



Scope of State Peer Review Statutory Privileges beyond Hospital Medical Staffs—Peer Review in Physician Groups, ACOs, CINs and PHOs

February 1, 2017 | 12:30-1:45 p.m.

Heather L. Fields
Reinhart Boerner Van Deuren s.c.
Milwaukee, Wisconsin
hfields@reinhartlaw.com
(Moderator)

Michael R. Callahan
Katten Muchin Rosenman LLP
Chicago, Illinois
michael.callahan@kattenlaw.com
(Presenter)

This webinar is sponsored by



Hypothetical

- You get a call from the Health System CMO, Dr. Susan Carealot, who also Chairs the Health System's ACO/CIN Quality and Credential Committee. She informs you, the GC, that the ACO/CIN's administrative offices have received a subpoena from a medical malpractice attorney for all ACO/CIN and Health System records and documents pertaining to the ACO/CIN's review of care provided to a Ms. Hada Bad-Outcome. Ms. Hada Bad-Outcome's family is suing the providers involved in her care for malpractice and negligent credentialing. All of her providers are ACO participants, including a PCP employed by Health System Physician Group, a cardiac surgeon who is a member of a participating independent physician group, a Health System hospital, and an affiliated skilled nursing facility.

Hypothetical

- Dr. Carealot tells you that Ms. Hada Bad-Outcome is a 65 year old CEO of a large, closely –held family company, who has 4 minor children and a stay-at-home husband, who experienced severe complications after her hypertension went undiagnosed by a Health System PCP. Ms. Bad-Outcome had seen the PCP because she was experiencing severe headaches, anxiety and nosebleeds. He believed she was stressed and dehydrated from travel, and prescribed zoloft and regular exercise. Two weeks later she experienced a heart attack, and after a CABG procedure performed by the independent surgeon, developed post-surgical complications, and had a stroke. During her subsequent rehabilitation at a SNF, a medication error caused her to have another stroke, and she is now in a vegetative state.

