

# The Peer Review Protection Act ("PRPA"): Looking Back, Looking Ahead

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## ABSTRACT

*The Peer Review Protection Act<sup>1</sup> ("PRPA"), enacted in 1974, provides limited immunity and confidentiality to health care providers with respect to post-care review and investigation. The purpose of the PRPA is to encourage health care providers to improve the quality of patient care. In the forty years since its enactment, however, many practitioners have labored under the assumption that the PRPA provides wholesale, blanket protection over any review or investigation of care rendered to a patient. This misperception is due in part to the inherent ambiguity of the Act,<sup>2</sup> which has resulted in a great deal of conflicting precedent from Pennsylvania's courts. Those who are charged with determining whether or not a particular document or communication is protected under the PRPA may find themselves scratching their heads as they review Pennsylvania decisional law, and perhaps the best answer as to whether certain information is protected under the PRPA is the admittedly unsatisfying, "It depends." Indeed, the analyses of courts that have considered whether the confidentiality provisions of the PRPA*

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<sup>1</sup> 63 P.S. §425.1 *et seq.*

<sup>2</sup> The Pennsylvania Supreme Court has noted that "[t]he varied factual circumstances and the resulting almost contradictory case law interpreting the Peer Review Protection Act serves to further confuse the bar as to the proper interpretation and application of the statute." *Young v. Western Pa. Hosp.*, 722 A.2d 153 (Pa. Super. 1998). See also *McClellan v. Health Maint. Org. of Pa.*, 686 A.2d 801 (1996) (noting vagueness in definition of "professional health care provider"); *Sanderson v. Bryan*, 522 A.2d 1138 (Pa. Super. 1987) (recognizing lack of specificity as to what information is confidential under the PRPA).

*prevent the disclosure of certain information are invariably fact-intensive, with the result that one court may find a particular type of information protected from disclosure, while another may order it disclosed as outside the realm of the PRPA. Recent case law from our Superior Court suggests, however, that whatever contradictions may appear in the decisional law, the central focus of any PRPA inquiry is, was, and likely always will be, whether the proceeding concerned a review by a health care provider for the purpose of improving quality of care. This article explores the history, intent, and content of the PRPA, how it has been interpreted by the courts, and attempts to answer the question, "what is and is not protected under the PRPA?"*

## INTRODUCTION

In the forty-odd years since the PRPA was enacted, and as courts in Pennsylvania have attempted to interpret that law (in all its ambiguous glory), what may appear on its face to be an inviolable shield protecting all aspects of internal care review has actually been interpreted by Pennsylvania's courts quite narrowly. Indeed, there are few categories of documents, communications or information that enjoy absolute protection from disclosure under the PRPA. This Article discusses the history and legislative intent of the PRPA, its basic provisions, and how it has been interpreted by Pennsylvania's courts (including a look at two recent decisions from our Superior Court), and endeavors to provide greater clarity as to what materials are and are not protected under the PRPA.

## HISTORY AND LEGISLATIVE INTENT

Enacted in 1974, the PRPA, in a nutshell, provides a framework pursuant to which health care providers evaluate patient care for purposes of quality improvement. The PRPA also provides limited immunity to those involved in the peer review process, as well as limited protection of documents and communications generated as part of the peer review process.

The PRPA was intended to improve the quality of care rendered, reduce mortality and keep health care costs within reasonable bounds;<sup>3</sup> to encourage "free and frank discussion by review organizations" and to "avoid a chilling effect by preventing the imposition of civil liability based upon testimony and documents presented to peer review organizations;"<sup>4</sup> to facilitate self-policing in the health care industry;<sup>5</sup> to maintain "high professional standards in the medical practice for the protection of patients and the general public;"<sup>6</sup> and to encourage "comprehensive, honest, and potentially critical evaluations of medical professionals by their peers."<sup>7</sup> The PRPA reflects the legislative determination that the medical profession itself is in the best position to police its own activities due to the medical skill and expertise involved in the practice of medicine.<sup>8</sup>

The Supreme Court of Pennsylvania has outlined the competing interests associated with the PRPA, as well as the purpose of peer review in general, as follows:

Peer review can best be understood if one realizes that in most cases doctors with hospital privileges are not employees of the hospital, instead, they are independent contractors

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<sup>3</sup> 63 P.S. §425.2; *Robinson v. Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979).

<sup>4</sup> *Sanderson v. Bryan*, *supra*.

<sup>5</sup> *Dodson v. DeLeo*, 872 A.2d 1237 (Pa. Super. 2005).

<sup>6</sup> *Cooper v. Delaware Valley Med. Ctr.*, 654 A.2d 547 (Pa. 1995).

<sup>7</sup> *Young v. Western Pa. Hosp.*, *supra*.

<sup>8</sup> *McClellan v. Health Maint. Org. of Pa.*, *supra*.

who must be granted permission to admit patients and make use of the hospital's resources.<sup>9</sup> A physician receives permission to use the hospital when he receives a vote of approval from his colleagues. Peer review is the common method for exercising self-regulatory competence and evaluating physicians for privileges. The purpose of this privilege system is to improve the quality of health care, and reflects a widespread belief that the medical profession is best qualified to police its own. Thus, it is beyond question that peer review committees play a critical role in the effort to maintain high professional standards in the medical practice.

The goal of protecting patients and the general public from less than competent physicians is balanced against the rights of the private physician. The worst possible punishment for a physician is a denial of privileges based upon a physician's poor performance, inferior qualifications, or disruptive behavior. Finding gainful employment in the hospital setting after a poor review is unlikely....<sup>10</sup>

In short, both Pennsylvania's Legislature and its courts have recognized the need to facilitate the unflinching review of care by health care providers as well as the potentially disastrous impact upon a physician if the results of such a review were to be disclosed.

