical Studies Act

Under both the letter and the spirit of the IMSA, the identities of the three bariatric surgeons are privileged from discovery. The controlling statute is 735 ILCS § 5/8-2101, which states, in relevant portion, as follows:

“Information obtained. All information ... or other data ... of the ... Illinois State Medical Society [or] allied medical societies ... used in the course of internal quality control ... or for improving patient care ... shall be privileged, strictly

confidential and shall be used only for ... the evaluation and improvement of quality care.”

The identities of the bariatric surgeons are privileged, then, if all of the following conditions were satisfied: (1) the names are “information ... or other data”; (2) the ACS is “allied” to the ISMS; and (3) the bariatric surgeons were retained “in the course of internal quality control ... or for improving patient care”. All three of these conditions were satisfied.

First, the names are reasonably categorized as information or other data. This point is indisputable and does not, in the view of *amici*, require elaboration.

Second, the ACS is allied to the ISMS. In *Niven v. Siqueira*, 109 Ill.2d 357, 366, 487 N.E.2d 937, 942 (1985), the Illinois Supreme Court held that “any legitimate medical society” is deemed allied to the ISMS for purposes of the IMSA. As Judge Dooling pointed out, the ACS has been a scientific and educational association of surgeons that was founded in 1913 and has members in every state. Moreover, Dr. Kamelgard has been an ACS member since 1996. Its legitimacy is not fairly in dispute.

Third, the ACS peer review process is intended both for purposes of internal quality control and to improve patient care. The ACS seeks to have its Fellows and other members meet reasonable ethical standards, including their satisfaction of minimal requirements for the rendition of expert testimony. Such standards enhance the stature of the medical profession generally and of the ACS membership specifically. This is a form of internal quality control. *See, Austin v. American Association of Neurological Surgeons*, 253 F.3d 967, 972-973 (7th Cir. 2001), *cert. denied*, 534 U.S. (1078) (Posner, J., Illinois law) (discussing the benefits to a medical association and to the interests of justice in self-policing of medical expert testimony).

Moreover, the enforcement of reasonable standards for expert medical testimony by medical societies, such as the ACS, improves patient care. As vital as health care is to all persons, the country has only limited resources to devote to that purpose. These resources are wasted when they are expended for “defensive medicine”, such as tests of marginal benefit that may be motivated by a fear of unfounded professional liability lawsuits as much as or more than patient needs. *See, United States Department of Health and Human Services, Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care (2003)*, pp. 7-8, 11. When physicians are allowed to testify as medical experts without a requirement that such testimony meet reasonable standards, such as the physicians’ displaying current expertise in the subject area of the proffered testimony, defensive medical practices are incentivized and health care is consequently degraded..

The leading case on this point is *Austin v. American Association of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001), *cert. denied*, 534 U.S. (1078). There, the American Association of Neurological Surgeons (“AANS”) had suspended one of its members, Dr. Donald Austin, on account of unfounded expert witness testimony provided against another AANS member in a medical malpractice suit. Dr. Austin sued the AANS for monetary damages and an injunction. The federal district court entered summary judgment in favor of AANS and against Dr. Austin, and Dr. Austin appealed.

In affirming the district court, the Seventh Circuit found that the AANS had provided Dr. Austin with reasonable procedural protections in its disciplinary proceedings. It went on to find that Dr. Austin’s expert testimony had been irresponsible. It then said –

“We note finally that there is a strong national interest, which we doubt not that Illinois would embrace, in identifying and sanctioning poor-quality physicians and thereby improving the quality of health care. Although Dr. Austin did not treat the malpractice plaintiff for whom he testified, his testimony at her trial was a type of medical service and if the quality of his testimony reflected the quality of his medical judgment, he is probably a poor physician. His discipline by the Association therefore served an important public policy.” 253 F.3d 967, at 974.

The Seventh Circuit’s observations are in accord with the intent of the Illinois General Assembly. The IMSA specifically states that it applies to the “Illinois State Medical Society [and] allied medical societies”. As stated *supra*, the ISMS does not provide direct medical services, but it does police its members’ ethical standards. The General Assembly included the specific reference to the ISMS in the IMSA so that the ISMS could enforce its standards in confidence and thereby maintain “internal quality control [and improve] patient care”.

