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Ghazal Sharifi

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IS THE DOOR OPEN OR CLOSED? EVALUATING THE FUTURE OF THE FEDERAL MEDICAL PEER-REVIEW PRIVILEGE

GHAZAL SHARIFI*

I. INTRODUCTION

Francisco Pardo is a homosexual physician who worked as a radiation oncologist for the General Hospital Corporation.¹ Russell Adkins is an African-American physician who worked in the surgery department of Houston Medical Center.² Like many physicians, both men were subject to peer-review, and both were subsequently released from their positions after several peer-reviews of their performances.³

Dr. Pardo filed a state discrimination lawsuit against his employer.⁴ Dr. Adkins filed a federal discrimination lawsuit against his employer.⁵ During the course of litigation, both men sought broad discovery requests. In response, each of the defendants claimed that the materials Drs. Pardo and Adkins sought were privileged.⁶ In both cases, the trial courts recognized the medical peer-review privilege.⁷ Dr. Pardo ultimately lost on

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1. *Pardo v. Gen. Hosp. Corp.*, 841 N.E.2d 692, 694 (Mass. 2006).

2. *Adkins v. Christie*, 488 F.3d 1324, 1326 (11th Cir. 2007).

3. *Pardo*, 841 N.E.2d at 697-98; *Adkins*, 488 F.3d at 1326-27.

4. *Pardo*, 841 N.E.2d at 696. Pardo claimed that "he was concerned that he was not being 'treated appropriately' and that he was planning to pursue his rights 'as a gay male in the workplace.'" *Id.* at 698.

5. *Adkins*, 488 F.3d at 1326. Dr. Adkins filed suit under 42 U.S.C. §§ 1983 and 1985, claiming that his employer "discriminated against him on racial grounds in their implementation and utilization of [the] peer review and physician disciplinary process." *Id.*

6. *Pardo*, 841 N.E.2d at 698; *Adkins*, 488 F.3d at 1327.

7. *Pardo*, 841 N.E.2d at 698; *Adkins*, 488 F.3d at 1327. Dr. Pardo specifically sought "all documents relating to patient care deficiencies by other members of the [department] . . . [dating] from 1986 to the present." *Pardo*, 841 N.E.2d at 699. Dr. Pardo joined the radiation oncology department in 1986, and was therefore seeking documents spanning the course of his

appeal, as the Massachusetts Supreme Court held that the materials were privileged under Massachusetts' law.⁸ In contrast, Dr. Adkins prevailed on appeal, where the Eleventh Circuit Court of Appeals held that the medical peer-review privilege does not apply to federal discrimination cases.⁹ These are two similar cases, with similar discovery requests, with one important distinction: their outcomes were the exact opposite.

In Part II, this Comment will assess the Seventh, Fourth, and Eleventh Circuit Courts of Appeals' refusal to recognize the medical peer-review privilege. Part III will evaluate the background of medical peer-review privilege through the context of the Health Care Quality Improvement Act of 1986 (hereinafter "HCQIA"), Federal Rule of Evidence 501, and federal and state case law. In Part IV, this Comment will analyze whether the Seventh, Fourth, and Eleventh Circuits have failed to follow the confines of Rule 501, Supreme Court precedent, and the HCQIA in their decisions not to recognize federal medical peer-review privilege. Part IV will also evaluate the impact of such cases on litigation surrounding peer-review, as well as the overall impact on the peer-review process itself. In Part V, this Comment will discuss whether the Seventh, Fourth, and Eleventh Circuit decisions concerning federal peer-review privilege were correctly decided and whether they will have any impact on medical malpractice litigation, as well as physician candidness in the peer-review process. Finally, this Comment will propose various policy changes as well as offer guidelines that courts may follow in assessing the medical peer-review privilege.

employment. *Id.* at 695. The hospital's reasons for Dr. Pardo's discharge were due to his alleged deficiencies in "clinical teaching and patient care activities." *Id.* at 696.

Dr. Adkins sought "documents relating to peer review of *all* physicians at the hospital during the seven years that [he] was a member of the hospital staff." *Adkins*, 488 F.3d at 1327 (emphasis in original). The Houston Medical Center claimed that Dr. Adkins' dismissal was a result of "repeatedly experiencing problems with availability for call, timely completion of medical records and failure to follow hospital protocol on patient admission." *Id.* at 1326.

8. *Pardo*, 841 N.E.2d at 704. The court discussed balancing the public policy considerations against discrimination and eradicating physician incompetency, concluding, "the legislature did not provide a blanket exception to the medical peer review privilege where there is a claim that a physician's actions are motivated by discriminatory animus." *Id.* at 703.

9. *Adkins*, 488 F.3d at 1331. The court determined that state statutes establishing the medical peer-review privilege address different policy concerns (i.e. medical malpractice lawsuits). *Id.* at 1330. The court identified a "strong evidentiary benefit" in not recognizing of the medical peer-review privilege in federal discrimination cases. *Id.*

II. FRAMEWORK FOR THE MEDICAL PEER-REVIEW PRIVILEGE

Currently, all fifty states, as well as the District of Columbia, have created an evidentiary privilege for medical peer-review information. Based on policy considerations, this privilege protects such information from discovery during litigation.¹⁰ These state privileges seek to protect physicians engaged in

10. George Newton II, *Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection*, 52 ALA. L. REV. 723, 723-24 (2001); see *Adkins*, 488 F.3d at 1330 (noting that all fifty states and the District of Columbia recognize the medical peer review privilege); Brief for the Georgia Hospital Association as Amicus Curiae Supporting Defendant/Appellees at 36, *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007) (06-13107-GG) (discussing how Georgia and every other state has passed legislation protecting peer-reviewed materials); see, e.g., ALA. CODE § 22-21-8 (West 2008) (“Written reports, records, correspondence, and materials concerning the accreditation or quality assurance or similar function of any hospital, clinic, or medical staff . . . shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care professional or institution arising out of matters which are the subject of evaluation and review for accreditation, quality assurance and similar functions.”); ARIZ. REV. STAT. ANN. § 36-445.01 (West 2008) (“All proceedings, records and materials prepared in connection with [peer] reviews . . . including all peer reviews of individual health care providers practicing in and applying to practice in hospitals or outpatient surgical centers and the records of such reviews, are confidential and are not subject to discovery.”); CAL EVID. CODE § 1157(a) (West 2008) (“Neither the proceedings nor the records of organized . . . peer review bod[ies], or medical or dental review [bodies] . . . shall be subject to discovery.”); CONN. GEN. STAT. § 19a-17b(d) (West 2008) (“The proceedings of a medical review committee conducting a peer review shall not be subject to discovery or introduction into evidence in any civil action for or against a health care provider arising out of the matters which are subject to evaluation and review by such committee. . . .”); D.C. CODE § 44-805(a)(1) (West 2008) (“The files, records, findings, opinions, recommendations, evaluations, and reports of a peer review body, information provided to or obtained by a peer review body, the identity of persons providing information to a peer review body . . . shall be confidential and shall be neither discoverable nor admissible into evidence in any civil, criminal, legislative, or administrative proceeding.”); GA. CODE ANN. § 31-7-133(a) (West 2008) (“Except in proceedings alleging violation of this article, the proceedings and records of a review organization shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action. . . .”); IND. CODE § 34-30-15-2 (West 2008) (“Except as otherwise provided in this chapter, a person who attends a peer review committee proceeding shall not be permitted or required to disclose: (1) any information acquired in connection with or in the course of a proceeding; (2) any opinion, recommendation, or evaluation of the committee; or (3) any opinion, recommendation, or evaluation of any committee member.”); N.C. GEN. STAT. § 90-21.22(e)(f) (West 2008) (“No person participating in good faith in the peer review or impaired physician or impaired physician assistant programs of this section shall be required in a civil case to disclose any information acquired or opinions, recommendations, or evaluations acquired or developed solely in the course of participating in any agreements pursuant to this section.”).

medical peer-review from having peer-review information used against them in medical malpractice litigation and litigation surrounding libel or slander. The state privileges also seek to encourage physician candidness by removing the fear of litigation.¹¹

Federal privileges, as opposed to state privileges, are shaped largely by evidentiary rules. Federal Rule of Civil Procedure 26 establishes that parties cannot have access to privileged information during the course of litigation.¹² Federal Rule of Evidence 501 defines the framework within which courts can recognize these evidentiary privileges.¹³ In attempts to apply federal evidentiary rules, courts have created controversy surrounding the issue of the federal medical peer-review privilege. In 1981, the Seventh Circuit was the first circuit court of appeals to hold that medical peer-review privileges do not extend to federal cases.¹⁴ In 2001, the Fourth Circuit followed suit, holding that the privilege does not apply in federal discrimination cases because the probative value of the materials outweigh the policy considerations for maintaining the privilege.¹⁵ Just recently, in *Adkins v. Christie*, the Eleventh Circuit joined the Fourth and Seventh Circuits in concluding that the state privilege does not

11. See Amicus Brief for Defendant/Appellees, *supra* note 10, at 36; (discussing how the peer review privilege protects health care personnel from litigation); *Adkins*, 488 F.3d at 1328 (discussing how loss of the privilege could chill evaluator candidness in the peer review process); *Virmani v. Novant Health Inc.*, 259 F.3d 284, 290 (4th Cir. 2001) (discussing how such policy considerations may be hampered without protection from a federal recognition of the medical peer-review privilege).

12. FED. R. CIV. P. 26. 26(a)(1) states, "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." *Id.* at (a)(1).

13. FED. R. EVID. 501. Rule 501 states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Id. The rule establishes that the courts can determine the scope of evidentiary privileges through the federal common law and through their reason and experience. *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996). However, the rule does establish that in civil actions applying state law (i.e. in diversity actions), the state's laws governing privilege apply to the case. *Id.*

14. Mem'l. Hosp. for McHenry County v. Shadur, 664 F.2d 1058, 1063-64 (7th Cir. 1981).

15. *Virmani*, 259 F.3d at 293.

extend to federal court.¹⁶ This series of cases has prompted questions surrounding the materials that are discoverable, the impact of decisions to exclude or include certain materials, and the potential solutions to the problems that arise.¹⁷

A. Behind Closed Doors: Peer-Review Defined

1. Health Care Quality Improvement Act (HCQIA)

The HCQIA defines the boundaries of the medical peer-review privilege and the framework for the immunities permitted under it.¹⁸ Congress passed the HCQIA seeking to improve quality assurance within the medical community,¹⁹ and also to provide incentives and protection so as to increase physician participation.²⁰ The HCQIA provides immunity for individuals within or connected to the “professional review body.”²¹ While the HCQIA governs states,²² it does not restrict state governments from passing legislation providing further protections or limitations on the immunity of health care professionals.²³

16. *Adkins*, 488 F.3d at 1330.