#### WHAT IS PEER REVIEW?

The actual language of the PRPA is relatively brief and frustratingly non-specific. Under the PRPA, certain information is protected from disclosure if it is generated by or in connection with "peer review" by a "professional health care provider" or its "review organization" as each of those terms is specifically defined under the Act. "Peer review" is generally understood to be a process designed to evaluate the quality and efficiency of health care services as compared to applicable standards of care, laws, rules, and regulations. The term "professional health care provider" is broadly defined as "individuals or organizations who are approved, licensed or otherwise regulated to practice or operate in the health care field under the laws of the Commonwealth,"<sup>11</sup> and provides some guidance in the form of a list of entities that meet these criteria.<sup>12</sup> In determining whether an individual or organization is a "professional health care provider," courts have considered whether the individual or organization (1) is a direct health care practitioner; (2) administrates medical facilities by overseeing patient care within its walls; (3) maintains medical facilities or equipment; or (4) operates a central health care facility.<sup>13</sup> Thus, organizations that have been found *not* to satisfy the definition of "professional health care provider" include an HMO,<sup>14</sup> the Pennsylvania Department of Health,<sup>15</sup> Medicare,<sup>16</sup> a health insurance provider,<sup>17</sup> and an independent contractor who staffed a hospital emergency room.<sup>18</sup> Conversely, a drug and

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<sup>9</sup> As more hospitals acquire physician-owned practices, a hospital's evaluation of physicians takes on new implications and may have profound, far-reaching implications beyond the matter of the credentialing and granting of privileges.

<sup>10</sup> *Cooper, supra*, 654 A.2d at 551 (citations omitted).

<sup>11</sup> 63 P.S. §425.2.

<sup>12</sup> Section 425.2 specifically designates physicians, dentists, podiatrists, chiropractors, optometrists, psychologists, pharmacists, registered or practical nurses, physical therapists, administrators of a hospital, nursing or convalescent home or other health care facility, and corporations or other organizations operating a hospital, nursing or convalescent home or other health care facility as "professional health care providers."

<sup>13</sup> *McClellan v. Health Maint. Org. of Pa., supra*.

<sup>14</sup> *Id.*

<sup>15</sup> *Rosser v. Feldman*, 38 Pa. D. & C. 4<sup>th</sup> 353 (Lackawanna C.P. 1998).

<sup>16</sup> *Yocabet v. UPMC Presbyterian*, 2015 Pa. Super. LEXIS 325 (Pa. Super. June 5, 2015).

<sup>17</sup> *Venosh v. Henzes*, 2015 Pa. Super. LEXIS 453 (Pa. Super. August 7, 2015).

<sup>18</sup> *Reginelli v. Boggs*, 2015 Pa. Super. Unpub. LEXIS 3895 (October 23, 2015)(non-precedential decision subject to Superior Court I.O.P. 65.37)(independent contractor which staffed hospital emergency room was not a "health care provider" under the PRPA).

alcohol treatment facility<sup>19</sup> and a provider of prison health services<sup>20</sup> were both found to be "professional health care providers" to which the PRPA applied.

Next, PRPA protects only that information which is generated by or in connection with the proceedings of a "review organization." That term is loosely defined as "any committee engaging in peer review,"<sup>21</sup> and includes a laundry list of groups that may come within the auspices of the PRPA, including a hospital utilization review committee, a hospital tissue committee, a health insurance review committee, a hospital plan corporation review committee, a professional health service plan review committee, and a physicians' or nursing advisory committee.

Whatever the name or type of group, however, in order to qualify for protection under the PRPA, the committee **must** have as its purpose one of the following:

- Evaluating and improving the quality of health care rendered;
- Reducing morbidity or mortality;
- Establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care;
- Reviewing the professional qualifications or activities of medical staff or applicants for admission thereto; or
- Reviewing the operation of hospitals, nursing homes, convalescent homes or other health care facilities.<sup>22</sup>

Initially, PRPA protection extends to not only the individuals who comprise the review organization but the organization itself as well.<sup>23</sup> In considering whether a group constitutes a "review organization," courts have been less concerned with the name or type of committee and more persuaded by the nature of the activities of the committee. Thus, a board of directors of a hospital could constitute a "review organization" if its purpose was to evaluate post-incident care for the purpose of improving the quality of health care rendered,<sup>24</sup> while a meeting of hospital personnel (including a physician who was eventually named as a defendant in subsequent litigation) for the purpose of discussing the care in question was not a "review organization" due to the fact that the hospital had not taken any steps to institute a formal peer review process prior to the meeting, and where no record of the proceedings was made.<sup>25</sup>

Additionally, although the Joint Commission on Accreditation of Health Care Organizations is a "review organization,"<sup>26</sup> a state licensing board is not.<sup>27</sup> As a general principle, however, investigations by risk managers or risk management departments do not constitute protected peer review activity because they are designed to evaluate and minimize exposure, as opposed to assessing and ensuring the quality of care.<sup>28</sup>

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<sup>19</sup> *Adriansen v. Marworth*, 2 Pa. D. & C. 5<sup>th</sup> 205 (Lackawanna C.P. June 18, 2007).

<sup>20</sup> *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. 2001).

<sup>21</sup> 63 P.S. §425.2.

<sup>22</sup> *Id.*

<sup>23</sup> *Troescher v. Grody*, 869 A.2d 1014 (Pa. Super. 2005).

<sup>24</sup> *Yocabet v. UPMC Presbyterian*, *supra*.

<sup>25</sup> *Johnson v. Wiseman*, 46 Pa. D. & C. 4<sup>th</sup> 532 (Bradford C.P. March 22, 2000).

<sup>26</sup> *Kates v. Doylestown Hosp.*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 432 (Bucks C.P. November 20, 2013).

<sup>27</sup> *Nothdurft v. Knab*, 55 Pa. D. & C. 4<sup>th</sup> 572 (Butler C.P. June 21, 1999).

<sup>28</sup> *Atkins v. Pottstown Mem. Med. Ctr.*, 634 A.2d 258 (Pa. Super. 1993).