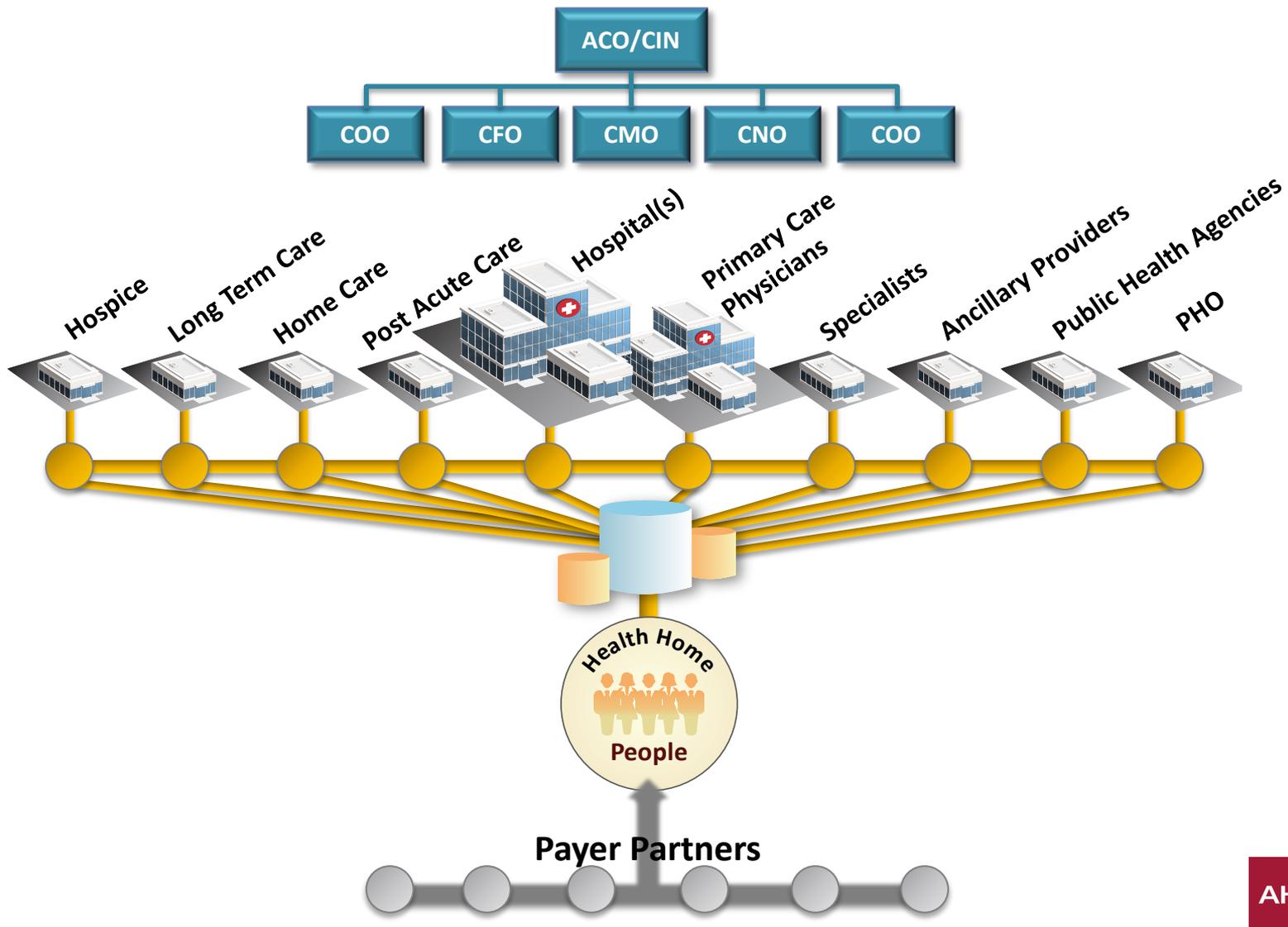
Hypothetical

- Dr. Carealot provides you copies of the applicable peer review policies for the health system, and the credentialing and quality review procedures of the ACO/CIN, and asks you to analyze whether the medical records and peer review materials reviewed and produced by the ACO/CIN are privileged from discovery. She does not want to release the records because after reviewing the case, the ACO/CIN's Quality and Credentials Committee determined that the PCP, who had a history of noncompliance with care protocols and poor quality scores, had not followed standard procedures for assessing the patient for hypertension. She also tells you that the cardiac surgeon had a history of similar post-surgical complications, and that based on this data, they decided he should be terminated from participation in the ACO/CIN.

Factors/Questions to be Assessed

- Are you seeking state and/or federal privilege protections?
- What is the scope of protected activities? -- peer review, quality improvement, RCAs, adverse events.
- What corporate entities, licensed facilities, licensed health care practitioners or others are protected under state/federal laws?
- What committees or organizational construct is required in order to assert the protections?
- Are your existing bylaws, rules, regs and policies properly structured to maximize available privilege protections?
- Can privileged information be shared across the ACO/CIN without waiving the privilege?
- How does applicable case law affect statutory interpretation?
- What impact, if any, of mandated adverse event reporting obligations?
 - Never events, hospital acquired infection
- Do state privilege protections apply to federal claims filed in federal court, i.e., antitrust, discrimination?

