Missed Opportunity by The Supreme Court to Address the Erosion of Hospital Self-Review Privileges

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In Tibbs v. Bunnell1, the U.S. Supreme Court recently denied a hospital's petition2 for certiorari to review the scope of the ***patient safety work product privilege***. The hospital appealed from a Kentucky Supreme Court decision3 holding that the privilege did not apply to a patient incident report submitted by the hospital to its patient safety organization ("**PSO**"). The hospital's petition was supported by the Joint Commission, the American Hospital Association and other health care advocacy groups4. However, the U.S. Solicitor General opposed the petition, arguing that regulatory guidance by the U.S. Department of Health and Human Services ("**DHHS** ") adequately addressed the question presented, and that the privilege did not apply5.

The U.S. Supreme Court's denial of certiorari leaves the question unresolved, and also leaves intact the trend among federal and state courts to restrict hospital self-review privileges, including patient safety and peer review privileges.

The Tibbs case involved a single incident report prepared by a nurse immediately following a patient's spine surgery. The report described an intraoperative complication that occurred during the surgery and was entered directly into the hospital's internet-based ***patient safety evaluation system***. After forty-five days, the incident report was automatically, and voluntarily, transmitted to the hospital's PSO. In the medical malpractice case that followed, a dispute arose concerning whether the incident report was privileged, and not discoverable under the federal Patient Safety and Quality Improvement Act6 ("**PSQIA**"). The Kentucky Supreme Court held that the incident report did not fall within patient safety work product privilege and was discoverable. The Court concluded that because the incident report included information "**normally contained in**" reports maintained for state regulatory agencies, it could not be rendered privileged nor undiscoverable merely because it was entered into the hospital's patient safety evaluation system, and later submitted to the PSO. The Court remanded the case to the trial court for "**in camera**" review to determine whether the "**intermingled**" information could be separated to protect any privileged information.

The U.S. Solicitor General's petition agreed with the Kentucky Supreme Court, citing DHHS guidance as supporting the decision. First, it was noted that DHHS has urged hospitals to utilize separate reporting systems for PSO purposes versus external reporting obligations, such as regulatory compliance. Contrary to this guidance, the Kentucky hospital used its patient safety evaluation system exclusively for all incident reports. The U.S. Solicitor General further noted that while entering information into the patient safety evaluation system is a necessary condition for the privilege, it is not a guarantee of privilege and does not protect information necessary for complying with regulatory agencies. The U.S. Solicitor criticized the hospital's practice of using its patient safety evaluation

system exclusively for all incident reports as potentially thwarting regulatory compliance efforts, contrary to the intent of the PSQIA.

On the other hand, the Joint Commission took a strong stance against the Kentucky Supreme Court's decision, and in favor of a "**robust federal privilege**" for patient safety work product. The Joint Commission, which advocated for Congressional enactment of the PSQIA, explained that passage of this federal law was necessary to close the "**gap**" in privilege protection after enactment of the federal Health Care Quality Improvement Act7 ("**HCQIA**"). The HCQIA provides limited civil immunity to healthcare providers engaged in the peer review process, but no "**privilege**" for peer review reports or work product. Rather, hospitals generally must rely upon state law to protect the confidentiality of peer review reports, although even these protections have been eroded. In Pennsylvania, for example, courts generally limit the peer review privilege under the state's Peer Review Protection Act8 to documents prepared as part of a formal peer review process, and not to incident reports or documents prepared for purposes of risk management or regulatory compliance.

The federal PSQIA expressly preempts state law in protecting PSO reports from discovery in any civil, criminal or administrative proceedings against a hospital, regardless of the level of peer review protection under state law. The Joint Commission noted that the patient safety work product privilege extends broadly to "**any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements**" submitted by the hospital to the PSO. The Joint Commission explained that information contained in PSO reports will almost always include information "**normally contained in**" documents subject to state reporting, and that to require disclosure of this information would essentially nullify the privilege itself. Finally, the Joint Commission urged that the patient safety work product privilege must be preserved, since it has been successful in encouraging open reporting of patient safety incidents and "**self-evaluations**" by hospitals to prevent medical errors and injuries.

The U.S. Supreme Court's denial of certiorari to review the patient safety work product privilege leaves hospitals with greater uncertainty concerning the scope and application of self-review privileges. It also leaves hospitals facing a judicial trend that disfavors application of these privileges, including the peer review privilege, particularly when regulatory agencies are involved. Recently, a U.S. District Court refused to recognize a hospital's assertion of the peer review privilege to protect the confidentiality of documents that the federal government had included in a "**civil investigative demand**" for potential violations of the False Claims Act9. In Pennsylvania, a plaintiff was successful in obtaining documents that a hospital had provided to the Pennsylvania Department of Health ("**DOH**") during an investigation, although the hospital had asserted peer review protection. The Pennsylvania Superior Court held that the hospital's communications to the DOH were not protected, because the hospital's cooperation with the investigation did not constitute self-review for peer review purposes10.

Given the narrow application of peer review and other self-review privileges, **hospitals should take precautions to ensure that confidential reports and investigations are undertaken with preservation of these privileges in mind.** Reliance upon patient safety or peer review privileges may be misguided unless reports are clearly designated for such purposes and prepared in strict conformance with applicable legal requirements. While these privileges generally will not protect documents created or maintained in the ordinary course of business or for regulatory compliance, they can and should protect reports prepared for

self-review purposes if handled appropriately. These privileges should not be waived because clear boundaries are not established between such reports and the hospital's normal recordkeeping and reporting. **Alternatively, some investigations (depending upon the nature of the review) should be conducted under the attorney-client privilege, which may offer stronger confidentiality protections when a hospital conducts a self-review under the direction of counsel in anticipation of litigation**. Therefore, it is recommended that the hospital seek the advice of counsel at the early stages of its self-review or investigation in order to fully protect any privileges that may be available.

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1 Tibbs v. Bunnell, 136 S. Ct. 2504 (June 27, 2016).
2 Tibbs v. Estate of Luvetta Goff, 2015 WL 1250865 (Petition for Writ of Certiorari, March 18, 2015).
3 Tibbs v. Bunnell, 448 S.W. 3d 796 (S. Ct. Ky 2014).
4 See, e.g., Tibbs v. Bunnell, 2015 WL 1848097 (Brief for Amicus Curiae the Joint Commission in Support of Petitioners, April 20, 2015).
5 Tibbs v. Estate of Luvetta Goff, 2016 WL 3014493 (Brief of the United States as Amicus Curiae, May 24, 2016).
6 42 U.S.C. 299b-21, et. seq.
7 42 U.S.C. 11101, et. seq.
8 63 P. S. 425.1, et. seq.
9 United States v. Aurora Health Care, Inc., 91 F. Supp. 3rd 1066 (E.D. Wis., 2015).
10 Yocabet v. UPMC Presbyterian, 119 A.3d 1012, (Pa. Super, 2015).

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