17. See Alyson Palmer, *11th Circuit: Interests in Federal Civil Rights Cases Trump Hospitals’ Shield Against Disclosure*, FULTON COUNTY DAILY REP. (June 19, 2007), available at <http://www.law.com/jsp/article.jsp?id=1182194747374#> (discussing the uncertainty of how far courts will allow discovery relating to medical peer-reviewed materials).

18. Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11115 (1986). Congress stated the purpose of the HCQIA as follows: “[t]here is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician’s previous damaging or incompetent performance. This nationwide problem can be remedied through effective professional peer review.” *Id.* § 11101.

19. 42 U.S.C. § 11101(1).

20. *Id.* § 11101(5).

21. *Id.* § 11111(a). The HCQIA defines “professional review body” as: “a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.” *Id.* § 11151(11). The protections are extended to “(A) the professional review body [itself], (B) any person acting as a member or staff to the body, (C) any person under a contract or other formal agreement with the body, and (D) any person who participate with or assists the body with respect to the action.” *Id.* § 11111(1).

22. *Id.* § 11111(a). Section 11111(a) states, “[A] professional review action . . . of a professional review body . . . shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.” *Id.*

23. *Id.* § 11115(d). Section 11115(d) states, “Treatment of patient malpractice claims. Nothing in this title . . . shall be construed as affecting in any manner the rights and remedies afforded patients under any provision of Federal or State law to seek redress for any harm or injury suffered as a result of negligent treatment or care by any physician, health care practitioner, or health care entity, or as limiting any defenses or immunities available to any

However, the act explicitly states that the immunities and protections provided by the HCQIA do not apply to civil rights litigation.²⁴

Cases interpreting the HCQIA have uniformly applied the protections and exceptions to *individuals* involved in peer-review. For example, in *Austin v. McNamara*,²⁵ the Ninth Circuit Court of Appeals held that the defendants, whom had participated in the peer-review process of the plaintiff, were immune from a federal anti-trust action under the HCQIA.²⁶ In contrast, in *Jeung v. McKrow*,²⁷ the Eastern District of Michigan held that the defendants were not immune under the HCQIA from the plaintiff's civil rights suit.²⁸

However, federal courts have had differing interpretations on whether the HCQIA protects peer-reviewed *information* from discovery.²⁹ Some federal courts have held that the HCQIA does not bar discovery of peer-review materials, whereas others hold

physician, health care practitioner, or health care entity." *Id.*

24. *Id.* § 11111(a)(D). Section 11111(a)(D) does not extend the liability protections for those participating in medical peer-review where the litigation pertains to "damages . . . relating to the civil rights of any person, or persons." *Id.*

25. 979 F.2d 728 (9th Cir. 1992).

26. *Id.* In *Austin*, the plaintiff contended that the defendant physicians were conspiring against him and attempting to shut down his neurosurgery practice by ending his staff privileges at the hospital where he worked. *Id.* at 731-32. After several complaints by the nursing staff, the defendant physicians conducted a series of peer-review evaluations of the plaintiff. *Id.* at 731. Ultimately, after multiple hearings, the hospital suspended the plaintiff's privileges, which were subsequently reinstated by a reviewing council. *Id.* at 732. The Ninth Circuit held that the requirements of the HCQIA were met, and that suspension of Austin's privileges were within the boundaries of section 11111(a). *Id.* at 737. Likewise, in *Rogers v. Columbia*, the Western District of Louisiana held that the physician defendants engaged in peer-review of the plaintiff were immune from a federal antitrust and state defamation lawsuit under the HCQIA. 971 F. Supp. 229, 237 (W.D. La. 1997). Similar to the facts in *Austin*, the plaintiff physician in *Rogers* was a bariatric surgeon who had his bariatric surgery privileges revoked for a year after peer-review by the defendant physicians. *Id.* at 231. He claimed that the defendants were conspiring against him and defaming him. *Id.* The court concluded that the defendants were immune under 42 U.S.C. §11111(a). *Id.* at 237.

27. 264 F. Supp. 2d 557 (E.D. Mich. 2003).

28. *Id.* at 572-73. The plaintiff was a physician of Korean descent alleging discrimination under section 1981 by the hospital administrator, the defendant. *Id.* at 568. After several conflicts with the defendant and peer-reviews of his performance, the plaintiff's surgery privileges were suspended. *Id.* at 561-63. The defendant sought to assert qualified immunity under the HCQIA. *Id.* at 567-68. After the court established that the plaintiff had established a prima facie case under section 1981, it determined that the HCQIA does not apply to civil rights claims. *Id.* at 561, 572.

29. See *supra* note 21 and accompanying text (describing what individuals are considered connected to a peer-review body).

the opposite.³⁰

2. *Federal Rule of Evidence 501*

Federal Rule of Civil Procedure (hereinafter "FRCP") 26 governs the discovery process in federal courts.³¹ FRCP 26 places limitations on access to privileged information;³² however, it does not explain what information is or is not privileged.³³ Federal Rule of Evidence 501 (hereinafter "Rule 501") governs the use of privilege in federal litigation.³⁴ The rule does not establish bright-line principles on what material is considered privileged, but rather directs the courts to apply the common law and use "reason and experience" in recognizing privileges.³⁵ The rule also directs courts to apply state privilege laws in civil cases where state laws govern an element of a claim or a defense.³⁶

In enacting Rule 501, Congress had concerns on whether the rule would create confusion as to when state law would apply,³⁷ leading to potential issues with forum shopping.³⁸ The House of

30. *Compare* Cohn v. Wilkes Gen. Hosp., 127 F.R.D. 117, 121 (W.D. N.C. 1989) (holding that in addition to state law, the HCQIA privileges the peer-reviewed materials requested by the physician plaintiff), *with* Atteberry v. Longmont United Hosp. 221 F.R.D. 644, 647-48 (D.C. Colo. 2004) (holding that there is no federal medical peer-review privilege and that the state privilege does not apply, therefore granting plaintiff's discovery request of peer-reviewed materials for her medical malpractice lawsuit) *and* Mattice v. Mem'l Hosp. of S. Bend, 203 F.R.D. 381, 386-87 (N.D. Ind. 2001) (concluding that the HCQIA does not privilege peer-review materials and are therefore discoverable).

31. FED. R. CIV. P. 26; *see supra* note 12 and accompanying text (discussing how 26(a)(1) restricts a party's access to privileged information).

32. *Id.*

33. *See* FED. R. CIV. P. 26(a)(1), 26(b)(1), 26(b)(5), 26(f) (establishing boundaries for what can be done with privileged material prior to and at trial). But the rule does not shed light as to what is considered privileged. *Id.*

34. FED. R. EVID. 501.

35. *Id.* Rule 501 states in relevant part,

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Id.

36. *Id.* Rule 501 describes application of state law as follows: "[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." *Id.*

37. *See* H.R. REP. No. 93-650, at 7082 (1973); S. REP. No. 93-1277, at 7059 (1973) (detailing the House of Representatives and Senate committee discussions on various concerns raised by enacting Rule 501).

38. H.R. REP. No. 93-650, at 7082.

Representatives determined that where there is no federal question or federal interest in the case, state law should prevail.³⁹ The Senate was more troubled by the state-federal dichotomy in Rule 501.⁴⁰ It asserted that such a distinction could create future litigation surrounding what is considered an element of a claim or defense.⁴¹ Furthermore, the Senate was concerned with the potential impact on mixed issues where both federal and state law may apply.⁴² The Senate did note, however, that where there are mixed issues creating a question of whether to apply state privilege laws, federal courts should favor admitting the evidence in question.⁴³

While never reaching the issue of medical peer-review privilege, the Supreme Court has provided guidance on evaluating federal privileges. In *Jaffee v. Redmond*,⁴⁴ the Court detailed several factors to assess in determining whether a privilege should be recognized.⁴⁵ Initially, the Court discussed the “common law”

39. *Id.* The committee acknowledged that by adding the state law provision “[u]nder which the federal courts are bound to apply the State’s privilege law in actions founded upon a State-created right or defense[,] removes the incentive to ‘shop.’” *Id.*

40. See S. REP. No. 93-1277, at 7059 (discussing the Senate’s conflict over whether the addition of the state provision to Rule 501 will create further problems).

41. *Id.* The committee comments discussing the ‘element of a claim or defense’ provision of the Rule states as follows:

The question of what is an element of a claim or defense is likely to engender considerable litigation. If the matter in question constitutes an element of a claim, State law supplies the privilege rule; whereas if it is a mere item of proof with respect to a claim, then, even though State law might supply the rule of decision, Federal law on the privilege would apply.

Id.

42. *Id.* The Senate committee notes discuss that two different aspects of privilege law would potentially apply in a situation where both federal and state claims or defenses would arise in a case brought in federal court. *Id.* The committee notes illustrated this point by noting that such a situation could arise in a federal antitrust case combined with a state unfair competition action. *Id.* The notes state that in such situations, “[i]t may even develop that the same witness-testimony might be relevant on both counts and privileged as to one but not the other.” *Id.*

43. *Id.* On evaluating a potential conflict in the application of state privilege laws or the guidance by Rule 501 of using reason and experience, the Senate committee notes state as follows: “If the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied.” *Id.*

44. 518 U.S. 1 (1996).

45. *Id.* at 10-15. The issue in *Jaffee* was whether there should be a federal evidentiary “privilege protecting confidential communications between a psychotherapist and her patient.” *Id.* at 9-10. After running through a number of factors, the Court concluded that the privilege promotes policy interests that outweigh the probative value of the evidence. *Id.* at 18.

clause of Rule 501, holding that the common law dictates a “primary assumption” that all evidence is admissible, and “any exemptions which may exist are distinctly exceptional.”⁴⁶

In establishing the factors to be followed in Rule 501 analysis, the Court first discussed whether the privilege would further the needs of the public good.⁴⁷ However, the Court did not provide much explanation in assessing this factor.⁴⁸ The second factor the Court discussed was the need to assess whether the privilege is “rooted in the imperative need for confidence and trust.”⁴⁹ In applying the principle, the Court evaluated whether the privilege would benefit private interests by encouraging more honest communications, and whether the privilege would serve the public interest as well.⁵⁰ Third, after weighing private and public interests, the Court examined whether there is consensus amongst the states in recognizing the privilege.⁵¹ The Court emphasized the importance of state-recognized privileges by stating, “the policy decisions of the States bear on the question [of] whether federal courts should recognize a new privilege,” determining that “consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.”⁵² Finally, the Court weighed all of the above factors against the evidentiary

46. *Id.* at 9. The Court determined that the federal common law concerning evidentiary privileges makes a “primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional.” *Id.* The Seventh Circuit, in *Ryan v. Comm’r*, emphasized the importance of disclosure, where the court stated, “[P]rivileges must be narrowly construed because they block the judicial fact-finding function.” 568 F.2d. 531, 542 (7th Cir. 1977).