Complete view of an operational ACO/CIN



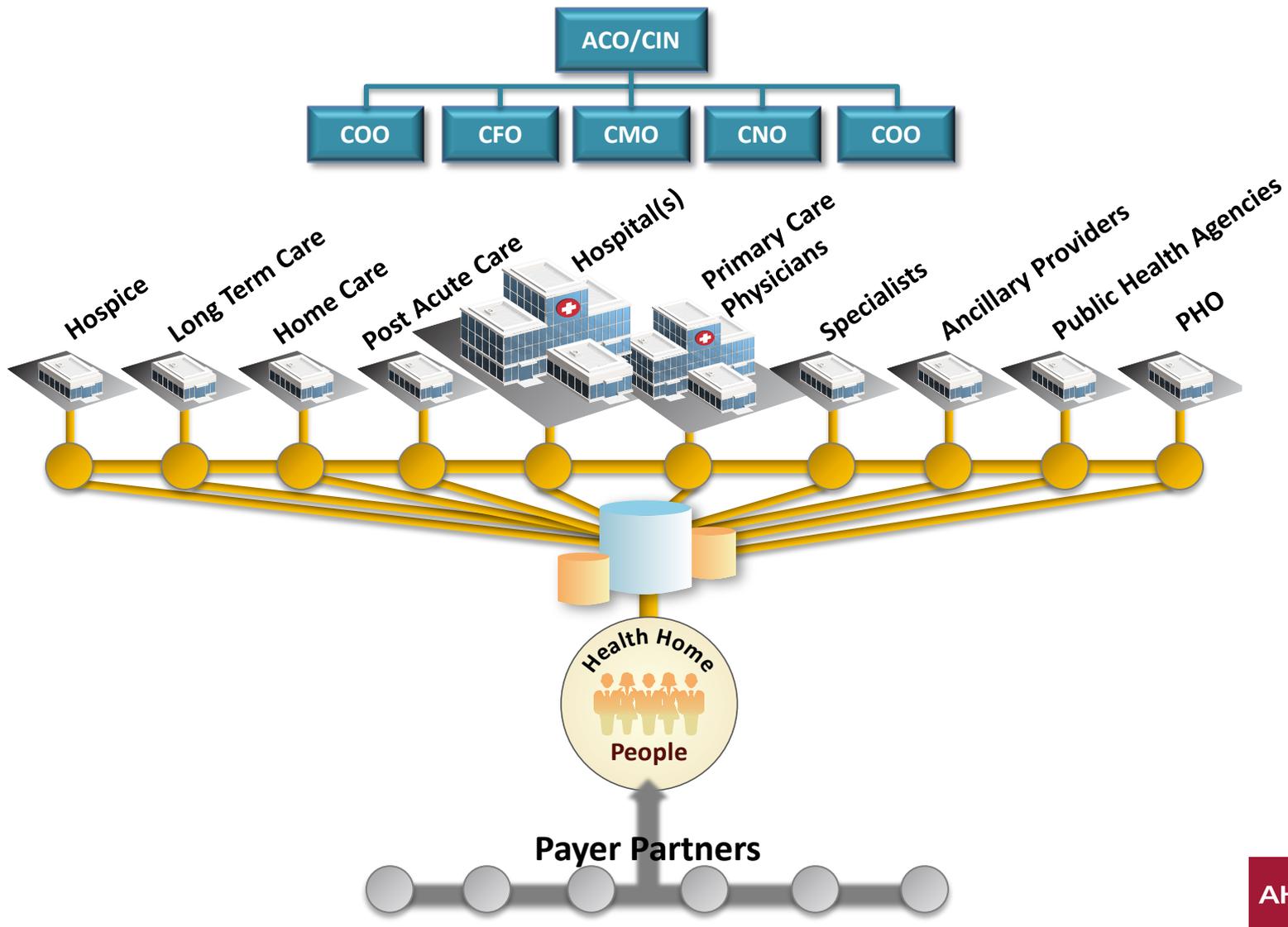
Summary and Analysis of Two Example State Statutes – North Carolina

- North Carolina
 - N.C. Gen. Stat. § 131E-95(B)
 - Proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not subject to discovery or introduction into evidence in any civil action against a hospital, surgicenter or provider of health services which results from matters which are subject to evaluation and review by the committee.
 - If information is otherwise available, it cannot be protected.
 - Information can be disclosed to a professional standards review organization, such as The Joint Commission, or to a PSO or its designated contractors.
 - Minimum necessary standard applies.

Summary and Analysis of Two Example State Statutes – North Carolina (Cont'd)

- Protections arguably apply to peer review conducted in a physician group, but no case law on this question.
- Appears that protections could be waived if information is disclosed outside of peer review process.
- One court held that protections do apply in federal proceedings.
- Not clear if information can be shared throughout system.