If the group or committee in question constitutes a "review organization" engaged in "peer review," then the activities and records of that committee are protected from disclosure,<sup>29</sup> and a person who provides information to a review organization is generally immune from criminal or civil liability, provided the information given is related to the performance of the review organization's duties and that the person in question does not knowingly provide false information.<sup>30</sup> Additionally, members of a peer review committee also enjoy immunity unless they are found to have acted with "malice."<sup>31</sup> The PRPA's Legislative History reflects a specific desire to shield those involved in the peer review process,<sup>32</sup> as well as to foster peer review participation and free and frank discussion by review organizations,<sup>33</sup> protect peer review participants from liability and from becoming involved in litigation at all,<sup>34</sup> and ensure participation in peer review by protecting committee members against lawsuits resulting from their committee evaluations.<sup>35</sup> Importantly, immunity under the PRPA does not apply to an organization, but only to individuals.<sup>36</sup>

Perhaps the most important provision of the PRPA, however, concerns the confidentiality attendant to peer review proceedings; indeed, most case law construing the PRPA concerns requests by medical negligence plaintiffs seeking to obtain documents from defendant health care providers concerning post-care evaluations. Defense counsel frequently invoke the PRPA as a basis for withholding internal documents relating to a health care provider's internal investigations. Pennsylvania's appellate courts have recognized that the potential harm to a health care provider if certain purported peer review documents are revealed is so great that challenges to trial court rulings on such matters, though interlocutory in nature, qualify as immediately appealable collateral orders for the purposes of Pa.R.App.P. 313(b) because "the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost."<sup>37</sup>

In further support for the confidentiality provisions of the PRPA, Judge Wettick of Allegheny County has noted that "[t]he need for confidentiality in the peer review process stems from the need for comprehensive, honest, and sometimes critical evaluations of medical providers by their peers in the profession."<sup>38</sup> Finally, determination of whether such confidentiality applies involves a balancing between "[t]he goal of protecting patients and the general public from less than competent physicians" and "the rights of the private physician. The worst possible punishment for a physician is a denial of privileges based upon a physician's poor performance, inferior qualifications, or disruptive behavior. Finding gainful employment in the hospital setting after a poor review is unlikely...."<sup>39</sup>

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<sup>29</sup> 63 P.S. §425.4.

<sup>30</sup> 63 P.S. §425.3.

<sup>31</sup> "Malice," in the context of peer review activities, is "'a wish to vex, annoy or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.'" [M]alice' and 'bad faith' should, therefore, in this context mean a primary purpose other than the safeguarding of patients." *Cooper v. Delaware Valley Med. Ctr.*, *supra*.

<sup>32</sup> The Legislative History of the PRPA reflects an intent to "provide protection to those persons who give testimony to peer review organizations." Hearing on H.B. No. 1729, 158 Pa. Legis. J. -- House at 4438 (1974) (statement of Representative Wells) and to provide for "the increased use of peer review groups by giving protection to individuals and data who report to any review group." H.B. 1729, Act of July 20, 1974, P.L. 564, No. 193.

<sup>33</sup> *Steel v. Weisberg (I)*, 347 Pa. Super. 106, 500 A.2d 428 (1985).

<sup>34</sup> *Cooper v. Delaware Valley Med. Ctr.*, *supra*.

<sup>35</sup> Jorstad, *The Legal Liability of Medical Peer Review Participants for Revocation of Hospital Staff Privileges*, 28 Drake L.Rev. 692, 693 (1978-79).

<sup>36</sup> *Cooper v. Delaware Valley Med. Ctr.*, *supra*.

<sup>37</sup> See, e.g., *Yocabet v. UPMC Presbyterian*, *supra*; *Troescher v. Grody*, *supra*; *Joe v. Prison Health Services, Inc.*, *supra*.

<sup>38</sup> *O'Neill v. McKeesport Hosp.*, 48 Pa. D. & C. 3d. 115, 121 (Allegheny C.P. 1987).

<sup>39</sup> *Cooper v. Delaware Valley Med. Ctr.*, *supra*.

Thus, under the confidentiality provisions, documents are protected from disclosure under the PRPA when they:

- Are generated by or arise from activities of a review committee or as part of a peer review process;
- Arise out of the matters which are the subject of evaluation and review by such committee; or
- Concern findings, recommendations, evaluations, opinions or other actions of such committee or any members thereof.<sup>40</sup>

There is a common notion that any document or information received or reviewed by a peer review committee are sacrosanct; this belief is incorrect. To begin with, no matter what the document, it is not protected under the PRPA unless it is actually submitted to and reviewed by a peer review committee.<sup>41</sup> Second, information that is otherwise available from original sources is not immune from disclosure even if provided to a peer review committee,<sup>42</sup> and the PRPA "does not protect non-peer review business records, even if those records eventually are used by a peer review committee."<sup>43</sup> Rather, in order to be protected from disclosure, the document must be generated and used exclusively by a peer review committee,<sup>44</sup> and must be derived from or part of an evaluation/review by a peer review committee.<sup>45</sup> Thus, a document is not protected by the PRPA simply by submitting it to a peer review committee<sup>46</sup> or by labeling a document as being "confidential"<sup>47</sup> or protected under the PRPA.<sup>48</sup> However, "documents generated by a peer review committee specifically for use in the peer review process are not discoverable simply because some of the information contained therein is available elsewhere."<sup>49</sup> Finally, to invoke peer review protection, the peer review organization, whose documents are at issue, must have been created by "some definite action prior to the time of review."<sup>50</sup>

A party seeking to invoke the PRPA to avoid production of peer review materials bears the burden of establishing that the PRPA applies to the documents or information in question<sup>51</sup> by demonstrating that the information contained in the records is not available in any other business record.<sup>52</sup> Often, satisfying this burden of proof requires an *in camera* inspection by the court.<sup>53</sup> Once a prima facie demonstration of privilege has been established, the burden shifts to the party seeking discovery of the evidence to demonstrate that disclosure does not violate the privilege or an exception applies.<sup>54</sup>

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<sup>40</sup> 63 P.S. §425.4.