47. *Jaffee*, 518 U.S. at 9.

48. *Id.* The Court only describes that evidentiary privileges may be justified “by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” *Id.* The Court ceased further discussion on this factor only stating that they thought it did apply in the case of the psychotherapist context. *Id.* at 10. Due to the lack of analysis, this may be the overarching consideration when evaluating all other factors weighing the probative and policy values of recognizing privilege.

49. *Id.* at 10.

50. *Id.* at 10-12. When applying this principle to the psychotherapist-patient relationship, the Court concluded that the privilege serves a private interest by encouraging more honest communications between a patient and psychotherapist, which is necessary for successful treatment of the patient. *Id.* at 10. Furthermore, the Court asserted that the privilege “serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.” *Id.* at 11.

51. *Id.* at 12.

52. *Id.* at 13. The Court continued by discussing that state assurances of confidentiality and privilege would be meaningless if the individual realizes that those assurances do not extend to federal courts, stating that, “[d]enial of the federal privilege would . . . frustrate the purposes of the state legislation that was enacted to foster these confidential communications.” *Id.* at 13.

benefit in denying the privilege.⁵³ If the above factors countervail the “truth-seeking function” of not recognizing the privilege, then the privilege may be recognized.⁵⁴

3. State Recognition of the Medical Peer-Review Privilege

All fifty states have enacted into law a variation of the medical peer-review privilege.⁵⁵ Unlike the HCQIA,⁵⁶ most states not only extend immunity to individuals involved in the peer-review process, but also provide protection for the materials used in the peer-review process.⁵⁷

Professor Susan Scheutzow, a leading scholar on health law,⁵⁸ analyzed a study conducted by the University of Wisconsin in conjunction with the Health Resources and Services Administration regarding state medical peer-review processes.⁵⁹ Dr. Scheutzow stated:

State laws generally grant protection in one or more of three ways: (1) providing peer review participants immunity from lawsuits for participating in the process; (2) making peer review information privileged from discovery and admission in court; and (3) requiring that the participants in the process keep information regarding the process and its findings confidential.⁶⁰

53. *Id.* at 12.

54. *Id.* As to the specific facts of *Jaffee*, the Court found that absent a privilege allowing for more frank and honest communication between a psychotherapist and his or her patient, “much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being.” *Id.*

55. See Amicus Brief for Defendant/Appellees, *supra* note 10 and accompanying text (noting that all states have enacted laws protecting peer-review privileges and citing to various state laws to exemplify similarities and distinctions).

56. 42 U.S.C. §§ 11101-11115; see *supra* note 24 and accompanying text (noting that the text of section 11111(a) of the HCQIA extends immunity to those involved in the peer-review process).

57. See *supra* note 10 and accompanying text (illustrating various state statutes, where most grant protections for materials within the peer-review process). All of the state statutes referenced in note 10 have protections for documentations, proceedings, and materials produced within peer-review committees.

58. Dr. Scheutzow is the Vice-President and Chief Legal Officer of Southwest General Health Center in Ohio. She has served as counsel for health organizations and physicians for over 20 years. *Leading Lawyers: Profiles*, INSIDE BUS., Dec. 1, 2001, Vol. 3, No. 12, at 82. Dr. Scheutzow also serves as an adjunct professor of law and teaching and writing extensively on health-law related issues. *Id.*

59. Susan O. Scheutzow, *State Medical Peer Review: High Cost But No Benefit – Is It Time for a Change?*, 25 AM. J.L. AND MED. 7 (1999). In her article, Dr. Scheutzow assessed the effectiveness of peer-review protections. *Id.* She argued that despite so many protections, peer-review statutes do not encourage peer-review, and therefore should be reformed. *Id.* at 8-9.

60. *Id.* at 9.

Dr. Scheutzow also drew distinctions between state laws that protect confidentiality and those that enable privileges, noting that privilege extends to the discoverability and admissibility of evidence to judicial proceedings, whereas confidentiality applies to release of the peer-reviewed information to third parties outside of judicial actions.⁶¹ She noted that physicians are still reluctant to participate in peer-review where they have immunity from civil lawsuits regarding their participation alone, and not their proceedings.⁶² Therefore, “[t]o create an environment that encourages physicians to participate in peer review, states have adopted privileges for peer review proceedings.”⁶³

The scope of state laws governing the discoverability of peer-reviewed information has also been categorized through states’ policy priorities.⁶⁴ While some states proscribe an “outer limits” approach affording extensive privilege protections,⁶⁵ others adhere to a “middle of the road” approach to balance the need for disclosure against the benefits of maintaining the privilege.⁶⁶ Still others recognize the privilege, but give more weight to disclosing the information.⁶⁷ The underlying policy considerations for state enactment of peer-review protections lie in the need to encourage physician participation in the peer-review process without the fear of “find[ing] themselves under attack for defamation and other actions.”⁶⁸

B. Room for Opening: The Current State of the Federal Medical Peer-Review Privilege

As it currently stands, there is no established federal medical peer-review privilege.⁶⁹ There have been three federal circuit

61. *Id.* at 17. Despite the distinction, it appears that most states are incorporating both confidentiality and privilege, as is exemplified by the sample statutes given in the accompanying text *supra* note 10.

62. *Id.* at 18.

63. *Id.*

64. Christina A. Graham, *Hide and Seek: Discovery In The Context of The State and Federal Peer Review Privileges*, 30 CUMB. L. REV. 111, 125 (2000).

65. *Id.* These states prioritize the policy benefits of privileging peer-reviewed information over the probative value of disclosing such information. *Id.*

66. *Id.* at 131.

67. *Id.* at 135. The states that adhere to this approach have statutory protections for peer-reviewed information. *Id.* However, courts are not quick to invoke the privilege. See *id.* at 136-38 (discussing cases from Illinois and Rhode Island, where the courts declined to recognize the privilege despite statutory protections).

68. Scheutzow, *supra* note 59, at 17.

69. No federal circuit court of appeals has recognized a federal medical peer-review privilege. The Supreme Court has also been silent on the issue. See *Nilavar v. Mercy Health Sys.*, 210 F.R.D. 597, 601 (S.D. Ohio 2002) (noting that there is a lack of Supreme Court precedent on the issue of federal medical

courts that have addressed the issue: the Seventh, the Fourth, and recently the Eleventh.⁷⁰ However, the distinctions between the federal trend of nonrecognition of the privilege and the state trends towards peer-review protections lead to uncertainty of the future of the federal medical peer-review privilege in the court system.⁷¹

The Supreme Court has not determined whether there is a federal medical peer-review privilege nor is there a circuit split amongst the federal courts of appeals.⁷² The Court, however, has touched on academic peer-review privileges in *University of Pennsylvania v. EEOC*,⁷³ where it held that there is no privilege for academic peer-review materials because such a privilege “lacks constitutional foundation [and] [h]as no . . . historical or statutory basis.”⁷⁴

The first federal circuit court of appeals to evaluate the medical peer-review privilege was the Seventh Circuit in *McHenry County v. Shadur*.⁷⁵ The physician plaintiff in *Shadur* alleged that a “disciplinary proceeding against him before the Hospital’s Board of Directors was in reality a sham as a means of implementing the alleged restraint of trade.”⁷⁶ During discovery, he sought documentation related to the proceedings, but the hospital then claimed that the materials were privileged.⁷⁷ The

peer-review privileges).

70. *McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981); *Virmani v. Novant Health Inc.*, 259 F.3d 284 (4th Cir. 2001); *Adkins v. Christie*, 488 F.3d 1324.

71. Palmer, *supra* note 17.

72. *See id.* (discussing how the defendants in *Adkins* may seek further review by the Supreme Court even though there is not a circuit court split).

73. *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990).

74. *Id.* at 195. In this case, the plaintiff was a professor that had been denied tenure at University of Pennsylvania. *Id.* at 184-85 She alleged that her supervisor had made sexual advances towards her, and upon being rejected, he wrote negative reports of her for the University Personnel Committee, who ultimately made tenure decisions. *Id.* at 85. The EEOC took the plaintiff’s case and in seeking to discover some materials from the peer-review committee (Personnel Committee), the University invoked a privilege. *Id.* at 186. The Supreme Court refused to fashion a new peer-review privilege claiming that the probative value of the evidence in a discrimination claim outweighs the policy underpinnings of invoking such a privilege. *Id.* at 189.

75. *Shadur*, 664 F.2d 1058.

76. *Id.* at 1060. The plaintiff claimed that the defendant physicians continually utilized the peer-review function to exclude him from the medical staff at the hospital where he was employed. *Id.* at 1059-60.

77. *Id.* Specifically, the plaintiff sought production of “[a]ll documents relating to proceedings instituted by the Hospital against physicians who had applied for or were granted admission to its medical staff.” *Id.* This information was covered under the Illinois Medical Studies Act making it a Class A misdemeanor for disclosure of such information. *Id.* The court ultimately determined that the criminal sanctions do not extend to discovery within federal proceedings, and that the dilemma between state and federal

Seventh Circuit conducted a Rule 501 analysis,⁷⁸ and determined that the need for full disclosure was especially necessary in that case to advance the interest of the “[o]pen and fair competition embodied in the Sherman Act.”⁷⁹ Finally, the court rejected application of the state law and its policy foundations of promoting peer-review without the fear of medical malpractice litigation.⁸⁰ The court held that the case at hand arose out of the peer-review proceedings, thus increasing the necessity to disclose such information, where nondisclosure may foreclose the lawsuit to begin with.⁸¹

Twenty years after *Shadur*, the Fourth Circuit addressed the issue of federal medical peer-review privilege in *Virmani v. Novant Healthcare Inc.*⁸² In *Virmani*, the physician plaintiff alleged that his termination arose out of peer-review proceedings, which were performed discriminatorily against his race and national origin.⁸³ The plaintiff sought discovery of peer-review proceedings, and the defendants invoked peer-review privilege.⁸⁴ Like *Shadur*, the *Virmani* court applied Rule 501 analysis rejecting the defendant’s reliance on *Jaffee*.⁸⁵ Rather the court relied on *University of Pennsylvania v. EEOC*.⁸⁶ Agreeing with that decision, the Fourth

law is “illusory in light of the Supremacy Clause of the United States Constitution.” *Id.* at 1063-64.

78. See discussion *supra* Part II.A.2 (discussing court analysis of recognizing new privileges under Rule 501, specifically looking at probative value of the evidence versus countervailing policy considerations).

