

New State Appellate Court Interpretation of the Patient Safety Act Privilege Protections

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Katten has prepared the following advisory on the new appellate court decision in Pennsylvania interpreting the scope of privilege protections under the Patient Safety Act and Pennsylvania's Peer Review Protection Act (PRPA). This is another example of how state trial and appellate courts tend to strictly interpret, or misinterpret state and federal privilege cases in favor of patient's bringing claims against hospitals and physicians in medical malpractice lawsuits. This advisory only focuses on the trial and appellate court's decisions with respect to the Patient Safety Act. A copy of the Court's decision, *Ungurian, S. v. Beyzman, A., M.D.*, is available [here](#).

Background

The plaintiff is a mother who sued the hospital and multiple physicians and other corporate entities alleging negligence during a cystoscopy procedure to remove kidney stones which led to the total and permanent incapacity of her son. During discovery, the plaintiff served requests for documents and interrogatories on all of the defendants. The hospital asserted that five of the documents requested were privileged from discovery under the Patient Safety Act and/or the PRPA. The disputed documents were:

1. an event report relating to Surgery, Treatment, Test, Invasive Procedure (the Burry Report);
2. a Serious Safety Event Rating Meeting Summary;
3. meeting minutes from the Patient Safety Committee;
4. a Root Cause Analysis Report; and
5. the Hospital's Quality Improvement Staff Peer Review Report, prepared by an outside physician.

In response to the plaintiff's Motion to Strike Objections and Compel Responses, the hospital's Response included a single affidavit prepared by the Director of Patient Safety Services. The affidavit stated that the Burry Report was "completed in compliance with Hospital's Event Reporting Policy" and the RCA was maintained "within its [Event Reporting Policy] for reporting to CHS PSO, LLC, and that it electronically submitted the Root Cause Analysis Report to CHS PSO, LLC." The hospital apparently did not assert the Patient Safety Act privilege protections regarding the other three documents.

There were multiple hearings and trial court orders regarding the ongoing discovery dispute, but ultimately the court ruled that neither the Patient Safety Act nor the PRPA protected any of the documents and, therefore, ordered the hospitals to produce them. The hospital filed an appeal from the various orders, including that they produce the credentialing files of all practitioners who provided care to the plaintiff's son as well as any National Practitioner Data Bank Query Responses. Although appeals in discovery disputes are not typically granted because they do not dispose of the litigation, the Appellate Court granted the appeal because it has jurisdiction when such disputes involve assertion of a privilege.

Appellate Court's Decision Regarding the Patient Safety Act

The Burry Report

The hospital's affidavit was fairly comprehensive in terms of its relationship with the Patient Safety Organization (PSO), its development of a Patient Safety Evaluation System (PSES), which was facilitated by its use of the event reporting system for the purpose of improving patient safety which can result in the preparation of documents such as the Burry Report. The trial court, however, determined that it did not qualify as Patient Safety Work Product (PSWP) because the affidavit did not state that the Report was prepared for the purpose of reporting to a PSO. The court cited language in the affidavit that the ERS system "is used to manage information that MAY be reported to the PSO." Therefore, the trial court stated that it "could have been developed for a purpose other than reporting to a PSO and still be managed within the ERS."

The Appellate Court agreed with the trial court's analysis because the hospital had failed to assert in the affidavit that it prepared the Burry Report for the purpose of reporting to a PSO and in fact reported it to the PSO. It is very important to note that in the hospital's appellate brief, it stated the Burry Report was submitted to the PSO, but because no such assertion was included in the affidavit and because the record on appeal did not include any evidence that the hospital had indeed made a report, the Appellate Court declined to accept this belated claim.

The RCA

In ruling that the root cause analysis (RCA) did not qualify as PSWP, the trial court found that the affidavit did not state that it was "also developed for the purpose of reporting to the PSO" In addition, it noted the hospital had admitted that the "information contained in the RCA "is not solely in the PSES." Therefore, because the RCA existed outside of the PSES, it was not privileged under the Patient Safety Act. The Appellate Court agreed with this analysis.

Analysis

"Information contained in the RCA is not solely in the PSES."

