

Trial Court Rules that Hospital's Safety Event Minutes Were Privileged Under PSQIA and State Law

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Plaintiff in this case filed a lawsuit against a Wisconsin hospital resulting from an injury on hospital grounds. During discovery, plaintiff requested “all documents, communication or correspondence as it relates to [Hospital’s] ‘Serious Event Review Team(s)’ (SERT) which were generated over a specified time period. Plaintiff filed a Motion to Compel after the Hospital refused to produce any materials arguing that they were protected from discovery under the Patient Safety and Quality Improvement Act of 2005 (PSQIA) and Wisconsin Statute Section 146.38. The document request eventually was narrowed down to the minutes of two SERT meeting minutes.

Through affidavits and in the Hospital’s memorandum in support of its Motion for a Protective Order, it established the following:

1. the minutes were entered into the Hospital’s Event Reporting System (ERS) and were discussed at the SERT meetings;
2. SERT and ERS are both components of the Hospital’s patient safety evaluation system (PSES) policy, which describes the process of collecting, utilizing, sharing and reporting patient safety work product (PSWP) or treating PSWP as deliberations or analyses.;
3. it was the Hospital’s routine practice during the relevant time frame that event reports were “prepared by and submitted to SERT for review and were reported to [the Hospital’s]...Patient Safety Organization (PSO);”
4. the date on which the minutes were entered into the PSES and reported to the PSO; and
5. the minutes related to the medical care provided to the plaintiff.

After quoting from the definition of privileged PSWP from the PSQIA, the court determined that the minutes were “assembled or developed by a provider for the purpose of reporting to a PSO and are actually provided” as demonstrated through the affidavits. The court further held that the minutes are privileged because they “identify the discussions and analyses conducted by SERT . . . meetings”. Having met the definition of PSWP under both the reporting and deliberations or analysis pathways, the minutes were therefore privileged from discovery under the PSQIA.

Plaintiff’s argument that the minutes were created separately from the Hospital’s PSES was rejected because no evidence to the contrary was ever presented.

Importantly, the trial court also ruled that the minutes were privileged under Wisconsin Statute Sections 146.38(1m) and 146.38(2m) which prohibits the disclosure of “an incident or occurrence report” in a civil

proceeding against a medical provider. Because the minutes in dispute related to the plaintiff's medical care they were not discoverable under this state statute.

Lessons Learned and Recommendations

1. This was a case of first impression, at least before this particular judge. Given the predisposition of most judges to deny privilege arguments, it was particularly important to educate the court regarding the PSQIA.
2. The decision emphasizes the importance of introducing affidavits, relevant PSES policies and legal memorandums citing in support of either a Motion to Quash a discovery request or in a Motion for a Protective Order, which was filed in this case.
3. Supporting affidavits should specifically describe the process by which the PSWP:
 - a. was collected in the PSES and when it was collected;
 - b. how it was shared, reviewed and utilized to improve patient care and/or reduce patient risk;
 - c. if utilizing the reporting pathway, that the PSWP was collected for the purpose of reporting to a PSO and when it was reported;
 - d. if relying on the deliberations or analysis pathway, establish how and when the PSWP was discussed within the context of the PSES; and
 - e. the affidavit should specifically cite to the relevant provisions within the PSES to support compliance with the PSQIA.
4. The PSES policy should identify which PSWP is being actually reported to the PSO and which are being treated as deliberations or analysis.
5. As a best practice, the PSES policy should identify the names of reports, analyses, committees, minutes and other work product utilized or created through identified quality assurance, quality improvement, peer review and other patient safety activities.
6. In this case, the court ordered that the minutes be turned over for an in camera inspection. There is no specific disclosure exception under the PSQIA to allow for such a court inspection. As a practical matter, a refusal to such a review will likely lead to an adverse ruling. Here, as is true in other cases, the Hospital utilized the permissible disclosure exception under Section 3.206(b)(3) of the Final Rule which allows a provider to disclose its own PSWP. The minutes were disclosed along with a letter to the court citing to this provision noting that the disclosure was limited to establishing compliance with the PSQIA and that the privilege protections remained in effect.
7. The privilege protections under the PSQIA and state peer review statutes are NOT mutually exclusive. Both can apply depending on the documents in question and if a provider can demonstrate compliance with both statutes.
8. The decision in this case is at least the second reported court ruling to apply both the reporting pathway and the deliberations or analysis pathway as a basis for uphold the PSQIA privilege protections.

Author's Note

Because the case is still active, the hospital requested that the trial court's decision not be attached to this Advisory. Michael Callahan, Senior Counsel at Katten who serves as outside counsel on PSQIA matters for the health system, assisted the Hospital's defense counsel in preparing the supporting affidavits, Motion for Protective Order and memorandum in support of the Motion.

Michael will present a 2-part webinar on Wednesday, October 19 and Wednesday, October 26 that will provide legal updates on this and other PSQIA decisions, identification of best practices on maximizing PSQIA and state privilege protections, and litigation lessons learned. More details to follow at a later date.

CONTACTS

For more substantive information regarding PSQIA legal developments, best practices and steps for maximizing privilege protections and related recommendations go to www.katten.com/Michael-Callahan#Presentations and www.katten.com/Michael-Callahan#Publications.



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