79. *Shadur*, 664 F.2d at 1062. The court noted that if the plaintiff were to prove his case, then it would also protect his right to practice medicine in the area. *Id.*

80. *Id.* The court observed that the purpose of the Illinois Medical Studies Act was to promote candidness in hospital peer-review committees. *Id.* It discussed the Act’s aims at protecting such information from discovery in cases such as medical malpractice cases, where the underlying claim does not arise out of the proceedings but rather some independent action. *Id.*

81. *Id.* at 1062-63.

82. 259 F.3d 284 (4th Cir. 2001).

83. *Id.* at 285-86. Dr. Virmani had undergone a series of peer-review evaluations after he punctured the iliac artery of a patient during a procedure. *Id.*

84. *Id.* at 286. Specifically, Dr. Virmani “sought to obtain [] all peer review records related to all reviews of physicians for any reason, during the twenty years preceding his request.” *Id.*

85. *Id.* at 288. The court noted that the factual circumstances surrounding *Jaffee* were significantly different from those of *Virmani*. *Id.* The court did acknowledge the importance of the medical peer-review process and the policy underpinnings stressing the importance of a privilege. *Id.* at 289. However, the court rejected the defendant’s reliance on *Jaffee* in establishing that such policy considerations outweighed the probative value of disclosing the peer-review materials. *Id.* at 289-90. The court noted, “The evidence that Virmani [sought] [] is not evidence in the form of a ‘smoking gun,’ but rather, evidence of disparate treatment on the basis of impermissible factors.” *Id.* at 289.

86. 493 U.S. 182 (1990).

Circuit held that in a discrimination suit, “costs associated with discrimination outweighed the costs that would ensue from the disclosure of peer review materials.”⁸⁷

The most recent decision on the federal medical peer-review privilege was that of the Eleventh Circuit Court of Appeals in *Adkins v. Christie*.⁸⁸ The factual circumstances of the case are similar to those of *Virmani*.⁸⁹ In *Adkins*, the plaintiff physician asserted a federal discrimination claim against his employer.⁹⁰ He was subsequently denied discovery of peer-reviewed materials because the hospital claimed, and the district court agreed, that such materials were privileged.⁹¹ In evaluating the peer-review privilege, after applying Rule 501 analysis, the Eleventh Circuit relied heavily on *Virmani*, ultimately “[d]eclining to recognize [that] a medical peer review privilege . . . provides a strong evidentiary benefit.”⁹² In following the above trends of the circuit courts, many federal district courts have also held that there is no medical peer-review privilege.⁹³

In urging the recognition of the privilege, defendant

87. *Virmani*, 259 F.3d at 289. The court applied *University of Pennsylvania v. EEOC* by agreeing that the “peer review materials . . . [were] especially relevant because the discrimination charge arose from the peer review proceedings themselves.” *Id.*

88. 488 F.3d 1324 (11th Cir. 2007); see discussion *supra* Part I (discussing the factual circumstances of *Adkins* and the specific findings of the Court).

89. 259 F.3d 284.

90. *Adkins*, 488 F.3d at 1326-27.

91. *Id.*

92. *Id.* at 1330. The court identified the importance of evaluating state policy considerations, however (quoting *Virmani*), it determined, “there is no evidence that state legislatures considered the potential impact on discrimination cases of a privilege for medical peer review proceedings.” *Id.*

93. See *Nilavar*, 210 F.R.D. at 601, 609 (holding that because of the lack of Supreme Court precedent, guidance by the Sixth Circuit Court of Appeals combined with other circuits’ authority and its own Rule 501 analysis, a federal medical peer-review privilege does not exist, and therefore, does not apply to the antitrust claim asserted by the plaintiff); *In Re Admin. Subpoena Blue Cross Blue Shield*, 400 F. Supp. 2d 386, 390-93 (D.C. Mass. 2005) (holding that the probative value of the medical peer-reviewed evidence outweighs policy considerations used to establish the State privilege, therefore, there is no federal medical peer-review privilege); *Weiss v. County of Chester*, 231 F.R.D. 202, 206 (E.D. Penn. 2005) (noting that despite the importance of the interests reflected in the state privilege, the probative value of the evidence outweighs, therefore, there is no federal medical peer-review privilege); *Braswell v. Haywood Reg’l Med. Ctr.*, 352 F. Supp. 2d 639, 650 (W.D.N.C. 2005) (holding that after *Virmani*, a federal medical peer-review privilege does not apply to the Fourth Circuit); *United States v. United Mem’l Hosp.*, No. 1:01-CR-238, 2002 U.S. Dist. LEXIS 4962 at *8-9 (W.D. Mich. 2002) (concluding that no medical peer-review privilege exists, especially in the context of a federal prosecution); *Sonnino v. Univ. of Kan.*, 220 F.R.D. 633, 645 (D. Kan. 2004) (holding that the probative value of peer-reviewed information in an action of discrimination outweighs the policy implications of disclosure).

hospitals raised policy concerns that without the protection of a privilege, physicians would not be candid in the peer-review process, and that physicians would resist participation fearing litigation surrounding medical malpractice, libel, slander, and other civil actions.⁹⁴ However, despite these concerns, the federal courts have thus far refused to recognize the privilege, opening the door to questions surrounding what will happen to the peer-review process if such information is discoverable.⁹⁵

III. DIRECTION OF THE FEDERAL MEDICAL PEER-REVIEW PRIVILEGE

Contrary to state trends, the Seventh, Fourth, and Eleventh Circuits declined to recognize the peer-review privilege.⁹⁶ The courts' reasoning raises questions as to whether the courts operated within the boundaries of Rule 501, Court precedent, as well as within the confines of the HCQIA.⁹⁷ Furthermore, proponents of the privilege are concerned that such a trend in federal courts towards refusal to recognize the peer-review privilege will lead to a variety of negative consequences in the realm of litigation and against the role of effective peer-review.⁹⁸

94. See Amicus Brief for Defendant/Appellees, *supra* note 10; *Adkins*, 488 F.3d at 1328; *Virmani*, 259 F.3d at 290 (discussing defendant's arguments on the public policy underpinnings of recognizing a federal medical peer review privilege).

95. See *Shadur*, 664 F.2d at 1063-64; *Virmani*, 259 F.3d at 293; and *Adkins*, 488 F.3d at 1329-30 (recognizing that the policy considerations surrounding state-recognized privileges do not outweigh evidentiary benefits of disclosing peer-reviewed materials).

96. See *Shadur*, 664 F.2d at 1061 (discussing how the law of the state where the action arose must not be ignored by federal courts in balancing the policy considerations of nondisclosure versus the probative value of the information); *Virmani*, 259 F.3d at 290 (noting that all fifty states as well as the District of Columbia recognize a medical peer-review privilege); *Adkins*, 488 F.3d at 1330 (acknowledging that the medical peer-review privilege is recognized by all fifty states and the District of Columbia).

97. See Teresa L. Salamon, *When Revoking Privilege Leads to Invoking Privilege: Whether There is a Need to Recognize a Clearly Defined Medical Peer Review Privilege in Virmani v. Novant Health Inc.*, 47 VILL. L. REV. 643, 670 (2002) (determining that the *Virmani* court failed to follow state trends and precedent).

98. See Alissa Marie Bassler, *Federal Law Should Keep Pace with States and Recognize a Medical Peer Review Privilege*, 39 IDAHO L. REV. 689, 711-12 (2003) (proposing that federal courts recognize the medical peer-review privilege to maintain candid and honest evaluations in the peer-review process, and to reduce forum shopping between state and federal courts caused by the disparity between state recognition of the privilege and the federal nonrecognition); Salamon, *supra* note 97, at 673-74 (noting that after decisions such as *Virmani*, the peer-review privilege will be ineffective, thus quashing the benefits of the peer-review process of reducing the detrimental impact of incompetent physicians).

A. *Within the Confines: Whether the Seventh, Fourth and Eleventh Circuits Stayed Within the Boundaries of Rule 501, Court Precedent, and the HCQIA*

In declining to recognize the medical peer-review privilege, the Seventh, Fourth, and Eleventh Circuit Court of Appeals have potentially stepped outside of the boundaries of Rule 501 by ignoring the principles of the federal “common law” and the “reason and experience” standards in coming to decisions.⁹⁹ Furthermore, the appellate courts may have strayed from Court precedent in evaluating the probative value of disclosure and the policy considerations of maintaining the privilege.¹⁰⁰

1. *Rule 501*

Rule 501 requires that courts use “reason and experience” as well as the guidance of the federal “common law” in coming to determinations about whether a federal evidentiary privilege should be invoked.¹⁰¹ The language of Rule 501 proscribes that where state law governs, “[p]rivileges shall be determined in accordance” with that state’s law.¹⁰² Furthermore, when enacting Rule 501, the House Judiciary Committee had some apprehension in not applying federal privilege standards surrounding scenarios where there is no element of a “claim or defense” grounded in federal law.¹⁰³ *Shadur*, *Virmani*, and *Adkins* all arose under federal law.¹⁰⁴ Therefore, the appellate courts did not violate the

99. See FED. R. EVID. 501 (stating that courts should determine whether privileges exist by the guidance of the “common law” and in light of their “reason and experience”).

100. See Salamon, *supra* note 97, at 670 (discussing that the *Virmani* court did not follow *Jaffee* in assessing the medical peer-review privilege).

101. FED. R. EVID. 501.

102. *Id.* The rule states in pertinent part as follows: “[H]owever, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.” *Id.*

103. H.R. REP. No. 93-650, 1082. The report stated:

[The Proviso on the Court’s proposed privilege rule] require[s] the application of State privilege law in civil actions and proceedings governed by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a result in accord with current federal court decisions . . . The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy.

Id.

104. See *Shadur*, 664 F.2d at 1061 (noting that the plaintiff’s claim arose under the Sherman Act); *Virmani*, 259 F.3d at 285-86 (identifying that the plaintiff brought suit under 42 U.S.C. §§ 1981, 1985); *Adkins*, 488 F.3d at 1326

language and spirit of Rule 501 in this respect.

The House Committee also had concern about forum shopping.¹⁰⁵ *Shadur*, *Virmani*, and *Adkins* did not limit application of federal privilege standards to cases that arise solely under federal law. Thus, while there may not be issues of forum shopping in these particular circumstances,¹⁰⁶ or in situations where there is a diversity action with the claim premised solely on state law, issues may arise in situations where there are mixed state and federal claims. Rule 501 and the House Committee notes are silent on what privilege standards would apply in these particular circumstances.