Like the enforcement of reasonable ethical standards by the ISMS and the AANS, the ACS peer review program against sub-standard expert witness testimony serves a public purpose. Such enforcement by the ACS maintains the internal quality of its members and concomitantly improves patient care. It therefore satisfies the third requirement of the IMSA.

Dr. Kamelgard’s brief in this Court makes much of the fact that it was not the individual CJC members themselves who retained the bariatric surgeons, but it was Dr. Collicott, the ACS Senior Staff person for the CJC, who initiated that effort. Kamelgard Brief, at pp. 12-22. The point is irrelevant.

For one thing, Dr. Collicott did act on behalf of the CJC, even if the CJC did not specifically instruct him to engage the expert consultants. Certainly, there is no suggestion that Dr. Collicott exceeded or contravened his authority as a representative of

the CJC. For another, the language of the IMSA does not suggest that only the individual members of the peer review committee fall under its protection. To the contrary, the statute is broadly worded to cover “[a]ll information ... or other data” of the medical society that is used in the peer review process.

The reference in Dr. Kamelgard’s brief (at p. 16) to *Roach v. Springfield Clinic*, 157 Ill.2d 29, 623 N.E.2d 246 (1993), and his assertion that “the [IMSA] only applies to committees” are misplaced. *Roach*, indeed, held that the IMSA privilege would only apply to that medical staff information that was attributable to “committees” of accredited hospitals or their medical staffs, because the IMSA specifically limits its applicability to such committees. By contrast, the IMSA does not limit the privilege to “committees” of the ISMS or allied medical societies. And, as already observed, the ACS bariatric surgeons were specifically retained to advise the CJC; thus, information and data pertaining to their retention are information and data of the CJC.

As pointed out in *Niven v. Siqueira*, 109 Ill.2d 357, 366, 487 N.E.2d 937, 942 (1985), the purpose of the IMSA is to encourage candid and voluntary studies in order to maintain internal quality within the medical profession and to protect patient health. Absent a guarantee of confidentiality, physicians might be reluctant to engage in peer review due to a number of apprehensions, including loss of referrals, respect, and friends, possible retaliations, and, as in the instant case, vulnerability to tort actions. *Ardisana v. Northwest Community Hospital, Inc.*, 342 Ill.App.3d 741, 746, 795 N.E.2d 964, 969 (1st Dist. 2003). These concerns apply to all physicians involved in the peer review process, not just the peer reviewers themselves. They would certainly apply to the consulting experts who the ACS employed to help the CJC in its deliberative processes.

It would be illogical to protect the deliberations and internal recommendations of a peer review committee, *Ardisana v. Northwest Community Hospital, Inc.*, 342 Ill.App.3d 741, 747, 795 N.E.2d 964, 971 (1st Dist. 2003, as well as letters of recommendation and other internal documents in a physician's personnel file, *Toth v. Jensen*, 272 Ill.App.3d 382, 649 N.E.2d 484 (1st Dist. 1995); *Stricklin v. Beckan*, 293 Ill.App.3d 886, 689 N.E.2d 328 (4th Dist. 1997), and not protect the identities of those persons who contributed to the committee's thought processes. As the IMSA covers the ACS peer review activity, the identities of the bariatric surgeons employed to assist the CJC in its deliberations should fall within that coverage and be privileged from discovery.

Conclusion

The IMSA protects the confidentiality of information and data used in the peer review process. The ACS, by undisputed facts, has established that the names of the bariatric surgeons fall under the wording of the IMSA and within its spirit. Accordingly, the names of those bariatric surgeons are privileged, and Judge Dooling properly terminated Dr. Kamelgard's Rule 224 petition. Judge Dooling should be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the Rule 341(d) cover, the Rule 341(h) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 10 pages.

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CERTIFICATE OF SERVICE

I certify that I personally filed nine copies of the foregoing Brief of American Medical Association and Illinois State Medical Society, *Amici Curiae* to the following address:

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In addition, I certify that three copies of the foregoing Brief of American Medical Association and Illinois State Medical Society, *Amici Curiae* were served on counsel of record by depositing the same in the United States mail, with postage prepaid, on August 18, 2009, addressed to:

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