An Uncertain Privilege Is No Privilege At All: How Courts And Litigants Misunderstand The Federal Patient Safety Work Product Privilege Under The Patient Safety And Quality Improvement Act

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Attorneys Peter Faben and Tasha Nankerville recently authored an article published in the January issue of Pennsylvania Bar Association's Quarterly Magazine regarding the Patient Safety And Quality Improvement Act ("PSQIA" or "the Act"). The purpose of this article is to familiarize readers with the Act, analyze case law applying the Act, and provide tips on implementing patient safety evaluation systems consistent with the statute to best employ the Act's protections.

Here are some key takeaways from the article:

• The Patient Safety and Quality Improvement Act ("PSQIA") was enacted by the federal government in 2005 to give healthcare providers a safe arena in which to honestly assess patient care and address medical errors without fear of those evaluations being used in lawsuits against them.

• The PSQIA created a new entity, the patient safety organization ("PSO"), and provides confidentiality and privilege protections for certain data and evaluations that are developed in furtherance of the goal of improving patient safety.

• To do this, the Act created a category of protected information called "patient safety work product," which is defined as (1) documents that a hospital or provider reported to a PSO, (2) documents developed by a PSO, and (3) documents that constitute the deliberations or analysis of a healthcare provider's patient safety evaluation system, which collects, manages, or analyzes information for reporting to or by a PSO.

• The PSQIA excludes include a patient's medical record, billing, or discharge information, or any other original patient or provider record from the class of protected information. In that way, the Act appropriately balanced the need to provide patients' access to information regarding their care, while protecting certain information healthcare providers use to improve patient care.

• Despite the robust protections of the PSQIA, Pennsylvania courts have failed to apply the confidentiality and privilege provisions of the PSQIA as drafted, undercutting the protections the Act was designed to provide. Pennsylvania courts have done this by limiting the definition of patient safety work product to *only* documents that a hospital or provider report to a PSO, which fails to give effect to the full language of the statute. These decisions from Pennsylvania contrast with other opinions that do apply the definition of patient work safety product as drafted in the PSQIA, which are reviewed in the article.

• Practical tools for healthcare providers and their counsel:

- Contract with a certified PSO

- Develop and implement written policies to outline the patient safety evaluation system

- Consider developing a functional reporting agreement with PSOs

- Ensure employees are educated about the patient safety evaluation system

- Carefully structure the patient safety evaluation system to ensure reporting under the Pennsylvania MCARE Act does not undermine protections

- Get information and supporting documentation regarding the patient safety evaluation system to counsel early in the discovery process

- Pay close attention to the language in affidavits explaining the patient safety evaluation system in support of protections

If you have any questions regarding the PSQIA or how to implement patient safety evaluation systems in accordance with the statute to best utilize the Act's protections, please reach out to partner Peter Faben, attorney Tasha Nankerville or any member of the Barley Snyder Health Care Industry Group. To view the full PBA article, please click here.

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