<sup>41</sup> *Ellison v. Women and Children's Hosp. of Buffalo*, 2010 U.S. Dist. LEXIS 130828 (W.D. Pa. 2010)(incident report); *Rice v. Taves*, 28 Pa. D. & C. 5<sup>th</sup> 464 (Lehigh C.P. March 14, 2013)(patient safety report); *Fledderman v. Glunk*, 2009 Phila. Ct. Com. Pl. LEXIS 24 (Phila. C.P. April 24, 2009), *aff'd in part, rev'd in part on other grounds*, 22 A.3d 1067 (Pa. Super. 2010)(documents procured by DOH from hospital); *Treible v. Lehigh Valley Hosp., Inc.*, 75 Pa. D. & C.4th 22 (Lehigh C.P. August 12, 2005)(quality assurance review form).

<sup>42</sup> 63 P.S. §425.4. *And see Scrima v. UPMC Mercy*, 33 Pa. D. & C. 5<sup>th</sup> 78 (Allegheny C.P. Sept. 9, 2013)(per Hon. Stanton R. Wettick)("the 'original sources' exception covers any documents created by an employee of a hospital who has no responsibility for evaluating the quality of the care and who did not prepare the documents at the request of a professional health care provider evaluating the quality of the care as part of a peer review.... However, where the document would not have been created but for the initiation of peer review, this document should be considered derived from or part of a peer evaluation").

<sup>43</sup> *Dodson v. DeLeo*, *supra*.

<sup>44</sup> *Id.*

<sup>45</sup> *Atkins v. Pottstown Mem. Med. Ctr.*, *supra*.

<sup>46</sup> *Dodson v. DeLeo*, *supra*; *Atkins v. Pottstown Mem. Med. Ctr.*, *supra*.

<sup>47</sup> *Atkins v. Pottstown Mem. Med. Ctr.*, *supra*.

<sup>48</sup> *Treible v. Lehigh Valley Hosp. Inc.*, *supra*.

<sup>49</sup> *Young v. Western Pa. Hosp.*, *supra*.

<sup>50</sup> *Mazzucca v. Methodist Hosp.*, 14 Phila. 573 (Phila. C.P. 1986).

<sup>51</sup> *But see Congdon v. Lancaster Gen. Hosp.*, 8 Pa. D. & C. 4th 596, 600 (Lancaster C.P. 1990)(stating that "plaintiffs, . . . have the burden of assuring the record contains the information on the purpose and uses of the hospital's incident reports").

<sup>52</sup> *Dodson v. DeLeo*, *supra*; *Mazzucca v. Methodist Hosp.*, *supra*.

<sup>53</sup> *Young v. Western Pa. Hosp.*, *supra*.

<sup>54</sup> *Custom Designs & Mfg. v. Sherwin-Williams*, 39 A.3d 372 (Pa. Super. 2012).

## WHAT IS PROTECTED UNDER THE PRPA?

Although a court's analysis of whether or not the PRPA applies to a particular document or communication is extremely and necessarily fact-sensitive, an analysis of Pennsylvania jurisprudence provides some guidelines as to what specific types of documents may or may not be protected under the PRPA.

### *Incident Reports, Patient Safety Reports, and Quality Assurance Forms*

Incident reports (sometimes called patient safety reports or quality assurance forms) are generally not deemed protected under the PRPA because they are most often created by or for use by a risk manager or risk management department for the purpose of evaluating potential exposure.<sup>55</sup> Additionally, incident reports are often based upon information from other sources not derived from or part of evaluation by a peer review committee, such that they are, in essence, a business record.<sup>56</sup>

In the context of analyzing whether an incident report is discoverable, courts have explained that "the determining factor is not whether the incident report initiated the peer review process, but for what *purpose* the report was generated."<sup>57</sup> Thus, a quality assurance review form prepared in the ordinary course of business by nursing staff, for the use and under the control of the risk management department, is not protected under the PRPA because its purpose is to investigate, evaluate, and defend malpractice claims, may or may not be used during a peer review process, and contains information which is available from original sources.<sup>58</sup> Similarly, the contents of an incident report are discoverable where there is no evidence that it was ever peer reviewed.<sup>59</sup>

### *Root Cause Analysis/Sentinel Event Report*

Unlike incident reports, "root cause analysis" or "root cause analysis of sentinel event" documents are generally protected under the PRPA.<sup>60</sup> Once again, the main focus of the courts is how, by whom, and for what purpose the document was created. Note, however, that a Pennsylvania trial court recently held that a sentinel event report prepared by hospital for a private accreditation commission and submitted to the Joint Commission for purposes of permitting that organization to conduct a root cause analysis, but which was not authored by or presented to the hospital's peer review committee, was not protected from discovery by the PRPA. *Brink v. Mallik*, 2013-01314 (Lackawanna C.P. April 15, 2015). Upon further consideration, the court subsequently withdrew and vacated this decision.

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<sup>55</sup> Litvin & McHugh, 3 West's Pa. Practice, *Torts: Law and Advocacy* § 7.40 (2012 ed.).

<sup>56</sup> *Atkins v. Pottstown Mem. Med. Ctr.*

<sup>57</sup> *Crawford v. Nedurian*, 20 Pa. D. & C. 4<sup>th</sup> 419 (Clinton C.P. 1994). See also *Ellison v. Women and Children's Hosp. of Buffalo*, *supra* (incident report discoverable because no peer review committee was ever convened and because the report was not "utilized in conjunction with a quality assurance function.").

<sup>58</sup> *Trump v. Menegat*, 61 Pa. D. & C. 4<sup>th</sup> 482 (Lehigh C.P. November 4, 2002); *Treible v. Lehigh Valley Hosp., Inc.*, *supra*.

<sup>59</sup> *Rice v. Taves*, *supra*. See also *Resnick v. Hahnemann Univ. Hosp.*, 28 Phila. 561 (Phila. C.P. 1995)(disclosure of incident report not precluded by the PRPA); *Hanzsek v. McDonough*, 44 Pa. D. & C. 3d 639 (Lehigh C.P. May 20, 1987)(incident reports prepared by nurses contemporaneously with care in question, which were reviewed by the risk management department of hospital for purposes of both quality control and claims review, were discoverable).