Complete view of an operational ACO/CIN



Summary and Analysis of Two Example State Statutes – North Carolina (Cont'd)

- Analysis
 - Does statute arguably protect requested records?
 - Medical records – No
 - Bylaws, policies and procedures – No
 - Peer review records and entities
 - Is ACO/CIN Quality and Credential Committee a “medical review committee”? – probably, BUT
 - Is ACO/CIN a hospital, surgicenter or provider of health services? - No
 - If physician group is conducting peer review through a medical review committee or through ACO/CIN Quality and Credential Committee are those activities protected? – Yes if treated as a “provider of health services” – case law interpretation?
 - What about SNF? – It is a provider of health services but does it have a medical review committee?
 - What about the PHO? – unless considered a provider of health services under state law then no.

Summary and Analysis of Two Example State Statutes – North Carolina (Cont'd)

- Can privileged information be shared across ACO/CIN?
 - Not clear – risk of waiver
 - Would want to make some sure that each “provider of health services” utilizes a “medical review committee” and that minimum necessary standard is followed
 - Make sure that bylaws, rules, regs and policies support your position
- Does North Carolina privilege apply in federal proceedings? – No

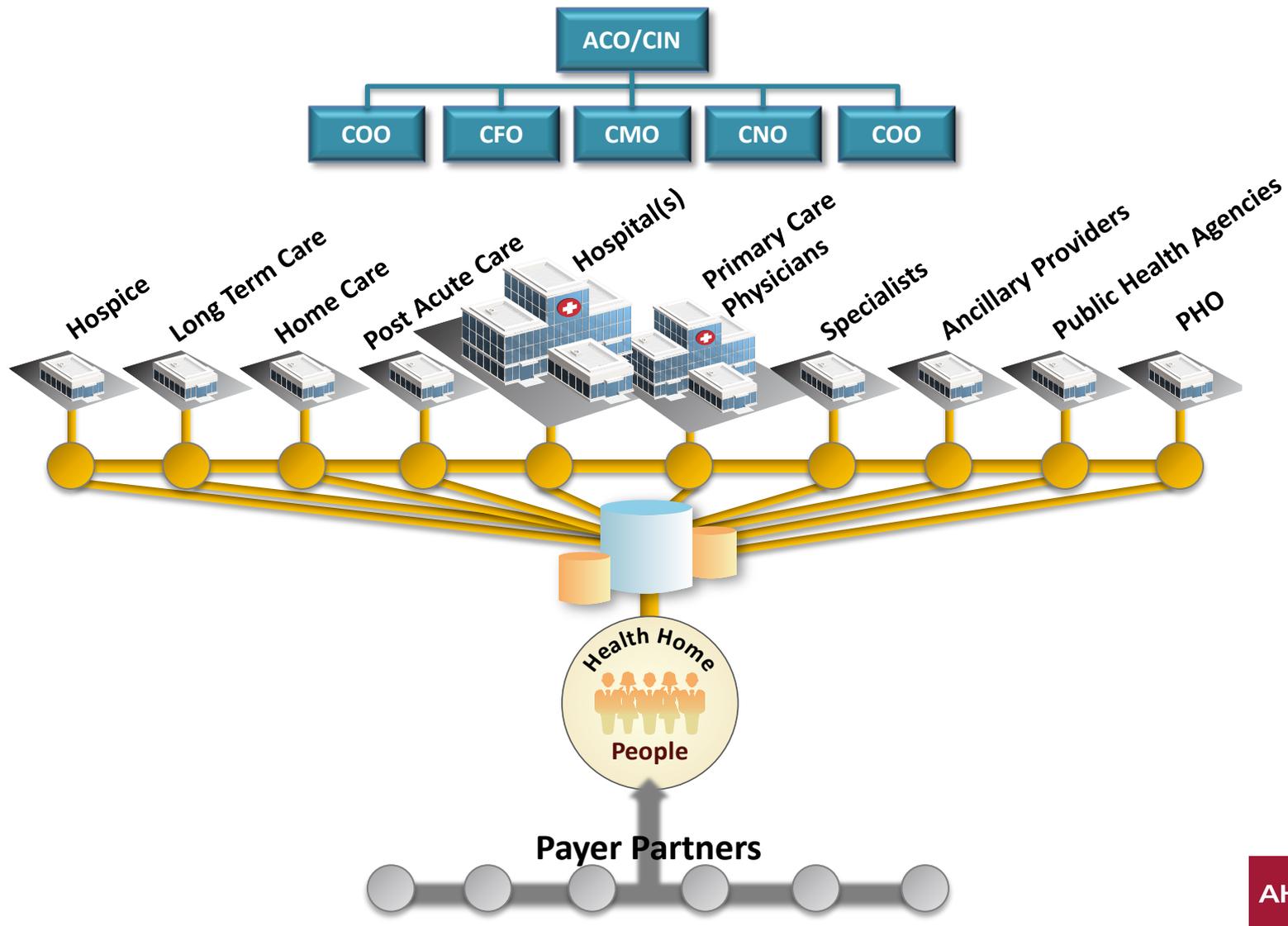
Summary and Analysis of Two Example State Statutes - Missouri