Uncertainty pertaining to mixed issues of state and federal law was a primary concern for the Senate Judiciary Committee.¹⁰⁷ The Senate Committee was first concerned with potential litigation surrounding what is considered “an element of a claim or defense as to which State law supplies the rule of decision.”¹⁰⁸ Second, it had reservations about potential difficulties arising in cases where both federal and state laws govern.¹⁰⁹ There was not any conflict as to whether there was an ‘element of a claim or defense’ governed by state law in *Shadur*, *Virmani*, or *Adkins* because all of the claims arose out of federal law,¹¹⁰ thus these cases did not address the Senate’s first concern. The Senate did note that where there is a conflict of laws, the privilege standard allowing disclosure should be favored.¹¹¹ The *Shadur*, *Virmani*, and *Adkins* courts all operated within the Senate Committee’s framework on how privileges should be applied. In assessing whether to adopt a federal privilege, all three courts favored

(noting that the plaintiff brought his claim under 42 U.S.C. §§ 1981, 1983, 1985).

105. H.R. REP. No. 93-650, 7082-83. The report concluded that the Court’s proposed privilege rule would require federal courts to recognize certain privileges; therefore, the committee felt that there might have been some situations in civil actions that might have resulted in forum shopping if certain states did not recognize those privileges and visa versa. *Id.* at 7089. Thus, the House determined that under their proviso the “[f]ederal courts are bound to apply the State’s privilege law in actions founded upon a State-created right or defense removes the incentive to ‘shop.’” *Id.* at 7083.

106. Because *Shadur*, *Virmani*, and *Adkins* all had claims premised solely under federal law, forum shopping was not a factor.

107. See S. REP. No. 93-1277, 7058-59 (noting apprehension surrounding enacting the House version of Rule 501, which was subsequently accepted).

108. *Id.* at 7058; see also Senate Judiciary Committee notes, *supra* note 44 (noting that there may be situations where even if state law supplies the rule of decision, federal law might afford the privilege).

109. See Senate Judiciary Committee notes *supra* note 44 (illustrating the Senate Judiciary Committee’s concerns with respect to cases that overlap state and federal laws).

110. See *supra* note 105 (identifying the federal claims in the three decisions).

111. See *supra* note 44 (revealing the Senate’s favoring of disclosure).

disclosure when having the option to adopt state medical-peer review laws.¹¹² Given the above, the *Shadur*, *Virmani*, and *Adkins* courts did not operate outside the boundaries of the text of Rule 501, nor did they contravene the congressional intent on how the rule should be applied.

2. Precedent

There is a question as to whether the *Shadur*, *Virmani*, and *Adkins* courts adhered to Supreme Court precedent in coming to their decisions.¹¹³ The primary concern is that the *Virmani* and *Adkins* courts incorrectly applied the “reason and experience” analysis of *Jaffee* when coming to their decisions.¹¹⁴ *Shadur* was decided prior to *Jaffee*, and therefore, was not bound by the *Jaffee* analysis.¹¹⁵ However, *Shadur* acknowledged that it is important to look at state trends when assessing whether to recognize a privilege.¹¹⁶ Despite this acknowledgment, the Seventh Circuit declined to extend the privilege emphasizing that federal privileges should be “narrowly construed.”¹¹⁷ The court determined that the materials were critical to the plaintiff’s claim, unlike a state malpractice action, where peer-reviewed materials “have little impact on the plaintiff’s ability to prove a meritorious claim.”¹¹⁸

112. See *Shadur*, 664 F.2d at 1058 (declining to apply the state medical peer-review privilege because the probative value of the evidence and the policy reasons behind enforcing federal antitrust laws were too strong); *Virmani*, 259 F.3d at 292 (declining to recognize the state medical peer-review privilege because the need to acquire probative evidence in a discrimination action outweighs the policy benefits of maintaining a privilege to promote physician candidness); *Adkins*, 488 F.3d at 1330 (declining to apply state medical peer-review privilege standards because the policy interest behind rooting out invidious discrimination outweighs the interest in promoting candidness).

113. See Salamon, *supra* note 97, at 670 (stating that *Virmani* failed to follow precedent in looking at state trends under the *Jaffee* test).

114. See *id.* (arguing that the *Virmani* court failed to follow *Jaffee* reasoning acknowledging that state trends should be evaluating when assessing a privilege in federal court); *Virmani*, 269 F.3d at 290; *Adkins*, 488 F.3d at 1327-28 (noting that the *Jaffee* test requires that federal courts look at the recognition of the privilege throughout states). While acknowledging that all fifty states as well as the District of Columbia have recognized the privilege, the court declined to recognize the privilege. *Id.*

115. *Shadur* was decided in 1981. *Jaffee* was decided in 1996.

116. The court recognized that it is important to consider state privileges in federal privilege analysis because, “[a] strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal . . . policy.” *Shadur*, 664 F.2d at 1061.

117. *Id.*

118. *Id.* at 1062. This is where the *Shadur* court may have attempted to draw the line between why the states recognize the peer-review privilege and why it is not necessarily as critical in the anti-trust context. *Id.*

The *Virmani* and *Adkins* courts did conduct a *Jaffee* analysis. Both courts acknowledged that *Jaffee* requires that federal courts assess state acknowledgment of the privilege.¹¹⁹ The *Virmani* court found that in enacting peer-review laws, state legislatures were focusing on “different concerns” such as medical malpractice lawsuits, and did not necessarily “[c]onsider [] the potential impact on discrimination cases.”¹²⁰ Therefore, the *Virmani* court decided to give state enactments little weight.¹²¹ The *Adkins* court relied directly on the *Virmani* analysis of state privilege legislation stating, “the state statutes address different policy concerns when they balance the need for candor . . . and access to evidence in a malpractice suit . . . a discrimination claim like this one . . . merit[s] a different analysis.”¹²²

Despite *Jaffee*’s strong language suggesting that federal courts should give great weight to state privileges statutes, the Fourth and Eleventh Circuits declined to recognize the peer-review privilege.¹²³ The distinction, however, may lie in the factual circumstances of each respective case. The policy underpinnings in the state privilege statutes, which address the need for a psychotherapist privilege were the same as those that the Supreme Court acknowledged,¹²⁴ whereas both the *Virmani*

119. *Virmani*, 259 F.3d at 291; *Adkins*, 488 F.3d at 1328; see *Jaffee*, 518 U.S. at 12 (stating, “[p]olicy decisions of the States bear on the question whether federal courts should recognize a new privilege . . . state legislatures are fully aware of the need to protect the integrity of the fact-finding function . . . the existence of a consensus among the States indicates that ‘reason and experience’ supports recognition of the privilege”); see also Ralph Ruebner & Leslie Ann Reis, *Hippocrates to HIPPA: A Foundation For A Federal Physician-Patient Relationship*, 77 TEMPLE L. REV. 505, 544 (2004) (noting that the *Jaffee* Court “acknowledged that primary source of modern privilege law is legislative rather than judicial action,” thus indicating a lack of federal common law on privileges).

120. *Virmani*, 259 F.3d at 291. The court evaluated policy decisions behind the Georgia state peer-review privilege law, as well as other commentary on the need to privilege peer-review information. *Id.* The court concluded that state legislatures were focused on concerns of medical malpractice and defamation lawsuits using peer-reviewed materials. *Id.* It determined that there is no evidence that state legislatures even considered discrimination arising out of the process, and therefore, decided to give little weight to the state laws. *Id.*

121. *Id.*

122. *Adkins*, 488 F.3d at 1330.

123. *Virmani*, 259 F.3d at 291; *Adkins*, 488 F.3d at 1330; see *Jaffee*, 518 U.S. at 12 (“The existence of a consensus among the States indicates that ‘reason and experience’ supports recognition of the privilege.”).

124. *Jaffee*, 518 U.S. at 9-11. The Court acknowledged that psychotherapist-patient privilege is “rooted in the imperative need for confidence and trust.” *Id.* at 10. The Court determined that absent assured confidentiality, patients would not be willing to talk freely and comfortably. *Id.* The Court acknowledged that state legislatures fostered these very principles when invoking the privilege, stating, “[d]enial of the federal privilege . . . would

and *Adkins* courts found that state peer-review legislation had different underlying concerns¹²⁵ without necessarily evaluating the implications for discrimination actions. A second possible explanation for the differential treatment of state privilege statutes is that in *Shadur*, *Virmani*, and *Adkins* the claims arose out of the peer-review process, whereas the same situation does not apply in the context of a psychotherapist privilege.¹²⁶ While the *Shadur*, *Virmani*, and *Adkins* courts did ignore strong state trends¹²⁷ and strong Supreme Court language encouraging adoption of state trends,¹²⁸ it is unlikely that these courts ignored precedent, but rather gave different weight to state policies given the factual circumstances of the cases.

3. HCQIA

The *Shadur*, *Virmani*, and *Adkins* courts did not violate the framework of the HCQIA. The HCQIA was enacted after *Shadur*, thus the language of the HCQIA did not bind the *Shadur* court.¹²⁹ However, both the *Virmani* and *Adkins* courts were bound by the HCQIA.¹³⁰

The *Virmani* court addressed the HCQIA stating, “we should not recognize a privilege where it appears that Congress considered the relevant competing concerns but has not provided

frustrate the purposes of the state legislation that was enacted to foster these confidential communications.” *Id.* at 13.

125. *Virmani*, 259 F.3d at 291; *Adkins*, 488 F.3d at 1330. Both courts concluded that state legislatures did not consider the impact on discrimination cases. *Id.* Instead, the courts noted that the focus was to reduce access to peer-reviewed information during defamation and medical malpractice actions. *Id.*

126. *Shadur*, 664 F.2d at 1062; *Virmani*, 259 F.3d at 291; *Adkins*, 488 F.3d at 1329. It is unlikely that an action would arise from a psychotherapist-patient relationship that is not an independent claim. In fact, the claim in *Jaffee* was an independent claim that did not arise out of the psychotherapist-patient relationship, but rather a third party wanted to use the psychotherapist-patient communications in her action against the patient. *Jaffee*, 518 U.S. at 5.

127. The *Shadur* court acknowledged that they should not ignore strong state trends. *Shadur*, 664 F.2d at 1061; see *Virmani*, 259 F.3d at 290; *Adkins* 488 F.3d at 1327 (acknowledging the prevalence of the peer-review privilege throughout the United States).

128. See *supra* note 124 and accompanying text (discussing *Jaffee*'s language regarding state privilege laws).

129. The HCQIA was enacted in 1986. *Shadur* was decided in 1981. The HCQIA can be considered to have been a congressional reaction to the *Shadur* decision because the HCQIA explicitly claims in section 11101(4): “The threat of private money damages liability under Federal laws, including treble damages liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.” 42 U.S.C. § 11101(4).