<sup>60</sup> *Byrns v. Urology Assoc. of the Poconos*, 19 Pa. D. & C. 5<sup>th</sup> 557 (Monroe C.P. November 12, 2010)("root cause analysis" was created by peer review committee during course of peer review process for the express purpose of evaluation by a professional health care provider); *Adriansen v. Marworth*, *supra*. And see *Scrima v. UPMC Mercy*, *supra* (timeline/chronology of events prepared by nurse summarizing discussions with various sources as to care, incident report, and plaintiff's medical records, and "re-education plan" prepare to present to nursing staff generated for purpose of evaluating conduct of medical staff and re-educating staff with respect to future care, were derived from peer evaluation and thus protected under the PRPA, even if some of the information was available through original sources).

## Employee Interviews

Recorded employee interviews conducted for the purpose of completing a root cause analysis of sentinel event are not discoverable.<sup>61</sup> However, a plaintiff is permitted to depose the witnesses who were interviewed as to their contact with the patient, which constitutes "original source" information, but those witnesses cannot be compelled to testify as to their appearance and participation in peer review proceedings. Once again, the finding of protection under the PRPA seems to depend upon whether the employee interviews were taken specifically in conjunction with peer review proceedings.

## Evaluations Made Contemporaneously with Care in Question

Where members of the medical staff document or communicate about the propriety of care contemporaneously with the treatment being rendered, such communications are not protected under the PRPA because they did not occur in connection with a definitive peer review action prior the review or evaluation.<sup>62</sup> Similarly, investigations undertaken at or near the time of the care in question for purposes of patient care and treatment are also not protected from discovery under the PRPA, because they are conducted for the purpose of minimizing the risk of harm to current patients and not for the purpose of implementing prospective policy changes.<sup>63</sup>

## Data as to Non-Event Care

Information such as complication and infection incident rates has been held not protected under the PRPA,<sup>64</sup> while notes from a hospital's transfusion committee and hospital utilization review committees were found not discoverable.<sup>65</sup>

## Hospital Policies and Procedures

Documentation such as bulletins and guidelines of a hospital's transfusion committee, staff policy and procedure manuals, and procedures for evaluating applications are all discoverable, as are a hospital's peer review protocols.<sup>66</sup>

## Non-Event/Non-Care-Related Physician Information

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<sup>61</sup> See, e.g., *Estate of Spangler v. Jameson Health Sys.*, 65 Pa. D. & C. 4<sup>th</sup> 129 (Lawrence C.P. 2003); *Adriansen v. Marworth*, *supra*.

<sup>62</sup> *Mazzucca v. Methodist Hosp.*, *supra* (intercom transmission from pathology to the surgical suite as to the malignant or non-malignant nature of a tumor found during exploratory surgery of the plaintiff); *Baldwin v. McGrath (No. 2)*, 8 D. & C. 3d 341 (1978)(intervention by member of staff during performance of questionable medical procedure, as permitted by hospital bylaws, is not protected by the PRPA because it did not occur pursuant to an action by the peer review committee).

<sup>63</sup> *Forrest v. St. Luke's Hosp.*, 73 Pa. D. & C. 4<sup>th</sup> 353 (Lehigh C.P. June 13, 2005).

<sup>64</sup> *Geiger v. Zelenkofske*, 53 Pa. D. & C. 4<sup>th</sup> 292 (Lehigh C.P. August 16, 2001)(complication rates); *Resnick*, *supra* (report prepared for presentation to infection control committee); *Trent v. Lancaster Gen. Hosp.*, 44 Pa. D. & C. 3d 606 (Lancaster C.P. July 1, 1986)(information concerning infection control policies and procedures and the rate of occurrence of staphylococcus aureus infections in other patients at defendant hospital during the year of plaintiff's three hospitalizations).

<sup>65</sup> *Resnick*, *supra*; *Holliday v. Klimoski*, 75 Pa. D. & C. 2d 408 (Washington C.P. July 12, 1976). And see *Kates v. Doylestown Hosp.*, 2014 Pa. Super. Unpub. LEXIS 1652 (August 22, 2014)(non-precedential decision subject to Superior Court I.O.P. 65.37)(emails, agenda and minutes of hospital's Stroke Committee were business records and communications that were neither used nor generated by Stroke Committee for peer review purposes and were therefore not protected by the PRPA).

<sup>66</sup> *Resnick*, *supra*; *Sotack v. Gaden Huetten Mem. Hosp.*, 36 D. & C. 4<sup>th</sup> 155, 161 (Monroe C.P. 1997). And see *Dempsey v. Mattiello*, 2014 Pa. Super. Unpub. LEXIS 797 (Pa. Super. June 19, 2014)(non-precedential decision subject to Superior Court I.O.P. 65.37)(policies and procedures of hospital proctoring committee not protected by the PRPA).

Plaintiffs frequently request information from hospitals about a defendant physician that is not related to the care in question but, rather, concerns the defendant's general qualifications. In support of such discovery, plaintiffs argue that such information is relevant to a corporate negligence cause of action under *Thompson v. Nason Hosp.*, 591 A.2d 703 (Pa. 1991), asserting the hospital breached its duty a duty to select and retain only competent physicians. Thus, requests for a defendant physician's credentialing file, application for staff privileges, and performance reviews, are often forthcoming from plaintiffs.

