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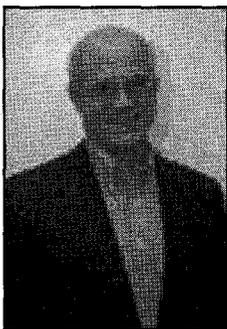
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## The Medical Studies Act and Allied Medical Societies: Looking Back at *Niven v. Siqueira* Twenty-Five Years Later

Miles J. Zaremski\*



It is indeed fortuitous that celebrating twenty-five years of the Beazley Institute for Health Law and Policy also causes me to look back upon the twenty-fifth anniversary of *Niven v. Siqueira*,<sup>1</sup> a case I litigated to the Illinois Supreme Court with one time partner, Frederic J. Entin. It is equally fortuitous that on the occasion of Beazley Institute's quarter century of existence, I found myself reexamining *Niven* twenty-five years later in another case, *Joseph Kamelgard v. American College of Surgeons*.<sup>2</sup> I suspect it is not often that an Illinois attorney has the opportunity to reexamine a case he helped litigate twenty-five years earlier. To begin, I will discuss *Niven* and its implications.

Essentially, *Niven* has been the only case in Illinois focused upon the state's medical peer review statute (colloquially referred to as the Medical Studies Act (MSA)) and one of the entities mentioned in the act, the "allied medical societies." The case started when an attorney representing a minor filed suit against our client, a Chicago-based hospital, and others for medical malpractice. In the course of discovery, plaintiff's counsel sought to discover certain documents from what today is known as the Joint Commission (JC) (formerly, Joint Commission on Accreditation of Hospitals, thereafter, Joint Commission on Accreditation of Healthcare Organizations). The JC is the main accrediting body for hospitals in the United States and is located in Oak Brook Terrace, a western suburb of Chicago. The JC objected to the discovery, asserting that the documents in its possession were privileged under the MSA, claiming it to be an allied medical society that ensures or improves care. The Illinois Supreme Court agreed that the JC fell within the general description of "allied medical

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1. 109 Ill.2d 357 (1985).
2. Dkt. No. 09-0960 (1 Dist.).

societies” as its documents were used in this case to foster improvement of hospital conditions, patient care, quality control, or to reduce the rates of death and disease, *i.e.*, reduce morbidity or mortality. Since this decision, *Niven* has been a staple of many subsequent Illinois appellate opinions addressing the parameters of the MSA, notably by opining that the purpose of this peer review statute is to improve care, period.

As we know, there are several prominent health care organizations in Illinois; two of the largest are the American Medical Association and the American College of Surgeons. These and others argue that because of the language in *Niven*, they are all allied medical societies due to the functions of any peer review activities within their organizational structure. It would be hard to quibble with this in general terms. What is puzzling is that they also seem to say that since the purpose of the MSA is to ensure health or quality of care, they can use this state statute as to any member or member’s activity, even if no nexus to Illinois exists for one or both. After all, they have consistently claimed, we know the purpose intended by the Illinois General Assembly when this statute came into being and that is merely to ensure healthcare—there are no geographical limitations as to subject or activity set forth per the wording of the statute. If these organizations are correct in their assertions the MSA could apply to any one of their thousands of organization members in any location. For example, to someone in Honolulu who testifies as a medical expert or to someone in San Juan, Puerto Rico, who publishes a medical paper on which new medical care could be based.

Now, twenty-five years after *Niven*, the case of *Kamelgard v. American College of Surgeons* gave me the occasion of researching whether such organizations were on point in their advocacy. The hours of research undertaken and what I found are, to be sure, of critical interest and importance to all who read this special edition of the *Annals*. The product of these efforts should also be useful for every Illinois attorney who wishes to assert the MSA as a defense to a discovery request arguably protected by the privilege offered by the MSA. Equally true would be its value for every Illinois court having to analyze the geographical restrictions, if any, within the act. I don’t believe anyone has ever undertaken, or reduced to a published writing, this research—at least none that I could locate.

