Overview of Presentation

1. Why this issue is important to you
2. The *Wirtz v. Montana 15th Judicial District* case handed down in April 2012
3. Basics of peer review process
4. Basics of incident reporting
5. The law regarding peer review and incident reporting
6. Analysis of the *Wirtz* decision
7. How to avoid the consequences of the *Wirtz* decision
8. New legislation in the healthcare arena
Why this issue is important to you

• To prevent internal peer review documents from becoming public
• Chilling effect on peer review
• Ultimate negative effect on good patient care

Pertinent facts of the Wirtz case

• Sheridan Memorial Hospital in Plentywood treated a patient in the emergency room who died.
• The hospital had one doctor on staff and that doctor actually treated the patient.
• After the patient’s death, the hospital requested a peer review from an independent peer review organization called Monida Healthcare.
• After reviewing the Monida report, the hospital terminated the physician’s employment.
The peer review report was allegedly used during settlement negotiations with the physician with regard to his termination.

The deceased patient’s family sued the hospital, alleging malpractice on the part of the doctor and negligence on the part of the hospital in hiring and retaining the physician.

The family in the malpractice case sent discovery requests to obtain the Monida report.

The trial judge denied the family’s request, stating that the Monida report was peer review and privileged under Montana law.

Patient’s family appealed to the Montana Supreme Court.

The Montana Supreme Court’s decision

The Court ordered the peer review report be produced to the patient’s family.

The Court’s decision was based upon the following.

1. Because the hospital utilized the Monida report in the employment dispute with the physician, the Supreme Court held that it was not “exclusively” used for peer review purposes;
2. The peer review report qualified as an “incident report” under the statute because it was:
   - A business record;
   - There was no evidence that the Monida report was a “subsequent evaluation” of the event in response to an incident report.
Overview of the peer review process

- What is peer review?
- Why is it necessary?
- What is an incident report?
- What should an incident report contain and what should it not contain?
- Montana law on peer review and incident reports.

What is peer review

- During the first half of the 20th century, medical profession developed peer review to review care.
- In 1952, the Joint Commission required peer review.
- Over the past 50 years, peer review has developed into the primary method of evaluating quality of healthcare.
- The Montana Supreme Court held that Montana's peer review statutes confer a privilege on data created by or at the request of a medical review committee.
- The Montana Supreme Court has found that Montana's peer review statutes encourage candor in medical review committees that review and evaluate the quality of medical care.
- The Montana Legislature has found that the continuous review and improvement of health care is in the interest of all Montanans.
Reasons to make peer review process confidential

- To encourage candid and open discussions among healthcare professionals.
- To encourage aggressive critiquing of fellow healthcare professionals.
- To protect communications and documents that are generated as a result of the peer review process.
- To provide immunity for those who participate in the peer review process.

Incident Reports – what they are and what they should and should not contain

- An incident report is:
  - a report of the facts of an occurrence;
  - that involves an unexpected or out of the ordinary happening within the healthcare setting;
  - to be filled out by a person who was involved in the incident or who has direct knowledge of the incident;
  - does not contain opinions, criticisms, or suggestions on how the incident could have or might have been avoided.
Montana law regarding peer review and incident reports

- The statutes:
  1. Professional Review Committees – MCA 50-16-201, et seq.

- New legislation was passed in 2013 modifying portions of both statutes to address issues raised by Wirtz. The changes to both statutes are identical.

50-16-201. Definitions.

  (1) (a) "Data" means written reports, notes, or records or oral reports or proceedings created by or at the request of a utilization review, peer review, medical ethics review, quality assurance, or quality improvement committee to a health care facility that may be shared with a medical practitioner, including the medical practitioner being reviewed, and that are used exclusively in connection with quality assessment or improvement activities, including the professional training, supervision, or discipline of a medical practitioner by a health care facility. The term includes all subsequent evaluations and analysis of an untoward event, including any opinions or conclusions of a reviewer. (b) The term does not include:
    (i) incident reports or occurrence reports; or
    (ii) health care information that is used in whole or in part to make decisions about an individual who is the subject of the health care information.
  (2) "Health care facility" has the meaning provided in 50-5-101.
50-16-201. Definitions. (continued)

(3) (a) "Incident report" or "occurrence report" means a written business record of a health care facility; that:

(i) may be but is not required to be created by the staff involved in response to an untoward event, such as a patient injury, adverse outcome, or interventional error, for the purpose of ensuring a prompt evaluation of the event; and

(ii) is a factual rendition of the event.

(b) The terms do not include any subsequent evaluation of the event created by or at the request of a utilization review, peer review, medical ethics review, quality assurance, or quality improvement committee, regardless of whether or not the subsequent evaluation of the event occurred in response to an incident report or occurrence report. The creation of an incident report or occurrence report is not a condition precedent for a subsequent evaluation of an event, and any subsequent evaluation of an event remains privileged and confidential pursuant to this part, regardless of the creation of an incident report or occurrence report.

Explanation included in the definition of “data”

- “...may be shared with a medical practitioner, including the medical practitioner being reviewed...”

- Data may be shared with the practitioner being reviewed, which is consistent with the goals of peer review.
Further explanation included in the definition of “data”

- “[Data] includes all subsequent evaluations and analysis of an untoward event, including any opinions or conclusions of a reviewer.”

- Clarifies that evaluations, analysis, opinions and conclusions of a reviewer are data and are privileged under peer review.

Explanation of “incident/occurrence report”

- Incident/occurrence report definition expanded to explain “may be but is [are] not required to be created by the staff involved in response to an untoward event…”

- Clarifies that an incident report may be created, but there is no requirement that a report has to be created.
Explanation of “incident/occurrence report”

- Clarifies report “is a factual rendition of the event.”