#### *Credentialing File*

Most trial courts have held that a physician's credentialing file is not protected under the PRPA because the materials are not generated as part of a peer review process, the information is available from other sources, and there is no expectation or guarantee of confidentiality.<sup>67</sup> Our Superior Court has held, however, that a doctor's credentialing file was protected by the PRPA when it contains information concerning problems and potential problems with the doctor's performance while working at the medical facility.<sup>68</sup>

#### *Personnel Files*

Pennsylvania courts have consistently held that peer review documents maintained within a physician's personnel files are not discoverable by a plaintiff in civil litigation, unless the plaintiff is the person whose actions had undergone peer review.<sup>69</sup> Non-peer review documents, however, would appear to be fair game for discovery.<sup>70</sup>

#### *Application for Staff Privileges*

Documents related to a physician's application for staff privileges are generally not protected under the PRPA because those documents do not contain information generated as the result of a peer review process.<sup>71</sup> As the Superior Court has stated, "[d]ocuments used in the determination of staff privileges are exactly the type of documents the Legislature contemplated when drafting the Peer Review Protection Act. Granting, limiting, or revoking staff privileges is one of the strongest tools the medical profession uses to police itself."<sup>72</sup> Additionally, such information is relevant concerning the physician's knowledge and skill. Finally, "a recital in the applicant's own words of what qualifications he believes he

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<sup>67</sup> See, e.g., *Harrison v. Hayes*, 870 A.2d 326 (Pa. Super. 2005)(but holding that information as to reasons on credentialing were made was not discoverable); *Ruhl v. Mauriello*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 589 (Lancaster C.P. January 9, 2006); *Geiger v. Zelenkofske*, *supra*; *Martin v. McAndrew*, 45 D. & C. 4<sup>th</sup> 129 (Lackawanna C.P. 2000); *Lindsay v. Bosta*, 147 P.L.J. 237 (Allegheny C.P. 1999); *Sotack v. Gnaden Huetten Mem. Hosp.*, *supra*; *Short v. Pavlides*, 33 D. & C. 4<sup>th</sup> 118, 129, 31 Phila. 221(1996); *Nelson v. Landsberg* (Phila. C.P. March 26, 1993).

<sup>68</sup> *Dodson v. DeLeo*, *supra*. See also *Troesch v. Grody*, *supra*.

<sup>69</sup> *Troesch v. Grody*, *supra*; *Pennsylvania State Univ. v. Commonwealth Dep't of Labor & Ind.*, 113 Pa. Commw. 119 (1988); *Sanderson v. Bryan*, *supra* (peer review records are not subject to discovery in any civil action other than a civil action by the person subject to the peer review).

<sup>70</sup> *Bolton v. Holy Spirit Hosp.*, 40 Pa. D. & C.3d 372 (Dauphin C.P. March 23, 1984)(personnel file discoverable except for documents generated by peer review committee).

<sup>71</sup> *Young v. Western Pa. Hosp.*, *supra*; *Ruhl v. Mauriello*, *supra*; *Geiger v. Zelenkofske*, *supra*; *Piper-Ochab v. Guthrie Clinic Ltd.*, 46 Pa. D. & C. 4<sup>th</sup> 551 (Lackawanna C.P. January 20, 2000)(physician's application for employment); *Martin v. McAndrew*, *supra*; *Lindsay v. Bosta*, *supra*; *Johnson v. Tray*, 43 Pa. D. & C. 4<sup>th</sup> 129 (Fulton C.P. October 4, 1999)(application for staff privileges and professional history); *Sotack v. Gnaden Huetten Mem. Hosp.*, *supra* (permitting discovery of documents regarding physician's application for privileges and information supplied with respect thereto but precluding from discovery records regarding the nature of the privileges granted and any change in scope of privileges); *Fuller v. Jackson*, 50 D. & C. 3d 628 (Cumberland C.P. 1987); *Fowler v. Pirris*, *supra*; *Holliday v. Klimoski*, *supra* (application for appointment/re-application for privileges). But see *Taylor v. DeLeo*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 20 (Dauphin C.P. *en banc* March 25, 2015)(physician's loss of operating privileges and denial of application for appointment and privileges constituted peer review information protected under the PRPA).

<sup>72</sup> *Young v. Western Pa. Hosp.*, *supra*.

has that would entitle him to a staff position" should not be protected by the PRPA since this information is critical in proving corporate negligence.<sup>73</sup>

Courts are split as to whether documents reflecting evaluations of a physician in connection with applications for staff privileges are discoverable. One court has held that documents related to clinical competency reviews in accordance with applications for staff privileges or reflecting a change in the scope of privileges are not discoverable,<sup>74</sup> while two other courts have found that such documents were not protected under the PRPA.<sup>75</sup>

#### *National Practitioner Data Bank Information*

Perhaps the only area of inquiry which remains unequivocally sacred – largely due to federal statute<sup>76</sup> – is information maintained by the National Practitioner Data Bank (“NPDB”). Courts have consistently held that information either obtained from or contained in a physician's NPDB file is protected under the PRPA and is not discoverable.<sup>77</sup> Whether or not a hospital made an inquiry, or did not make an inquiry to the NPDB, however, is a permissible discovery request.<sup>78</sup>

#### *Disciplinary Actions*

The courts are somewhat split on this issue. While one court permitted discovery of written charges against a doctor filed by the medical staff to the board of trustees as well as staff meeting minutes referring to professional conduct of the doctor prior to the care in question,<sup>79</sup> and another permitted discovery of information as to a physician's disciplinary actions and in-patient treatment for alcoholism,<sup>80</sup> a third found that a question during the deposition of the hospital chief of staff as to whether there had been any infraction of hospital rules by the defendant doctor was "exactly of the type which [the PRPA] is designed to protect," such that such information was not required to be disclosed.<sup>81</sup>

#### *Other Information Concerning Physician Qualifications and Activities*

Finally, Pennsylvania courts have considered whether the following types of information are protected under the PRPA, with the following results:

- Physician's performance evaluations – Split.<sup>82</sup>

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<sup>73</sup> *Fowler v. Pirris*, 34 D. & C. 3d 530, 535 (Washington C.P. 1981).

<sup>74</sup> *Sotack v. Gnaden Huettten Mem. Hosp.*, *supra*. And see *Dempsey v. Mattiello*, *supra* (summaries of procedures performed by defendant physician, redacted of handwritten notes, not protected under the PRPA).

<sup>75</sup> *Fowler v. Pirris*, *supra* (documents relating to staff/governing body's review of defendant doctor's qualifications and disposition of request for staff privileges); *Holliday v. Klimoski*, *supra* (recommendations concerning hospital staff to the board of director as to a physician's reapplication for privileges, along with records of the board of trustees concerning its consideration thereof).