130. *Virmani* was decided in 2001. *Adkins* was decided in 2007.

the privilege itself.”¹³¹ The court concluded that while Congress did not reject a privilege for medical peer-review materials outright, it did weigh the benefits of protecting peer-reviewed materials against “allowing putative victims of discrimination to pursue their claims—and [Congress] decided to give greater weight to the latter.”¹³² Furthermore, the *Virmani* court identified that even if Congress did intend the HCQIA to grant protections to peer-review materials, it did not intend on protections of such materials if they violate civil rights laws.¹³³

In *Adkins*, the defendants sought HCQIA immunity and argued that it extended to the peer-reviewed materials.¹³⁴ The *Adkins* court did not directly address the HCQIA in its decision. But the parties discussed the HCQIA in their briefs to the Court.¹³⁵ The plaintiff noted that the HCQIA does not bar access to peer-reviewed materials because the party opposing the assertion of immunity must be able to have access to the peer-reviewed information in order to rebut the presumption that the peer-review action met the standards required by the HCQIA.¹³⁶ Secondly, the plaintiff asserted that the HCQIA qualified immunity does not extend to civil rights actions.¹³⁷ The amicus

131. *Virmani*, 259 F.3d at 291.

132. *Id.* at 291-92; see 42 U.S.C. § 11111(a)(1)(D) (disclaiming that immunity from liability does not apply to actions concerning the civil rights of any person(s)).

133. *Id.* at 292. The defendant in *Virmani* argued that there was a Congressional intent to protect medical peer-review materials because the main sponsor of the HCQIA intended on restricting the admission of peer-review evidence used in disciplinary proceedings. *Id.* The *Virmani* court acknowledged that while the intent may have been there to protect peer-review materials, there was no intent to extend such protection to “actions that violate civil rights laws.” *Id.*

134. See Amicus Brief for Defendant/Appellees, *supra* note 10, at 5; Amicus Brief for Appellant at 48, *Adkins v. Christie*, 488 F. 3d 1324 (11th Cir. 2007)(06-13107-G) (discussing the defendants’ HCQIA defense asserting qualified immunity under § 11111(a)).

135. *Id.*

136. See *id.* at 49. The plaintiff asserted that “[b]y law, any peer review action is automatically presumed to have met . . .” the requirements under § 11112(a) of the HCQIA, “[b]ut the presumption is rebuttable by a preponderance of evidence.” *Id.* Section 11112(a) requires the following for HCQIA qualified immunity to apply:

“[A] professional review action must be taken – 1) in the reasonable belief that the action was in the furtherance of quality health care, 2)after a reasonable effort to obtain the facts of the matter, 3)after adequate notice and hearing procedures are afforded to the physician involved . . . 4) in the reasonable belief that the action was warranted by the facts known after [a] reasonable effort to obtain the facts.”

42 U.S.C. § 11112(a). The plaintiff asserted that without access to the information, the presumption cannot be rebutted. Brief for Appellant, *supra* note 134, at 49.

137. *Id.* at 50; see 42 U.S.C. § 11111(a)(1)(D) (creating an exception to the

brief in support of the defendants employed the HCQIA to persuade the *Adkins* court to reject *Virmani*, arguing that *Virmani* “misconstrued key provisions of the [HCQIA].”¹³⁸ Despite these arguments, the *Adkins* court relied on *Virmani* in its reasoning without mention of the HCQIA.¹³⁹ In adopting *Virmani*, and absent any reasoning to suggest the contrary, the *Adkins* decision was not contrary to the HCQIA.¹⁴⁰

B. Slamming the Door Shut: The Impacts on Litigation Surrounding the Peer-Review Process

Proponents of the privilege fear that the trend started by the Seventh, Fourth, and Eleventh Circuits may have greater implications on litigation surrounding the peer-review process and the effectiveness of the peer-review process itself.¹⁴¹

HCQIA immunities for civil rights claims); see also discussion *supra* note 134 (discussing the *Virmani* court's rejection that the HCQIA applied to civil rights cases).

138. Amicus Brief for Defendant/Appellees, *supra* note 10, at 16. The brief did not explain why *Virmani* misconstrued the HCQIA, nor did the brief cite to any specific provisions of the HCQIA that were misconstrued.

139. *Adkins*, 488 F.3d at 1330.

140. Both *Adkins* and *Virmani* applied federal law to discrimination claims brought by physicians subject to peer-review. *Adkins*, 488 F.3d at 1326-27; *Virmani*, 259 F.3d at 285. There was no argument in the defendant's brief nor the amicus brief in support of the defendant as whether/why the *Virmani* court did not appropriately apply the HCQIA. See discussion *supra* note 138 (noting that the amicus brief in support of the defendants did not discuss why *Virmani* misapplied the HCQIA). Absent any further information and *Adkins*' heavy reliance on *Virmani*, the *Adkins* court did not appear to go outside the boundaries of the HCQIA.

141. See Palmer, *supra* note 17 (discussing concerns after the *Adkins* decision that the peer-review privilege will not be recognized in federal decisions to claims outside of discrimination, and also fears that such a decision would reduce physician candidness in the peer-review process because of litigation fears); Salamon, *supra* note 97, at 673 (concluding that the physician participants in medical peer-review will have to forecast whether claims against them may be brought in federal or state court and may be stripped of a privilege that they relied upon); Ronald G. Spaeth, Kelley C. Pickering & Shannon M. Webb, *Quality Assurance and Hospital Structure: How the Physician-Hospital Relationship Affects Quality Measures*, 12 ANN. HEALTH L. 235, 243-44 (2003) (noting that disclosing peer-review information may lead to greater access to the peer-reviewed materials by medical malpractice plaintiffs thus creating a “resurgence” of medical malpractice actions); Bryan Liang & Steven Small, *Communicating About Care: Addressing Federal-State Issues in Peer Review and Mediation to Promote Patient Safety*, 3 HOUS. J. HEALTH L. & POL'Y 219, 236 (2003) (discussing that individuals may circumvent state peer-review protections by joining a federal claim to a personal injury lawsuit).

1. *Impact on Litigation*

One primary fear is that nonrecognition of the privilege will result in peer-reviewed information being used in medical malpractice litigation.¹⁴² The *Shadur*, *Virmani*, and *Adkins* courts characterized the underlying claims in a way that federal nonrecognition of the medical peer-review privilege will not likely increase medical malpractice litigation.¹⁴³ All three courts made the distinction that the underlying action was based on the peer-review process itself and not just an independent claim utilizing peer-review information.¹⁴⁴ Medical malpractice lawsuits are based on the alleged breach of duty of care by a physician to a patient resulting in harm to the patient,¹⁴⁵ thus peer-reviewed information would only be tangential to the underlying action and not a foundation for it.¹⁴⁶

In subsequent cases, if the peer-review privilege is evaluated through the lens of the *Shadur*, *Virmani*, and *Adkins* courts, then no medical malpractice litigant can have access to peer-review material. However, if access to peer-review information is interpreted broadly (meaning no restrictions on access), then many litigants in medical malpractice claims against federally funded or federally run hospitals (and its physicians) could potentially have

142. See Spaeth, *supra* note 141, at 245 (discussing that the plaintiff's right to broader discovery of peer-review materials may attach the negative consequences of medical malpractice litigation, such as higher insurance premiums for physicians as well as consumers, and decreased quality and access for consumers to healthcare).

143. *Adkins*, 488 F.3d at 1329; *Shadur*, 664 F.2d at 1062; *Virmani*, 259 F.3d at 290.

144. The *Shadur* court determined that the purpose of the state peer-review privilege was premised on preventing peer-review materials to be used against physicians in independent causes of action such as medical malpractice lawsuits. *Shadur*, 664 F.2d at 1062. Nonetheless, the court concluded that the plaintiff's underlying claim was premised on the peer-review process itself. *Id.* The *Virmani* court noted that in a discrimination case, the "[p]laintiff's claim arises out of the peer review proceedings, [whereas] a plaintiff's claim in a medical malpractice case arises from actions that occurred independently of the review proceedings." *Virmani*, 259 F.3d at 290. The *Adkins* court concluded that the peer-review materials were "[t]he only way that *Adkins* can demonstrate the existence of disparate treatment." *Adkins*, 488 F.3d at 1329. In *Adkins*, the plaintiff's claim was directly related to the peer-review process, whereas a medical malpractice lawsuit would not be premised on the peer-review process. *Id.* at 1329. The *Adkins* Court noted that recognizing a privilege under the factual circumstances of the case would potentially bar the plaintiff from bringing his case, whereas the same would not hold true in a medical malpractice action. *Id.*

145. See 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 185 (2007) (defining medical malpractice litigation).

146. See discussion *supra* note 144 (discussing independent claims not based on the peer-review process versus claims resulting from the peer-review process).

access to the information.¹⁴⁷

Proponents of the privilege also fear that federal claims will be joined to state personal injury claims so as to circumvent state peer-review privileges.¹⁴⁸ However, such a scenario is not likely to occur. It is doubtful that federal courts will be able to assert supplemental jurisdiction over a state personal injury lawsuit because the state claim likely will not be “so related to claims in the [federal] action . . . that they form part of the same case or controversy.”¹⁴⁹ Federal courts exercising diversity jurisdiction will also be bound by state law because of Rule 501’s requirements that state privilege laws apply where there is “an element of a claim or defense” founded in state law.¹⁵⁰ Finally, *Shadur*, *Virmani*, and *Adkins* identified that the claims arose out of the peer-review process and not an independent action, which indicates that there will be privileges against personal injury lawsuits in federal courts.¹⁵¹

If courts narrowly adhere to the framework established by the Seventh, Fourth, and Eleventh Circuit Courts, then it is likely that there will not be a large impact on litigation involving peer-review materials.¹⁵² However, if courts interpret the *Shadur*, *Virmani*, and *Adkins* decisions broadly,¹⁵³ then there may be detrimental impacts resulting in more litigation around peer-reviewed materials.

147. A broad interpretation would result in unrestricted access because the decisions of the Seventh, Fourth, and Eleventh Circuits hold that the medical peer-review privilege does not apply in federal courts.

148. See Liang, *supra* note 141, at 236 (noting that a federal claim can be added to a claim of “patient injury” so as to avoid state privilege standards).

149. See 28 U.S.C. § 1367(a) (2006) (noting that in a civil action where federal courts have original jurisdiction, a state claim must be so related to the federal claim that they form the same case or controversy).

150. See FED. R. EVID. 501 (requiring application of state privilege laws where an element of a claim or defense is founded in state law).

151. See discussion, *supra* note 145 (noting the courts’ separation of actions premised on the peer-review process and actions (i.e. personal injury claims) based on independent circumstances).