- Corresponds to the revision to “data” that evaluations, analysis, opinions and conclusions of a reviewer are “data” and incident reports are “factual.”

- Incident/occurrence reports need to be kept factual.

- Evaluations/responses should be kept separate and not indicated on the incident/occurrence report.

Further explanation of “incident/occurrence report”

- Excludes documents created by peer review type committees.

- Clarifies that data created by a peer review type committee is privileged regardless of the creation of an incident report.
Further explanation of “incident/occurrence report”

- The incident/occurrence report is “not a condition precedent for a subsequent evaluation of an event” and “any subsequent evaluation of an event remains privileged and confidential,” regardless of the creation of an incident or occurrence report.

- Clarifies that data can be created without any relation to an incident or occurrence report and there is no need to have an incident/occurrence report BEFORE having data.

Practice pointers on how to keep peer review confidential

- Our Supreme Court has indicated a willingness to find ways to require production of peer review data.

- Therefore, you need to be:
  - knowledgeable regarding the laws establishing peer review;
  - meticulously follow the law to keep true peer review data confidential.
What should you do

- All peer review must be conducted in careful accordance with the statute.
- What does that mean?
- Carefully drafted by-laws should outline procedures which are in compliance with the statute.

Name the committee appropriately

Names such as "charting committee" and "pharmacy committee" will be viewed with skepticism by any reviewing court.

Section 50-16-201 states:

(1)(a) “Data” means written reports, notes, or records or oral reports or proceedings created by or at the request of a utilization review, peer review, medical ethics review, quality assurance, or quality improvement committee of a health care facility that are used exclusively in connection with quality assessment or improvement activities, including the professional training, supervision, or discipline of a medical practitioner by a health care facility.
Clearly define committee organization and membership

- Policies/by-laws must set forth the tasks of peer review committees in such a way that they fall under the protection of the statutes.
- Identify the members of the committees by job description.

Keep committee records in accordance with the law

- Don’t overreach and automatically claim that all documents considered by the committee are “confidential.”
- For example, do not stamp the medical records “confidential.”
- Just because a document is reviewed by the committee, does not make it confidential.
- Only data and/or work product of the committee is confidential.
- Overreaching will cause a court to look skeptically at all committee documents.
50-16-201. Definitions.

(1) (a) "Data" means written reports, notes, or records or oral reports or proceedings created by or at the request of a quality assurance committee that may be shared with a medical practitioner, including the medical practitioner being reviewed, and that are used exclusively in connection with quality assessment or improvement activities, including but not limited to the professional training, supervision, or discipline of a medical practitioner by a medical practice group. The term includes all subsequent evaluations and analysis of an untoward event, including any opinions or conclusions of a reviewer.

Keep peer review activities confined to statutorily allowed functions

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Disclose peer review “data” only to those authorized to view it

- Persons who are actively participating in the peer review process pursuant to the hospital policies, procedures or by-laws;

- Persons acting in accordance with the statutory structure.

All committee members must understand their roles and confidentiality imperative

- Educate peer review committee members regarding confidentiality and restrictions on discussing activities, information, deliberations and documents, as well as the production of data.

- Committee members need to avoid any disclosure (intentional or inadvertent) that would waive the statutory privilege.

- What does waiver mean?
Peer review files must be segregated

- Peer review committee documents and data must be kept in a specific file
- No co-mingling with other committee records
- Peer review analyses, opinions, and discussions should not be filed in either personnel or medical staff files

Keep incident reports limited to the facts

- No opinions.
- No suggestions.
- No comments regarding cause of incident or how to avoid in future.
**FASAFF CLINICAL INCIDENT REPORT FORM**

Use this form to report any unexpected patient incidents related to patient care or treatment, even if there is no adverse patient outcome (this includes errors, delays, hospital, injuries and sentinel events). This form is to be completed by FASAFF personnel in accordance to any reporting requirements of the facility/hospital. After completion, please return to FASAFF by calling 888-908-3088.

**Details of where incident was discovered**
- Identification of person affected by incident:
  - Name:
  - Hospital (include address):
- Date of Birth:
- Date & Time of incident:

**Onsite Staff Involved**
- Name:
- Title:

**Nature of incident (check appropriate boxes)**
- Medication Error:
  - Incorrect order
  - Incorrect dosage
  - Incorrect medication
- Device Failure:
  - Equipment failure
  - Electrode failure
- Communication:
  - Delays in communication
  - Inadequate communication
- Patient Management:
  - Patient positioning
  - Patient education
  - Patient documentation issues
- Infection Control:
  - Preventive measures
  - Infection control
- Medication Administration Error:
  - Dosage error
  - Wrong site
- Medication Preparation Error:
  - Wrong vial
  - Wrong dose
  - Wrong brand
  - Wrong unit
- Medical Error:
  - Treatment protocol error
  - Preoperative checklist

**Patient Outcome (check appropriate boxes)**
- Critical condition:
  - Pneumonia
  - Septicemia
  - Uncontrolled bleeding
  - Severe allergic reaction
- Injury:
  - Inadequate monitoring
  - Error in treatment
  -豹伤之同意

**Contributory factors (check appropriate boxes)**

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<th>Knowledge &amp; Training</th>
<th>Poor communication</th>
<th>Poor documentation</th>
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<td>Staffing Issues</td>
<td>Distraction</td>
<td>Poor Handwriting</td>
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<td>Labeling</td>
<td>Use of abbreviations / shorthand</td>
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<td>Breach of Policy / procedure</td>
<td>Supplies</td>
<td>Storage</td>
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**Other**