

## PA Superior Court Continues to Heighten the Bar on Establishing Evidentiary Privileges Under the Patient Safety Quality Improvement Act and Peer Review Protection Act

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On April 28, 2020, the Pennsylvania Superior Court in *Ungurian v. Wilkes-Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital*, affirmed several Luzerne County trial court orders compelling the production of documents the hospital argued were privileged by the Patient Safety Quality Improvement Act (PSQIA), 42 U.S.C. § 299b-22(a), and the Pennsylvania Peer Review Protection Act (PRPA), 63 P.S. § 425.4. In further tightening the reigns on evidentiary privileges, the Superior Court found the hospital failed to meet its burden in establishing that these documents were protected by the PSQIA or the PRPA.

In general, the PSQIA protects patient safety work product from disclosure in litigation. The PSQIA defines "patient safety work product" as "any data, reports, memoranda, analyses (such as root cause analyses), or written or oral statements . . . which . . . are assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization (PSO)." The overarching goal of the PSQIA is to improve patient safety by encouraging voluntary and confidential reporting of events that adversely affect patients.

In *Ungurian*, the hospital asserted that an event report and root cause analysis report were patient safety work product, within the meaning of the PSQIA, because they were prepared for the express purpose of improving patient safety and quality and are maintained within its event reporting system for reporting to its PSO. However, in holding that the documents were discoverable, the Superior Court found the hospital failed to demonstrate these reports were prepared for the purpose of reporting to a PSO and were actually reported to its PSO. In addition, the Superior Court found the root cause analysis report was not maintained solely in the safety evaluation system, which also defeated the hospital's claim that it was privileged patient safety work product. Thus, the Superior Court ruled that neither the event report nor the root cause analysis report were entitled to the protection under the PSQIA.

The Superior Court in *Ungurian* also reviewed the hospital's objection under the PRPA that peer review activity is protected from disclosure in litigation. The PRPA defines "peer review" as "any evaluation of the quality and efficiency of services ordered or performed by one health care provider by another provider." The purpose of the PRPA is to encourage healthcare providers to improve the quality of patient care through free and frank evaluations by review organizations.

Despite the PRPA's broad definition of what constitutes protected peer review, the trend of late has been to narrow the scope of the privilege by strictly construing terms in the PRPA to limit its applicability. In further narrowing its scope, the Superior Court in *Ungurian* held the identity of the members of any committee engaging in a purported peer review is an essential element in determining whether the protections of the PRPA privilege apply. Thus, the failure of the hospital to disclose the identity of the committee members involved in the event reporting, root cause analysis, Serious Safety Event Rating Committee and Patient Safety Committee, was fatal to its claim for protection under the PRPA.

The hospital did, however, disclose the identity of the individual involved in performing a Quality Improvement Medical Staff Peer Review. Yet, the Superior Court ruled the individual, a physician whose Pennsylvania medical license had lapsed four years prior to the events at issue, was not a "healthcare provider" within the meaning of the PRPA. Further, the Superior Court noted the contract

between the parties involved did not provide for the provision of peer review services. Similarly, the Superior Court found the hospital's vague assertion that its Patient Safety Committee is a multidisciplinary group whose membership is representative of both the hospital and the community it serves, demonstrated the committee was not exclusively comprised of "professional healthcare providers," and therefore, not entitled to the protections of the PRPA.

The Superior Court also held the event report further did not meet the criteria for protection under the PRPA because it was generated in accordance with the hospital's "event reporting policy," and therefore, was more akin to a business record of a hospital, rather than the records of a peer review committee.

Finally, the Superior Court in *Unigurian* followed recent case precedent, set forth in *Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018), in holding that the PRPA does not protect performance reviews and evaluations in the credentialing files of healthcare providers because a credentialing committee does not qualify as a "review committee."

It remains to be seen whether the Pennsylvania Supreme Court will accept the invitation to revisit the scope of the privileges afforded under the PSQIA and the PRPA. However, the Superior Court has made it clear that the current state of the law will continue to restrict intended confidentiality and highly scrutinize an institution's practices in conducting essential patient safety and patient improvement review, thereby infringing upon the overarching goals the PSQIA and the PRPA were designed to promote. Assuming these rulings are not overturned, in part or in whole by the Pennsylvania Supreme Court, this opinion does provide useful guidance on the lengths a healthcare provider, and its counsel, must go to preserve a privilege under the PSQIA and/or the PRPA.

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