152. A large impact on litigation will not be felt because the circuit courts indicated that there would not be a probative necessity for scenarios that are not premised in the peer-review process and/or necessary to maintain the plaintiff’s claim. *Adkins*, 488 F.3d at 1329; *Shadur*, 664 F.2d at 1062; *Virmani*, 259 F.3d at 290. This limits nonrecognition of the privilege to narrow fact patterns, such as discrimination claims. Furthermore, the *Virmani* and *Adkins* courts stressed the probative value of the materials because the claim was alleging discrimination by the peer-review process. *Virmani*, 259 F.3d at 293; *Adkins*, 488 F.3d at 1330. A narrow reading of these holdings would limit nonrecognition to only discrimination claims.

153. A broad interpretation would mean that there is no medical peer-review privilege in federal courts in all circumstances.

2. *Impact on Peer-Review Process*

Courts declining to recognize the peer-review privilege invoke fears that the purpose and effectiveness of the peer-review process will be negatively impacted.¹⁵⁴ Depending on how courts interpret the *Adkins*, *Shadur*, and *Virmani* decisions, there may be a detrimental impact to physician candidness. Conversely, the potential for disclosure will serve as a check on possible peer-review. Furthermore, there are safeguards to indicate that physician candidness may not be all that effected by the outcome of these cases.

If courts interpret the three circuit court decisions narrowly, then there are protections in place for physicians participating in the peer-review process.¹⁵⁵ A narrow interpretation would indicate that non-recognition of the privilege applies to situations where the action arises from the peer-review process.¹⁵⁶ This prevents physicians being subject to actions outside the peer-review process, such as medical malpractice or defamation lawsuits, thus mending some fears of litigation as a result of participating in the process.¹⁵⁷ A narrow interpretation may also allow for a safeguard to ensure effective peer-review to root out discrimination. Where reviewing physicians are on notice that they and the peer-review materials may be subject to discrimination lawsuits, they may be more scrupulous in their evaluations.

Conversely, a broad interpretation of the *Shadur*, *Virmani*, and *Adkins* courts may have an impact on participation.¹⁵⁸ Without limitations on the scenarios to which non-recognition of the privilege would apply, physicians participating in, and/or being evaluated through, a peer-review process may be subject to actions independent from the peer-review process.¹⁵⁹

Finally, there are safeguards in place for litigation arising out of the peer-review process indicating a minimal impact on the effectiveness of the peer-review process. First, a “physician bringing an action against a peer review [committee] [may be]

154. See Salamon, *supra* note 97, at 673 (noting that *Virmani* establishes situations where the ‘privilege becomes all but illusory’ to peer-review participants).

155. See discussion, *supra* Part III.B.1. (detailing narrow versus broad interpretations of the *Shadur*, *Virmani*, and *Adkins* decisions).

156. See accompanying text *supra* note 154 (arguing that narrow interpretation of the *Shadur*, *Virmani*, and *Adkins* decisions would determine that cases that are not premised in the peer-review process itself, such as medical malpractice actions, do not have as strong of a probative value).

157. Assurance about the confidentiality of the process will arise because physicians will not be potentially opening themselves or other physicians to having peer-reviewed information used against them in independent actions.

158. See discussion, *supra* Part III.B.1 (discussing broad interpretations of the *Shadur*, *Virmani* and *Adkins* decisions).

159. *Id.*

deterred by the potential responsibility for paying the defendant's legal fees under the [HCQIA];"¹⁶⁰ therefore, a plaintiff should be rather certain before bringing such an action. Second, "data shows that physician-plaintiff[s] ha[ve] a near-zero chance of success" in bringing actions against a peer-review committee.¹⁶¹ Unless there is a broad interpretation of the *Shadur*, *Virmani*, and *Adkins* decisions, these cases will likely not have a large impact on the effectiveness of the peer-review process.

IV. RESOLVING CONCERNS SURROUNDING THE FEDERAL MEDICAL PEER-REVIEW PRIVILEGE

Despite many questions surrounding the peer-review process, the overall impact on litigation will likely not be substantial.¹⁶² However, uncertainty lies in circumstances where both federal and state law apply.¹⁶³ *Shadur*, *Virmani*, *Adkins* and Rule 501 do not provide guidance on how to best deal with this concern.¹⁶⁴ This question can be addressed in three ways. First, Congress can make legislative changes to clarify this problem by amending Rule 501 and adopting the Senate version of the Rule. Second, Congress can pass legislation recognizing the medical peer-review privilege and defining its boundaries. Third, courts can work within the framework established by the *Shadur*, *Virmani*, and *Adkins* courts to favor disclosure in cases that arise out of the peer-review process, while applying the privilege to cases that arise independent of the peer-review process.

A. *Neither Closed Nor Open: How the Direction of the Seventh, Fourth, and Eleventh Circuit Courts of Appeals Does Not Adversely Affect the Peer-Review Process*

The decisions of the Seventh, Fourth, and Eleventh Circuit Courts of Appeals will likely not have a substantial impact on the peer-review process or any litigation arising from the process. The framework established by the *Shadur*, *Virmani*, and *Adkins* courts

160. William P. Gunnar, *The Scope of a Physician's Medical Practice: Is the Public Adequately Protected by State Medical Licensure, Peer Review, and the National Practitioner Data Bank?*, 14 ANN. HEALTH L. 329, 357 (2005).

161. *Id.* The author cited studies that indicate a low rate of success for physician-plaintiffs against peer-review committees. *Id.* at 353.

162. See discussion *supra* Part III.B (discussing the likelihood that *Shadur*, *Virmani*, and *Adkins* will impact litigation surrounding the peer-review process as well as the impact on the process itself). Though there is the possibility that courts will interpret these decisions broadly, the framework of the cases do not give such an indication.

163. See discussion *supra* Part II.A.2 (analyzing the House and Senate Judiciary Committee notes on potential issues that may arise where both federal and state law governs).

164. See discussion *supra* Part III.A.1 (noting that neither the rule nor case law give sufficient guidance on this concern).

does not permit too broad or too narrow of interpretations on the medical peer-review privilege's application in federal courts. Furthermore, the safeguards in place concerning litigation arising out of the peer-review process reduce the likelihood of adverse impacts on the peer-review process.¹⁶⁵

While it is possible for federal courts to interpret *Shadur*, *Virmani*, and *Adkins* to mean that there is no federal medical-peer review privilege, the cases themselves do not exclude recognizing the privilege in certain circumstances. All three cases acknowledge the reasoning behind state peer-review laws.¹⁶⁶ Yet, all three courts distinguish the facts of the cases from fitting within the frame of state peer-review laws, and declined to use state peer-review laws in reaching their decisions.¹⁶⁷

Each of these decisions specifically noted that the plaintiffs' claims arose out of the medical peer-review proceedings, and indicated that this factor was a heavy consideration for disclosure of the peer-review information.¹⁶⁸ It would be a far stretch for a

165. See discussion *supra* Part III.B.2 (discussing the safeguards established to prevent abuse of nonrecognition of the privilege in federal courts).

166. *Shadur*, 644 F.2d at 1062. The *Shadur* court noted that the purpose behind the Illinois Medical Studies Act (the applicable state peer-review law) "is 'to bolster the effectiveness of in-hospital peer group review'" through open and candid communication. *Id.* The court noted that the reasoning behind state medical peer-review laws arises from fears that disclosure of peer-review participants and materials in litigation, specifically medical malpractice litigation, will reduce the effectiveness of the peer-review process. *Id.*; *Virmani*, 259 F.3d at 290. *Virmani* cited the Georgia Supreme Court in identifying the purpose of state peer-review laws. *Id.* The court noted it was a "proper legislative choice between the competing public concerns of fostering medical staff candor, on the one hand, and impairing medical malpractice plaintiffs' access to evidence, on the other hand." *Id.* The *Adkins* court acknowledged that health care providers have a "legitimate interest in keeping peer review documents confidential and in protecting them from widespread dissemination." *Adkins*, 488 F.3d at 1329.

167. *Shadur*, 664 F.2d at 1062. The *Shadur* court stated that this was not a medical malpractice lawsuit, and was in fact a situation where the plaintiff's suit arose out of the medical peer-review process. *Id.* The court specified that absent disclosure of the peer-review proceedings the plaintiff might not have had enough evidence to establish his case. *Id.* at 1062-63. The court declined to recognize the privilege observing, "[t]he public interest in private enforcement of federal antitrust law in this context is simply too strong to permit the exclusion of relevant and possibly crucial evidence." *Id.* at 1063. *Virmani*, 259 F.3d at 291. The *Virmani* court stated, "There is no evidence that state legislatures considered the potential impact on discrimination cases of a privilege for medical peer review proceedings." *Id.* The court then declined to have the state law influence its decision. *Id.* The *Adkins* court agreed stating, "[t]he interests at issue in a discrimination claim . . . are different from that of a malpractice case, and merit a different analysis." *Adkins*, 488 F.3d at 1330. The *Adkins* court then declined to use the state peer-review law in coming to its decision. *Id.*

168. See *id.* and accompanying text (detailing why the *Shadur*, *Virmani*, and *Adkins* courts declined to apply the state privilege law).

court to interpret these cases broadly to mean that there is no circumstance where the medical peer-review privilege would apply in federal court. First, Rule 501 does not permit for such an interpretation to occur. Rule 501 requires that if a state provides the rule of decision, then the federal court must apply the state law in determining privileges.¹⁶⁹ In cases such as medical malpractice and defamation actions, which do not arise out of the peer-review process, the applicable state law will govern, thus requiring the federal courts to apply state privilege laws. Second, courts interpreting these cases broadly will be ignoring the reasoning behind the *Shadur*, *Virmani*, and *Adkins* decisions. Each of these cases heavily weighed the fact that the plaintiffs' claims arose out of the peer-review process,¹⁷⁰ and a broad interpretation flatly rejecting the privilege in federal courts would go against the weight of that reasoning.

Additionally, a very narrow interpretation of these cases likely would not produce adverse impacts on the peer-review process. Under such an interpretation, courts would only disclose peer-reviewed information in cases involving discrimination arising out of peer-review process. While this is more consistent with the decisions of *Virmani* and *Adkins* as opposed to a very broad interpretation,¹⁷¹ it does not include the facts and reasoning of *Shadur*, which was cited by both the *Adkins* and *Virmani* courts.¹⁷² The claim in *Shadur* was an antitrust lawsuit without reference to discrimination.¹⁷³ While the HCQIA may protect individuals participating in peer-review,¹⁷⁴ it does not go so far as to prevent plaintiffs from bringing such claims nor does it prevent discovery of such information.¹⁷⁵ Therefore, *Shadur* cannot be ignored, and a narrow interpretation limited to disclosure only in discrimination cases is unlikely.

