

How PSOs Can Help Protect Peer Review

Earlier this summer, an Illinois appellate court determined that information assembled or developed for the purpose of being reported to a patient safety organization (PSO) and that is maintained in a distinct patient safety evaluation system (PSES) is not discoverable “in connection with a federal, state, or local civil, criminal, or administrative proceeding” (42 U.S.C. § 299b-22(a)). The court upheld a lower court’s opinion that patient safety work product (PSWP) is privileged under the Patient Safety and Quality Improvement Act (PSQIA) of 2005 and affirmed the legal protections derived from creating a PSES and reporting to a federally listed PSO.

While this is good news for the advancement of patient safety, healthcare facilities must carefully follow the provisions of PSQIA to take advantage of the privileged status for PSWP maintained in a PSES. If the PSES is not developed properly, then the information kept within it may not be privileged. (Though PSQIA allows providers much flexibility in designing the scope of their PSES, clear and thorough documentation of the PSES and all PSWP is a best practice.)

Challenges to legal privileges provided by state peer review statutes are becoming increasingly frequent and successful—and state court decisions illustrate that privileges are strictly construed. Court opinions highlight such potential vulnerability. A New York court, for example, held that statements made by a physician during a peer review hearing—which was not conducted as part of a PSES—were subject to disclosure in a medical negligence case. The court found that an exception in the state’s peer review law allowed statements by a defendant during such meetings to be discoverable.

A New Jersey appellate court for the first time reviewed the privilege protections afforded by a state Patient Safety Act, which is similar in intent to the federal PSQIA. The court concluded that absolute protection from discovery is provided to information that is handled in accordance with the state’s Patient Safety Act. The case offers a lesson for facilities seeking protection under the federal PSQIA, with regard to the structuring of patient safety investigative processes. The New Jersey court held that documents created exclusively under the New Jersey Patient Safety Act (PSA), and not for some other statutory or licensure purpose, are absolutely privileged from discovery. “The PSA’s confidentiality provisions insulate such documents from outside access,” the court wrote in its opinion. “They do so regardless of a plaintiff’s asserted need for disclosure and regardless of whether the documents contain factual information in addition to subjective opinions.” However, the court also made it clear that the absolute privilege from discovery applies only if a healthcare facility follows “specified procedures of the PSA and the related regulations” in generating the documents—otherwise other legal principles govern, and depending on the type of documents involved, a privilege may not apply.

The concern in such situations is, of course, that patient safety improvement efforts would be hindered by reluctance on the part of staff members to participate in peer review committees for fear that frank discussion and investigative documents could be later revealed in a malpractice case.

The bottom line is that peer review laws, along with the privilege protection they may offer, vary by state. However, the federal protection offered by PSQIA allows organizations that create and submit event reports and other patient safety information through a PSES to a PSO to privilege this documentation from discovery, and the PSQIA preempts state law. Therefore, ECRI Institute recommends that organization leadership not only review state patient safety and peer review protection laws and ensure that all discussions and documentation are in compliance with state laws, but also that organizations strongly consider participation in a PSO for the benefits it offers in advancing patient safety.



How Can We Help You?

Whether you have questions about the final rule or want to learn more about ECRI Institute PSO and/or support for other PSOs, we would be happy to hear from you. Please contact ECRI Institute at psa@ecri.org or call (610) 825-6000, ext. 5558.