Immunity for Physicians Who Criticize Their Peers

By Christopher C. Taintor, Esq. Section 2511 of the Maine Health Security Act grants immunity from suit to physicians (and some others) "for making any report or other information available to any . . . professional competence committee . . . committee pursuant to law." A "professional competence committee" is any committee which has "responsibility effectively to review the professional services rendered in [a healthcare] facility for the purpose of insuring quality of medical care of patients therein." The term can include a credentialing, peer review, quality assurance, or medical executive committee, as long as its purpose is at least in part to "maintain or improve . . . quality of care," "reduce morbidity and mortality," or "establish and enforce appropriate standards of professional qualification, competence, conduct or performance." In *Strong v. Brakeley*, which was decided in 2016, the Maine Supreme Judicial Court ruled that for physicians, the immunity afforded by Section 2511 is absolute – that is, even if a doctor who is asked to comment on the competence or character of a peer maliciously lies in response to that inquiry, he cannot be held liable for damages. The Court reasoned that the immunity provision is intended to encourage the candid reporting which is essential to promoting quality in the healthcare profession, and that allowing liability upon proof of bad faith would discourage doctors from exposing incompetent or unprofessional colleagues. In *Argerow v. Weisberg*, the Law Court took the immunity analysis one step further. In that case Argerow, a nurse practitioner, resigned from her position with Dr. Weisberg and accepted a job at Mercy Hospital. In a lawsuit against both Weisberg and Mercy, Argerow alleged that Weisberg, who had an incentive to retaliate against her because she had testified against him in a workers compensation hearing, then contacted Mercy and accused her of incompetence, which led the hospital to withdraw its job offer. The Superior Court dismissed the complaint, citing Section 2511 of the MHSA. Argerow appealed and the Law Court affirmed the dismissal. For a majority of the Law Court, the case was a simple application of the rule it had established in *Strong v. Brakeley*. However, two justices dissented, arguing that the Court had gone too far. Most notably, the dissenters said that it was error for the Superior Court, and a majority of the Law Court, to treat any and all information presented to a hospital as falling within the scope of Section 2511. In their view, Argerow should have been allowed to conduct some limited discovery focused on the immunity defense before the Superior Court ruled on the motion. They argued that "[t]he Court's decision expand[ing] the scope of immunity to include *any* information supplied to any representative of a hospital by a physician" was wrong, because the statute was "intended to apply to information supplied by a *qualified* reporter to an *appropriate* authority during a *legitimate* peer review process." According to the dissenters, context is critical in deciding questions of immunity, and from the complaint alone the Court could not know "to whom Weisberg placed his call or report, . . . or whether that person could be properly deemed an appropriate 'board, authority, or committee' pursuant to Section 2511." *Argerow* illustrates the difficult policy choices confronted by a court called upon to interpret and apply an immunity statute like Section 2511. There is no doubt that important public policies are served by encouraging doctors and representative of health care organizations to be candid about the shortcomings of their peers. Patients can be harmed if doctors and hospitals are afraid to divulge that information to organizations that are prepared to hire their former employees, because they might be sued for defamation or on some other theory. On the other hand, as the law has now developed, healthcare professionals like Argerow have no recourse for even the most savage, career-crippling falsehoods, shared behind closed doors

and with malicious purpose, regardless of the existence of any formal credentialing, peer review, or quality assurance process.