169. FED. R. EVID. 501. The rule states in pertinent part, "[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." *Id.*

170. See *supra* note 168 and accompanying text (discussing the emphasis the *Shadur*, *Virmani*, and *Adkins* courts placed on the fact that the plaintiffs' claims arose out of the peer-review proceedings).

171. This is more consistent than a broad interpretation of *Virmani* and *Adkins* because both of these cases gave great weight to the fact that the policy considerations of eliminating discrimination far outweighs the policy considerations put forth by states of shielding peer-review information. *Virmani*, 259 F.3d at 291; *Adkins*, 488 F.3d at 1330.

172. *Virmani*, 259 F.3d at 290-91; *Adkins* 488 F.3d at 1329.

173. *Shadur*, 664 F.2d at 1059.

174. 42 U.S.C. § 11111(a).

175. See *Virmani*, 259 F.3d at 291-92 (concluding that the HCQIA does not create a medical peer-review privilege).

Finally, safeguards established to decrease the likelihood of plaintiffs' success in bringing actions against peer-review committees gives further weight to the argument that the peer-review process will not be adversely affected by the *Shadur*, *Virmani*, and *Adkins* decisions. The requirement under the HCQIA leaving open the potential for plaintiffs having to pay the defendants' legal fees in failed claims,¹⁷⁶ coupled with a "near zero" success rate of plaintiffs bringing actions against peer-review committees,¹⁷⁷ ensures that plaintiffs who do choose to bring actions against peer-review committees in federal courts, will be careful in the claims they bring.

*B. Leaving A Crack: Proposal to Preserve the Balance of
Maintaining State Privilege Protections
While Recognizing Federal Policy
Considerations In Favor of Disclosure*

While the *Shadur*, *Virmani*, and *Adkins* decisions themselves may not have a substantial impact on the peer-review process, there is still a question of what federal courts should do in situations where both state and federal law govern.¹⁷⁸ This issue did not arise in *Shadur*, *Virmani*, or *Adkins* because all three cases were clearly governed by federal law.¹⁷⁹ Three possible solutions to this problem are for Congress to modify Rule 501 adopting the Senate version of the rule, to pass legislation recognizing a federal medical peer-review privilege, or for the courts to apply the reasoning of *Shadur*, *Virmani*, and *Adkins* in holding disclosure of peer-reviewed information can occur only in cases that arise from the peer-review process.

176. 42 U.S.C. § 11113. The statute states that in any lawsuit brought against a defendant who was engaged in peer-review, and who met the standards set forth by other provisions of the HCQIA,

[If] the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

Id.

177. See discussion *supra* Part III.B.2 (delineating the potential safeguards in place to prevent the *Shadur*, *Virmani*, and *Adkins* decisions from adversely affecting the peer-review process).

178. See discussion *supra* Part III.A.1 (evaluating the concern of both federal and state law governing and noting that the *Shadur*, *Virmani*, and *Adkins* decisions do not give sufficient guidance on this point).

179. See *supra* note 105 and accompanying text, (identifying the plaintiffs' federal claims in all three cases).

1. Legislative Solutions

When drafting the text of Rule 501, the House and Senate Judiciary Committees disagreed on how the Rule should be written.¹⁸⁰ Each had different concerns on how the rule would manifest itself.¹⁸¹ Ultimately the House version of Rule 501 was adopted.¹⁸² However, the Senate's concerns about the adopted version of the Rule are the very concerns that arise in light of the *Shadur*, *Virmani*, and *Adkins* decisions.

The Senate proposed a different variation of Rule 501 that resolved their apprehension about the difficulties that may arise in determining and defining what is an element of a claim or defense and what to do in situations where both federal and state law govern.¹⁸³ The Senate Judiciary Committee proposed the following:

[I]n criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced . . . in diversity cases where the litigation in question turns on a substantive question of State law . . . it is clear that State rules of privilege should apply unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision . . . If the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied.¹⁸⁴

While the Senate's version of the Bill is flawed in the same manner as the current Rule 501,¹⁸⁵ it does pose fewer problems than the current version of the rule. The adopted version allows for more situations where both federal and state law can apply in

180. H.R. REP. NO. 93-650; S. REP. NO. 93-1277.

181. See discussion *supra* Part III.A.1 (outlining the House and Senate Judiciary Committees' various concerns, such as forum shopping and issues where both federal and state laws govern).

182. H.R. REP. NO. 93-1597 (1975). The notes of the Conference Committee state, "The Conference adopts the House provision." *Id.*

183. S. REP. NO. 93-1277. See discussion, *supra* Part III.A.1 (addressing the Senate's concerns in greater detail).

184. S. REP. NO. 93-1277. The formal wording of the civil action portion of Rule 501 proposed by the Senate is as follows:

In civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision.

H.R. REP. NO. 93-1597. The Senate Judiciary Committee also noted, "the Federal law of privileges should be applied with respect to pendant State law claims when they arise in a Federal question case." S. REP. NO. 93-1277.

185. This proposed rule is flawed in the sense that it does not find a solution to circumstances where both federal and state law prevails.

a single case. The current version of Rule 501 requires that state law provide the privilege rule where an “element of a claim or defense” is governed by state law.¹⁸⁶ Absent clearer boundaries defining the types of claims and when state law would govern, difficulties may arise where federal law incorporates state law¹⁸⁷ or with questions such as those created by the *Shadur*, *Virmani*, and *Adkins* decisions about how courts should apply potential questions where both state and federal law govern.

The Senate proposal defines these boundaries more clearly. It allows for federal privilege laws to apply where there is a federal question, even where the federal courts are applying pendent jurisdiction to ancillary issues,¹⁸⁸ and where state law applies in diversity situations.¹⁸⁹ While the variation of the rule is slight, the Senate’s version of the rule would ultimately provide guidance on how to manage cases where both federal and state law governs. All cases arising out of federal law, such as the claims in *Shadur*, *Virmani*, and *Adkins*,¹⁹⁰ would not be subject to state privilege standards. Most diversity cases would be subject to state privilege cases. However, this proposal leaves unanswered questions of what the impact will be on cases where the claim arises out of the peer-review process,¹⁹¹ and also how plaintiffs may be able to work around the rule to be able to bring their cases in federal court and still have access to such information.¹⁹² While the Senate version of Rule 501 presents more defined boundaries than that of the

186. FED. R. EVID. 501.

187. See Paul Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 139, n.73 (1973) (analyzing the problem that is created where federal law incorporates state law and the Rule allows for both federal and state law to govern).

188. See *supra* note 184 and accompanying text (discussing the Senate’s proposal on pendent jurisdiction).

189. S. REP. NO. 93-1277. The only exception the Senate carved out was in diversity cases, where federal privilege law would apply if, for some reason, federal law would apply the rule of decision. *Id.* However, the Senate Judiciary Committee even indicated in the notes that this circumstance would rarely if ever arise. *Id.* They did indicate, however, that if the situation did arise, the rule favoring the reception of the evidence should apply. *Id.*

190. See *supra* note 105 and accompanying text (specifying the plaintiffs’ claims in the *Shadur*, *Virmani*, and *Adkins* decisions).

191. There may be diversity cases where the alleged conduct arises out of the peer-review process. The Senate’s proposed variation on the rule would have potentially damaging implications for plaintiffs within those cases, such as closing the opportunity for many to bring forward a case where they have been wronged by the peer-review process.

192. While this may be tenuous, creative plaintiffs may find a way to opt for federal claims in order to get access to such information in federal courts, where they may not have access in state courts. This conflicts with the concern about forum shopping that both the Senate and House Judiciary Committees had when enacting Rule 501. H. REP. NO. 93-650; S. REP. NO. 93-1277.

current version, this solution still does not completely address the questions created by the *Shadur*, *Virmani*, and *Adkins* decisions.

Another potential legislative solution could be for Congress, like all fifty states as well as the District of Columbia have done, to pass legislation adopting the medical peer-review privilege and draw boundaries and exceptions for the privilege. However, such an action could fall into the same problem that was acknowledged by the *Virmani* and *Adkins* courts, where Congress would overlook the potential impact of its legislation on certain types of cases. Furthermore, such legislation does not allow for courts to have flexibility in assessing circumstances on a case-to-case basis.

Conversely, congressional legislation on the privilege would ensure the effectiveness of the peer-review process. However, the great potential for Congress overlooking an important type of situation or case, and the definiteness of legislation preventing court flexibility, does not render congressional recognition of the privilege a feasible solution.

2. Court Solutions

Although revision of Rule 501 or congressional legislation defining the boundaries of the privilege are both options to be considered, the more likely and realistic solution to the issue at hand will be for federal courts to interpret the *Shadur*, *Virmani*, and *Adkins* decisions to apply nonrecognition of the peer-review privilege only to situations where the plaintiffs' claim arises out of the peer-review process. This is the best solution to strike a balance between policy considerations for recognizing the privilege and disclosing the peer-review information.

While this proposal may still subject those individuals participating in the peer-review process to litigation, such litigation would arise only out of the peer-review process. This proposition, in turn, will allow for more effective peer-review because physicians engaged in the process will not attempt to abuse the process for discriminatory or anti-competitive purposes if they know that they may be subject to litigation.

This approach, as compared to a broad interpretation of the *Shadur*, *Virmani*, and *Adkins* decisions, will prevent plaintiffs who do not have claims arising out of the peer-review process from seeking their claims in federal court so as to get access to peer-reviewed materials. This proposal is preferable over the narrow reading of the *Shadur*, *Virmani*, and *Adkins* decisions because those that were wronged in the peer-review process outside of discrimination will still be able to support their claims through discovery of the peer-reviewed materials. Finally, this approach is the best solution because it fits within the framework and reasoning established by the *Shadur*, *Virmani*, and *Adkins*

courts.¹⁹³

V. CONCLUSION

The growing number of federal courts that do not recognize a medical peer-review privilege has resulted in questions as to how far the privilege extends. The HCQIA, Rule 501, and Supreme Court precedent have not answered looming concerns about how to balance the decisions of the Seventh, Fourth, and Eleventh Circuit Courts of Appeals with the need to maintain effective peer-review processes and control litigation surrounding the process. No federal appellate court or the Supreme Court has gone so far as to assert that nonrecognition of the privilege ends only at discrimination claims, nor have courts concluded that peer-reviewed materials are accessible in every federal claim. Either alteration and clarification of Rule 501, or specific guidelines for courts will help detract fears of negative policy implications, as well as protect the quality and privacy of the peer-review process.

193. See *supra* note 168 and accompanying text (identifying the purpose and reasoning behind the *Shadur*, *Virmani*, and *Adkins* decisions).

