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## 6 Best Practices for Designing and Implementing Patient Safety Evaluation System (PSES) Policies in Order to Maximize Privilege Protections Under the Patient Safety Act

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The federal [Patient Safety and Quality Improvement Act of 2005](#) (PSQIA) established a voluntary reporting system for licensed health care facilities and professionals designed to “enhance the data available to assess and resolve patient safety and health care quality issues” in order to improve patient care outcomes and reduce risk. Under the PSQIA, providers either form or participate in a Patient Safety Organization (PSO) certified by the Agency for Healthcare Research and Quality (AHRQ).

To further encourage health care providers to participate in PSOs, the PSQIA provides strong privilege and confidentiality protections for patient safety information, called patient safety work product (PSWP), which is not subject to discovery or admissibility into evidence in all state and federal proceedings and investigations.

Identifying what is privileged PSWP is one of the primary purposes of a PSES. Consider the following as among best practices for developing strong patient safety policies.

### Conduct an Inventory of Internal Patient Safety Activities

A PSES policy is important for internal training and education because it describes the process utilized for collecting, establishing, sharing and reporting PSWP. It also is a critical document if an entity ends up arguing that certain materials are PSWP and therefore privileged in the event of a discovery dispute in a lawsuit. The court will not simply accept the word of the hospital or other provider that information qualifies as privileged PSWP.

As a first step for creating a PSES policy, entities should conduct an inventory of all performance improvement, quality assurance, peer review and other patient safety activities. As part of this inventory, entities also should identify the committees, departments, individuals and categories of professionals engaged in these activities within the organization. This will help determine the scope of activities to include within the PSES and therefore claim as privileged PSWP.

### Identify Privileged Activities and Information as Specifically as Possible

Following an inventory, details of these activities and the information to be protected should be reflected within the PSES. If an entity finds itself seeking to claim privilege protections over an incident report, committee minutes or other internal analysis, it will be able to cite the specific reference within the PSES as evidence that it intended to treat this information as privileged.

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## Employ a ‘Big Tent’ to Minimize Policy Gaps

Make sure a cross-section of individuals is involved in the creation of a PSES policy. Representatives from quality, risk management, in-house/outside counsel and medical staff leaders should be included. It is important to capture multiple perspectives and opinions and all aspects of the process and relevant activities. Relying on just one group or function may create a policy with gaps that can cause problems in the future.

## Carefully Describe a Patient Safety Work Product Pathway

Policy developers should make sure that the PSES policy distinguishes which forms of PSWP (i.e., information, incident reports, root cause analysis (RCAs), etc.) are being reported to the PSO (or scanned and downloaded and reported) and what information is being treated as deliberations or analysis.

Note that information which is being treated as deliberations or analysis cannot be “dropped out” and used for other purposes. PSWP can be shared internally for any legitimate purpose and externally if the entity meets one or more of the PSQIA disclosure exceptions. These exceptions include disclosing PSWP to consultants, attorneys, independent contractors that are assisting the hospital in patient safety activities and other disclosures permitted under the PSQIA.

## Don’t Forget a ‘Catch All’ Category and Annual Update

Entities also should include a “catch all” provision to account for other privileged patient safety activities not specifically identified in a PSES policy. Keep in mind that PSEP policies should be updated annually to reflect current practices and changes on what constitutes PSWP.

## Tailor Templates to the Situation

A PSES policy template received from a PSO or other source is an invaluable tool. But it’s not one-size-fits-all. Customize it for each participating hospital and provider.

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## CONTACT

For more substantive information regarding the Patient Safety Act legal developments, best practices and steps for maximizing privilege protections and related recommendations go to [www.katten.com/Michael-Callahan#Presentations](http://www.katten.com/Michael-Callahan#Presentations) and [www.katten.com/Michael-Callahan#Publications](http://www.katten.com/Michael-Callahan#Publications).



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