- Missouri
 - Missouri Revised Statutes, Chapter 537, Section 537.035
 - “Peer Review Committee” is a committee of health care professionals (physician, surgeon, dentist, podiatrist, pharmacist, psychologist, nurse, social worker, professional counselor or mental health professional) with the responsibility to evaluate, maintain, or monitor the quality and utilization of health care services or to exercise any combination of such responsibilities.

Summary and Analysis of Two Example State Statutes – Missouri (Cont'd)

- Entities covered include committees of:
 - Health care professional societies
 - Professional corporation of health care professionals
 - Health care professionals employed by or affiliated with a university
 - Licensed hospitals or other health care facilities, including long term care
 - Organizations formed pursuant to state or federal law to exercise responsibilities of a peer review committee
 - HMOs

Complete view of an operational ACO/CIN



Summary and Analysis of Two Example State Statutes – Missouri (Cont'd)

- What information is considered privileged?
 - Interviews, memorandums, proceedings, findings, deliberations, reports and minutes concerning the health care provided any patient are not subject to discovery and is not admissible into evidence in any judicial or administrative action for failure to provide appropriate care.
- Persons in attendance not required to disclose or testify.
- Information is discoverable if otherwise available.
- Can be required to testify as to personal knowledge.
- Protections do not apply in peer review litigation.

Summary and Analysis of Two Example State Statutes – Missouri (Cont'd)

- Analysis
 - Does statute arguably protect requested documents
 - Medical records – No
 - Bylaws policy and procedures – No
 - Peer review records, findings and reports, assuming information generated by an established “peer review committee”
 - Hospital – Yes
 - SNF – Yes
 - Physician group – Yes
 - ACO – Depends on corporate structure – is it one of the listed covered entities or simply a contracting vehicle? If it is an approved MSSP ACO it probably would qualify
 - PHO – Probably not
- Can information be shared across ACO/CIN?
 - Not clear

Summary and Analysis of Two Example State Statutes – Missouri (Cont'd)

- Can protections be waived?
 - No
- Can Missouri privilege protections be asserted in federal court?
 - No
- Is Physician authorization to share required?

Patient Safety and Quality Improvement Act of 2005

- Privileged Patient Safety Work Product
 - Any data, reports, records, memoranda, analyses (such as Root Cause Analyses (RCA)), or written or oral statements (or copies of any of this material) which could improve patient safety, health care quality, or health care outcomes;
- And that:
- Are assembled or developed by a provider for reporting to a PSO and are reported to a Patient Safety Organization (PSO), which includes information that is documented as within a patient safety evaluation system (PSES) for reporting to a PSO, and such documentation includes the **date the information entered the PSES**; or
 - Are developed by a PSO for the conduct of patient safety activities; or
 - Which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a PSES.