<sup>76</sup> See 42 U.S.C. § 11137(b); 45 C.F.R. § 60.13.

<sup>77</sup> *Troescher v. Grody*, *supra*; *Jacksonian v. Temple Univ. Health Syst. Found.*, 862 A.2d 1275 (Pa. Super. 2004); *Ruhl v. Mauriello*, *supra*.

<sup>78</sup> *Jacksonian v. Temple Univ. Health Sys. Found.*, *supra*.

<sup>79</sup> *Holliday v. Klimoski*, *supra*.

<sup>80</sup> *Johnson v. Tray*, *supra*. And see *Dempsey v. Mattiello*, *supra* (document containing a factual account of family's complaint which did not contain any actions or opinions of a peer review organization not protected from disclosure by the PRPA).

<sup>81</sup> *Bandes v. Klimowski*, 3 Pa. D. & C.3d 11 (Fayette C.P. March 11, 1977).

<sup>82</sup> *Ruhl v. Mauriello*, *supra* (information not protected under the PRPA); *Reginelli v. Boggs*, *supra* (defendant hospital could not invoke the PRPA with respect to performance evaluations of non-employee defendant physician maintained by his employer, an independent contractor which staffed the defendant hospital's emergency room, because documents in question were not generated or maintained by hospital). *But see Resnick v. Hahnemann Univ. Hosp.*, *supra* (evaluation records used by hospital in deciding whether or not to retain doctor were not protected

- Residency and fellowship records – Protected.<sup>83</sup>
- Physician's loss of privileges at another hospital – Protected.<sup>84</sup>
- Physician's applications to professional societies, and inquiries made by him about applications for staff privileges – Not protected.<sup>85</sup>
- Application for admission to HMO – Not protected.<sup>86</sup>
- Physician's CV, profit and loss business records, notes and correspondence concerning working conditions – Not protected.<sup>87</sup>

## RECENT DEVELOPMENTS

Within the last six months, the Pennsylvania Superior Court has issued two decisions addressing whether the PRPA applies to information submitted by a health care provider to an independent organization conducting its own care analysis, ultimately answering that question in the negative. In both cases, the Superior Court's opinions were premised upon rationale consistent with prior precedent and focused upon whether the entity conducting the investigation was a "health care provider."

In June 2015, in the case of *Yocabet v. UPMC Presbyterian, supra*, the court considered whether the PRPA protected from disclosure documents and communications furnished by a hospital to the Department of Health and Medicare with respect to their investigation of medical treatment that later became the subject of a civil lawsuit. In *Yocabet*, the Pennsylvania Department of Health, on behalf of the Centers for Medicare and Medicaid Services, conducted an investigation of the UPMC kidney transplant program after its pre-screening process failed to identify medical conditions in a kidney donor (the civil action plaintiff), which conditions contraindicated that individual as a potential donor. Pursuant to the investigation, UPMC provided documents to the DOH.

The plaintiff sought to discover all documents and interviews generated as the result of the DOH investigation; UPMC refused, claiming that the requested materials were confidential under the PRPA. The Superior Court concluded that such documents were discoverable, in part because the Report issued after DOH investigation (which determined that UPMC's kidney transplant program was not in compliance with CMS guidelines and which provided a plan of correction to bring the hospital into compliance) was publicly available. The court further reasoned that neither DOH nor Medicare was a "professional health care provider," notwithstanding that the investigating committee personnel included health care providers, re-emphasizing earlier pronouncements in other decisions that peer review only occurs when it is ordered or performed by a "professional health care provider." In this case, the investigation was not initiated by a "professional health care provider," and thus, the sought-after documents were not protected under the PRPA.

UPMC advanced several arguments in defense of its position that PRPA did indeed shield the documents from disclosure, including that its voluntary participation in the DOH investigation invoked the PRPA. The court disagreed, stating that the participation by UPMC did not convert the DOH/CMS investigation to one protected by the PRPA, recognizing that UPMC's participation was not intended to police its own

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under the PRPA); *Dempsey v. Mattiello, supra* (documents in "proctoring file" which contained specific evaluations of defendant physician were protected under the PRPA).

<sup>83</sup> *Walmsley v. Pennsylvania Hosp.*, 32 Phila. 573, 34 Pa. D. & C.4<sup>th</sup> 320 (Phila. C.P. November 15, 1996).

<sup>84</sup> *Id.*

<sup>85</sup> *Obenski v. Brooks*, 7 Pa. D. & C. 3d 253 (Phila. C.P. May 12, 1978).

<sup>86</sup> *McClellan v. Health Maint. Org. of Pa., supra*.

<sup>87</sup> *Corrigan v. Methodist Hosp.*, 857 F. Supp. 434 (E.D. Pa. 1994)

activities but, rather, to report to a governmental body so that it could retain the right to receive payment from programs covering a group of its patients.

Two months later, in *Venosh v. Henzes, supra*, the Superior Court found that the PRPA did not protect a health insurance company from disclosure of information concerning its quality-of-care review conducted regarding an incident which was also the subject of a medical malpractice action. In that case, the plaintiff sued her orthopedic surgeon, his practice, and the hospital where her knee replacement surgery was performed. During discovery, she served a subpoena upon her health insurance carrier, Blue Cross, and its affiliate, seeking records relating to her surgical treatment, including any investigative records. Blue Cross declined to produce materials relating to a quality-of-care review it had conducted with respect to the medical providers and the incident at issue.

The court found that the Blue Cross investigation was not protected under the PRPA because the primary purpose of that review process was to ensure that Blue Cross's insureds were receiving the appropriate level of medical care from the health care providers. Additionally, the purpose of the Blue Cross review process was not to "self-police" the medical profession, but to determine whether its affiliate should continue to contract with the health care providers in question. Further, the PRPA did not apply because a health insurance company is not a "professional health care provider" as defined by the PRPA.