This statement by the Appellate Court as a basis for holding that the RCA is not PSWP, taken to its extreme, would mean that no information which is collected and maintained within a provider's PSES would ever qualify as PSWP if the information appears or is used outside the PSES. Under the Patient Safety Act, providers are specifically expected to use PSWP for all internal purposes which are not limited to patient safety activities identified in the PSES.

Using an RCA as an example, these reports include facts from the medical record and other sources which are not necessarily privileged. Any discussion and analyses that take place in the PSES will include facts and the work product from these PSES identified patient safety activities are shared with committees, work force members and others in their collective effort to improve patient safety and reduce risk.

In a number of reported cases, plaintiffs have argued that because a claimed PSWP document, such as an incident report, contains facts which are not privileged, the report itself cannot be privileged. Courts have rejected this argument consistently recognizing that any protected analysis will always include a discussion of the underlying facts on which the incident report, RCA, etc., is based. (See *Daley v. Ingalls Memorial Hospital*).

"Burry Report collected in the ERS did not qualify as PSWP because the affidavit said that such reports 'may be reported to the PSO' and there was nothing in the record establishing that it was reported."

What is not clear in the decision is whether the hospital submits only some event reporting system (ERS) reports to the PSO and those which it does not are considered privileged discussion or analyses. There is no discussion about the D or A pathway for creating PSWP. As you may know, the federal district court in *Rumsey v. The Guthrie Clinic*, which also involved a medical malpractice case in Pennsylvania, specifically identified the use of D or A as a means of creating PSWP.

It is easy to conclude that both the trial and Appellate Court decisions are result-oriented, looking for technical defects and skewed interpretations in refusing to apply any of the privilege and both were protections under either the Patient Safely Act or the PRPA. This is simply the reality which hospitals and other providers will constantly face particularly in state court medical malpractice actions. That said, the decision in *Ungurian* does provide some valuable lessons learned which I have pointed out in the past and remain true today.

Lessons Learned and Recommendations

1. The heavy burden of establishing that documents and other information are privileged under state laws or the Patient Safety Act is on the provider.
2. Courts do not like privilege statutes and will look for various ways to rule against the assertion of a privilege.
3. Most courts have no knowledge or experience in working with or interpreting the Patient Safety Act which makes it imperative that providers seek to effectively educate the court about the Act with citations to favorable cases, including but not limited to *Daley v. Ingalls Memorial Hospital* and *Rumsey v. The Guthrie Clinic*.
4. The use of detailed affidavits also is essential to establish compliance with all of the required elements of the Act including the so-called missing assertions as determined by the trial and Appellate Court in this case.
5. You make your record at the trial level and cannot supplement on appeal.
6. In addition to a fully detailed affidavit you should consider including the PSES policy which hopefully includes provisions which support the privilege claim as well as the documents or information in dispute.
7. Consider adding screenshots of either blank forms, reports, etc., of what you treat as PSWP and/or provide the documents in dispute, but with the privileged information redacted.
8. Consider submitting the documents for an in camera inspection to the court if this might work in your favor. This obviously is a judgment call that you make with legal counsel. If you choose this route, make sure you obtain a protective order and that you use the written authorization permissible disclosure exception under Final Rule Section 3.206(b)(3).
9. Use defense attorneys who are well acquainted with your PSES and related policies, the Patient Safety Act and how to assert the privilege and/or with outside legal experts who can assist and collaborate with the provider's defense attorney.
10. Your PSES policy should be reviewed and updated to capture all of the patient safety activities, reports, analyses, etc., for which you want to assert the privilege protections under the Patient Safety Act.
11. The PSES policy should specifically delineate what information is being reported to the PSO and what information is being treated as deliberations or analysis.
12. If the provider is collecting all of certain reports within its PSES but only reporting some of them, the unreported ones should be identified as D or A if you intend to keep them privileged as well. Although there is no time limit as to when a document must be reported, if that is your intent, not reporting them within a reasonable time period will be used against you. If holding on to a report for a particular purpose for a longer period of time than usual, you should document the reasons for doing so. Keep in mind that once collected and maintained in the PSES and not dropped out, the information remains privileged PSWP. It is not clear whether the hospital made this argument or not.

CONTACT

For more information on policy review, state and PSA privilege protections, or defending against state, federal or legal PSWP demands, please contact your Katten [Health Care](#) attorney or the following:



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