Patient Safety Act (Cont'd)

- What types of information can be considered for inclusion in the PSES for collection and reporting to the PSO if used to promote patient safety and quality?

 - Medical error or proactive risk assessments, root cause analysis
 - Risk Management – Not all activities will qualify such as claims management, but incident reports, investigation notes, interview notes, RCA notes, etc., tied to activities within the PSES can be protected
 - Outcome/Quality—may be practitioner specific
 - Peer review
 - Relevant portions of Committee minutes for activities included in the PSES relating to improving patient quality and reducing risks

Patient Safety Act

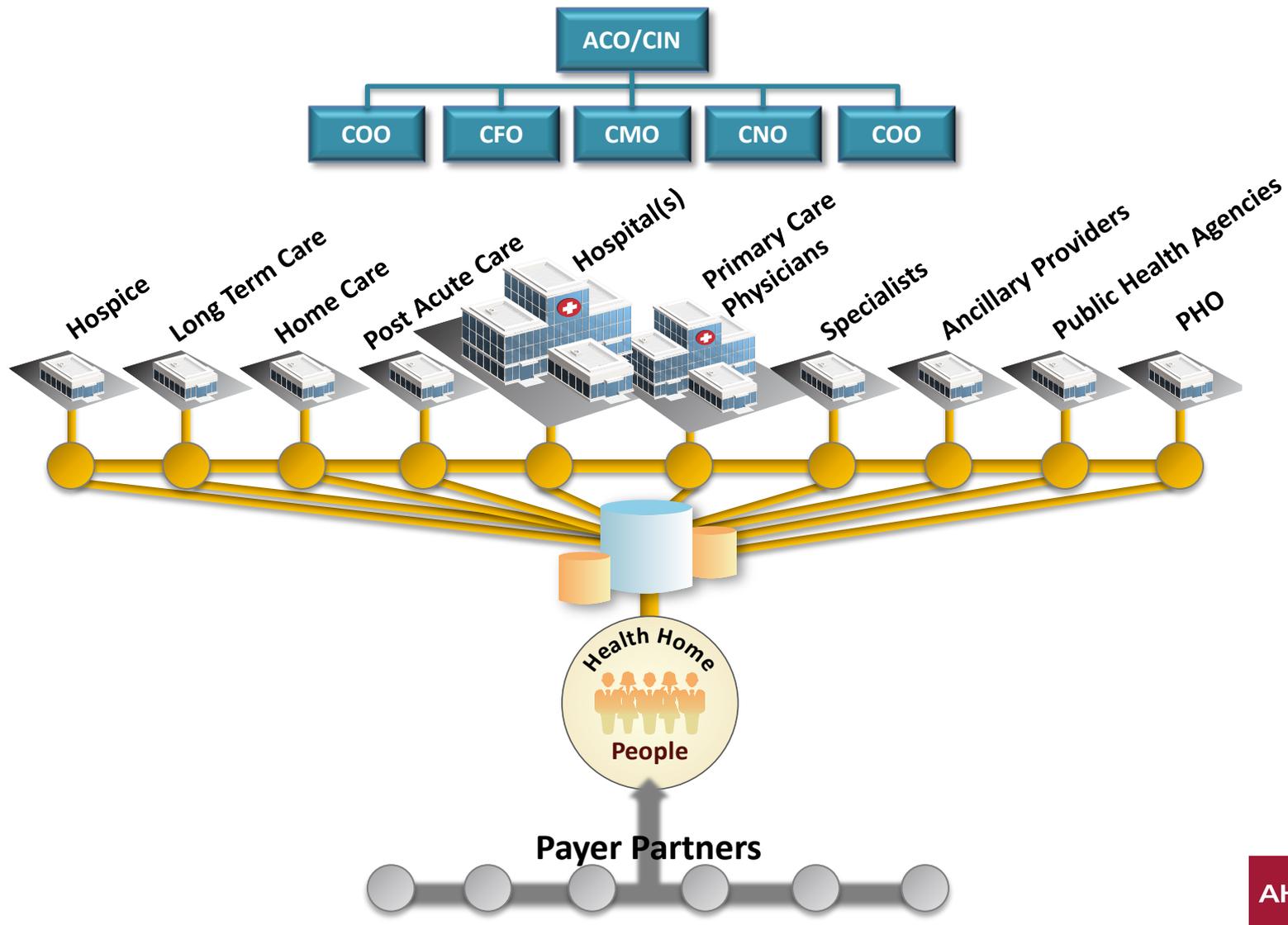
- What is not PSWP?
 - Patient's medical record, billing and discharge information, or any other original patient or provider information
 - Information that is collected, maintained, or developed separately, or exists separately, from a PSES. *Such separate information or a copy thereof reported to a PSO shall not by reason of its reporting be considered PSWP*
 - PSWP assembled or developed by a provider for reporting to a PSO but removed from a PSES is no longer considered PSWP if:
 - Information has not yet been reported to a PSO; and
 - Provider documents the act and date of removal of such information from the PSES
 - Reports that are the subject of mandatory state or federal reporting or which may be collected and maintained pursuant to state or federal laws be treated as PSWP