The Illinois Medical Studies Act<sup>3</sup> consists of five sections, though the first section is the one typically referred to in published decisions. These five sections were first enacted into law in 1961. One or more of these sections has been expanded over the years, but it still remains in five sections. None of the sections have any legislative history, though the description “allied medical societies” was penned in the first and third

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3. 735 ILCS 5.

sections, as they are to this very day. The reason no legislative history exists is because there was no mandate to do so until the creation of the 1970 Illinois Constitution. This version of the Constitution requires that legislative history be kept and recorded. Thus, any legal advocate or jurist who says what the Illinois General Assembly intended by creating the MSA, or why certain entities are identified in it, would be fictionalizing the birth of peer review in our state. It has taken developing case law in Illinois over the years, as well as looking at legislative history of amendments to the MSA, other Illinois acts with declared purpose and references to peer review committees, and looking to other states having similar peer review statutes, to provide a clear answer.

This journey starts with *Jenkins v. Wu*, an Illinois Supreme Court decision the year before *Niven*, which references legislative history offered by (then) State Representative Harold Washington when he debated the 1976 amendments to the MSA. He was quite clear that the MSA was intended to improve quality of care in Illinois and lower the cost of health care in the state too. Four appellate court cases from 1987-2007 have echoed this same geographical limitation—Illinois.

While not explicitly stating so, the *Niven* court referenced the fifth section of the MSA in determining the *situs* for health care rendered in a hospital that is accredited by the Joint Commission. Again, the discussion centered on accredited hospitals in Illinois.

As further proof that the MSA is focused on ensuring quality care but only in Illinois, one need only look as well to the Illinois Hospital Licensing Act, the Illinois Medical Practice Act, the Emergency Medical Services Act, and the acts that regulate dentistry and podiatry. The former two statutes were amended in 1987 by one Senate bill with a single statement, “Because the candid and conscientious evaluation of clinical practice is essential to the provision of adequate hospital (health) care, it is the policy of this State to encourage peer review by health care providers.” The sponsor of this amendment stated that this sentence was inserted to, “deal with peer review in Illinois hospitals”. Illinois cases have equated this language to what is contained in the first section of the MSA: promotion of the state’s legitimate interest in improving the quality of healthcare in Illinois.

In addition, it was also useful to compare the five sections of the MSA with one another. After all, Illinois law is quite firm that rules of statutory construction require that any interpretation of a statute be done so in light of the objectives and purposes of a statute as a whole, and that words within a statute should be consistent with one another.<sup>4</sup> Since the MSA lacks a legislative history when it was created forty-nine years ago, case law can be

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4. *Nola Wilson v. Michael Molda*, 918 N.E.2d 1165, 1173 (1st Dist. 2009).

a suitable substitute to define purpose and objective. Concomitantly, by looking at the websites for the entities specifically mentioned in the MSA (particularly the first and third sections), it is clear that they pertain to Illinois, Illinois citizens and Illinois physicians.

The same is true if one looks at amendments to the MSA over the years: they all pertain to Illinois. One amendment dealt with changing the description in the first section of the act from “inter-insurance exchanges” to “insurance companies.” Why, you ask, was this done? The Illinois State Medical Society specifically requested this change because its insuring arm for Illinois member physicians no longer was referred to as an inter-insurance exchange.

Not to be outdone by the above analyses, nearly every, if not all, states have their own MSA in spirit, if not in words. Thus, one would ask, why would any entity claim that it could use the Illinois version of peer review to govern a member unknown to Illinois practice and medicine? For this writer, that question will always remain puzzling. Similarly, the esteemed Washington, D.C. based Institute of Medicine, in its well regarded book, *To Err is Human*, commented on the MSA and similar state statutes. Therein, the following is stated, “No [peer review] statute expressly covers systems or collaborations that cross state lines.” The notion that peer review is state-based could not be articulated more clearly.