Blue Cross argued on appeal that it was a "review organization." While the court acknowledged that a "professional health care provider" can hire an outside organization to conduct a peer review evaluation, peer review can only be initiated and performed by a professional health care provider, and a review committee operates as such only when its goal is to gather and review information for the purposes set forth in the PRPA, which did not happen in this case, because the investigation was undertaken by Blue Cross.

The import of both *Yocabet* and *Venosh*, then, is that the PRPA does not protect from disclosure information gathered or generated by an entity which is not a "professional health care provider," where the focus of the investigation is not to improve the quality of a health care provider's delivery of medical care. Importantly, in both cases, the investigating entity had no power to directly impact the quality of treatment by the provider whose care was being evaluated, and thus, these investigations were not within the scope of the PRPA.

#### **OTHER POTENTIALLY APPLICABLE PRIVILEGES**

Although some types of documents or information may not be protected by the PRPA, other privileges may prevent their disclosure. For example, the Medical Care Availability and Reduction of Error Act ("MCARE") provides that documents, materials or information solely prepared or created for the purpose of compliance are confidential and are not discoverable or admissible as evidence in any civil or administrative action or proceeding.<sup>88</sup> These protections include reports of incidents, serious events or infrastructure failures by and reports of the institution's patient safety officer to administration, and documents submitted to the Pennsylvania Patient Safety Authority, are confidential. While a patient "serious event" notification is not confidential, it is not an acknowledgment or admission of liability. Like the PRPA, the MCARE Act excepts information that is otherwise available from original sources.

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<sup>88</sup> 40 P.S. § 1303.311.

Although the MCARE Act may present other grounds for withholding information concerning post-incident care, the few courts that have considered this issue have applied the same analysis as utilized in cases where the PRPA is invoked, namely, whether the information sought was generated in connection with a Patient Safety Committee proceeding. Thus, although the fact that a Patient Safety Report was generated pursuant to the MCARE Act did not render its contents "original source" information so as to render it outside the scope of the PRPA protection, because the Patient Safety Report was not reviewed by a peer review organization, it was not shielded from discovery under either the PRPA or the MCARE Act.<sup>89</sup> Similarly, information concerning an investigation as to how hospital patients developed infections during heart surgery was not protected under either the PRPA or the MCARE Act because the investigation did not take place within the confines of the Patient Safety Committee.<sup>90</sup> However, some courts have found that incident reports that were not protected from disclosure under the PRPA were shielded by virtue of the confidentiality provisions of the MCARE Act.<sup>91</sup>

### WAIVER OF THE PRPA

There is some case law to suggest that the protections of the PRPA may be waived under certain circumstances. Although the statute is silent on this issue, certain conduct by a health care provider can be construed as voiding the immunity provided under the PRPA. For example, protection under the PRPA may be waived when peer review documents are provided to counsel and risk management and are used to prepare the defendant physician for his deposition.<sup>92</sup> As well, a statement issued by a hospital following a review of medical care rendered by a physician to various patients (not including the plaintiff) to the effect that said medical care may have been improper, that the physician had been fired, and that the matter had been referred to U.S. Attorney and State Board of Medicine, was not protected under the PRPA, in part because the PRPA was waived once information about the evaluation of the physician was released to third parties.<sup>93</sup> Conversely, a hospital's letter to a plaintiff disclosing an investigative report's conclusion that there was no failure to meet the appropriate standard of care did not operate as a waiver of the PRPA privilege because it did not disclose the nature of the investigation or facts determined in the investigation.<sup>94</sup>

The mere presence of third-party, non-health care providers at a peer review organization's proceeding will not waive the protection under this Act, as long as the proceeding is of the type "that the legislature intended would be protected by the [Act]."<sup>95</sup>

### CONCLUSION

While the PRPA seems, at first glance, to be quite broad in scope, ambiguity in its language has led to contradictory decisional law and subsequent confusion among legal practitioners and health care providers. Although there might seem to be a lack of consistency in the conclusions reached by

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<sup>89</sup> *Rice v. Taves, supra*; *Treible v. Lehigh Valley Hosp. Inc., supra*.

<sup>90</sup> *Forrest v. St. Luke's Hosp., supra*.

<sup>91</sup> See, e.g., *Mascato v. Midwife & Associates, Inc.*, No. 2006-C-660v (Lehigh C.P. May 31, 2007); *Bates v. Sacred Heart Hosp. of Allentown*, No. 2005-C-2574v (Lehigh C.P. May 15, 2006).

<sup>92</sup> *Tirado v. Lehigh Valley Hosp.*, 49 Pa. D. & C. 4<sup>th</sup> 110 (Lehigh C.P. 2000)(court held that fairness dictated that opposing counsel be provided with a copy of the summary, since defense counsel saw the document and it was utilized in preparing for the deposition).

<sup>93</sup> *Justice v. Banka*, 2014 Phila. Ct. Com. Pl. LEXIS 308 (Phila. C.P. August 29, 2014). The court also found that in providing information to the public, the hospital demonstrated that it was not able to police itself and, further, that referring a matter to the U.S. Attorney was not "self-policing." Finally, the court noted that it would be unfair to permit the hospital to make numerous disclosures of information obtained in peer review process to the public but then refuse to provide that information to the plaintiff.

<sup>94</sup> *Byrns v. Urology Assoc. of the Poconos, supra*.

<sup>95</sup> *Piroli v. Lodico*, 909 A.2d 846 (Pa. Super. 2005)(billing manager); *Trump v. Menegat, supra* (legal services attorney).

Pennsylvania courts, those same courts have been uniform in their approach to the interpretation of the PRPA and in their narrow, strict approach to dealing with the thorny question of what materials are or are not protected under the statute. The overarching lesson to be gleaned from the myriad opinions of Pennsylvania's courts on this issue is that the focus of any inquiry as to whether information is or is not protected under the PRPA will center squarely upon an analysis of whether the information in question concerns the assessment of care for purposes of improving the delivery of care and whether such information was generated pursuant to a peer review proceeding.