Patient Safety Act

- What entities are covered under the Act?

 - All entities or individuals licensed under state law to provide health care services or which the state otherwise permits to provide such services, i.e., hospitals, SNFs, physicians, physician groups, labs, pharmacies, home health agencies, etc.
 - A non-licensed corporate entity that owns, controls, manages or has veto authority over a licensed provider is considered a provider.

Complete view of an operational ACO/CIN



Patient Safety Act (Cont'd)

- Analysis
 - Do the protections apply to the requested documents
 - Medical records – No
 - PSES policies and procedures – No
 - Records that must be reported (or collected and maintained) by a state or federal law – No
 - Committee reports, analysis, etc.
 - Yes, if collected and identified in a system-wide PSES or in the PSES of a provider which has collected the PSWP for reporting to a PSO and is reported or if it constitutes deliberation or analysis
 - Are all ACO/CIN entities covered
 - All licensed providers facilities and the physician are covered if participating in a PSO
 - ACO/CIN is not covered unless it is a licensed provider and/or it owns, controls or manages licensed providers or has veto authority over decision making
 - If not, patient safety and peer review activities must be conducted in a licensed facility.

Patient Safety Act (Cont'd)

- What about the PHO? – No, it is not a licensed provider
- Can PSWP be shared?
 - Identifiable PSWP can be shared by and between affiliated providers
 - Physicians and other licensed professionals need to authorize, in writing, the sharing of identifiable PSWP
- Can protections be waived?
 - There are disclosure exceptions but privilege protections are never waivable
- Do protections apply in all state and federal proceedings?
 - Yes

Comparison of North Carolina and Missouri Statutes to PSA

- Patient Safety Act
 - The confidentiality and privilege protections afforded under the PSA generally apply to reports, minutes, analyses, data, discussions, recommendations, etc., that relate to patient safety and quality if generated or managed, or analyzed within the PSES and collected for reporting to a PSO.
 - The scope of what patient safety activities can be protected, generally speaking, is broader than the North Carolina and Missouri.
 - The scope of what entities can seek protection is generally greater.

Comparison of North Carolina and Missouri Statutes to PSA

- The protections apply in both state and, for the first time, federal proceedings.
- The protections can never be waived.
- If the protections are greater than those offered under state law the PSA pre-empts state law.
- Non-provider corporate parent organization involved in patient safety activities as well as owned, controlled or managed provider affiliates can be included in a system-wide PSES and be protected.
- PSWP can be shared among affiliated providers.
- PSWP is not admissible into evidence nor is it subject to discovery.
- Key to these protections is the design of the provider's and PSO's patient safety evaluation system ("PSES").

Title © 2016 is published by the American Health Lawyers Association. All rights reserved. No part of this publication may be reproduced in any form except by prior written permission from the publisher. Printed in the United States of America.

Any views or advice offered in this publication are those of its authors and should not be construed as the position of the American Health Lawyers Association.

“This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought”— from a declaration of the American Bar Association.