Furthermore, there is jurisprudence of over 150 years, both from the United States Supreme Court as well as from our own state high court, that unalterably holds that health care and its regulation is within the police powers of every state to regulate and oversee. Likewise, peer review statutes exist to promote the public, health, safety and welfare within each state—the exact purpose why states are given the power to supervise health care within its own borders.

Atop this piece, I mention the case of *Kamelgard v. American College of Surgeons*. The facts are fairly simple. Dr. Kamelgard (Kamelgard) testified in a New York federal medical malpractice case as a plaintiff’s expert against a New York physician who treated a New Jersey resident in a New York (Long Island) hospital. After a defense verdict, the defendant doctor filed a complaint with the American College of Surgeons (ACS), a professional organization in which he was a Fellow and member. The claim was that Dr. Kamelgard provided improper expert testimony. After months of investigation, the ACS charged Kamelgard with violating its rules and scheduled a hearing on these charges for some weeks later. Kamelgard retained legal counsel, who wrote a lengthy letter to the ACS that included the fact that New York court records indicated that the New York doctor Kamelgard testified against had been sued at least 30 times before. Within weeks of receiving this letter, the ACS postponed its hearing for unknown reasons, and then dropped the charges.

Thereafter, Kamelgard filed in March 2009 a petition in the Circuit Court of Cook County pursuant to Rule 224 of the Illinois Supreme Court the names of those who may be responsible to him in damages for improperly investigating him. Although Kamelgard was unknown to Illinois practice and medicine, the ACS through its counsel at the time asserted the Medical Studies Act as a defense to the discovery Kamelgard sought. The first trial court found in favor of the ACS. That decision was found to reflect an abuse of discretion, and was reversed.<sup>5</sup> It is also interesting to note that the appellate court also discussed in its opinion that the trial court had initiated *ex-parte* communications with the ACS attorney.

The case was then returned to the Circuit Court of Cook County and assigned to a second judge. After a lengthy hearing and an equally long written opinion, it was determined that the MSA applied to allied medical societies of which the ACS was one, Kamelgard's petition for the names he sought was denied. This trial court held that (1) testifying as an expert impacts patient care (relying on the dicta, albeit incorrect, offered by Judge Posner in the *Austin* case), and that (2) the purpose of the MSA's peer review process is to improve patient care. Since the MSA does not by its words contain geographic boundaries regarding the subject or activity under peer review, the purpose of the MSA is served even though Kamelgard testified in New York and had never been to Illinois to practice medicine in any capacity. Because it was considered aberrant to the scholarship on peer review and where it can be undertaken, the analysis by the second trial court on the scope and purpose of the MSA by an allied medical society deserved another appeal, which Kamelgard undertook in April 2009.

First, the words Judge Posner penned in the *Austin* case about testifying being a medical service were not well thought out and reflected an incomplete analysis of medical practice. Decisions in Florida and in Minnesota have disagreed with Posner's view on the subject. It would also be imprudent to make such a declaration, considering that if testifying is a medical service like examining a patient then whenever an out-of-state expert comes to court to testify in Illinois, (s)he would have to be licensed to practice medicine per the Medical Practice Act. There is no provision for testifying as a medical service. More importantly to the discussion of the MSA here, the testimony that was the subject of the *Austin* case never occurred in Illinois; it occurred in Missouri.<sup>6</sup>

As of submission of this article, our appellate court has yet to rule in *Kamelgard*. It will be interesting to see how it decides the MSA issue.

To briefly conclude, the Beazley Institute for Health Law and Policy has no doubt enjoyed a wonderful development over the last quarter century;

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5. See 385 Ill. App.3d 675 (1 Dist. 2008).

6. See 2001 WL 34115583, \*1.

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however, it may have been a less arduous task than Dr. Kamelgard has had to endure in his journey through the Illinois court system over the last two plus years. Regardless, it has been an unwelcomed pleasure for me to look back twenty-five years on *Niven* and then to be able to “update” it as precedent as more fully described in the preceding pages of this piece.