Courts' Interpretations of Statutes Demonstrate Shifting Landscape for Defense Bar

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The Legal Intelligencer
March 31, 2021
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For years, the defense bar has asserted the privileges and protections afforded by the Peer Review Protection Act, MCARE Act, Patient Safety and Quality Improvement Act, and the Health Care Quality Improvement Act. They relied on these privileges in the face of pointed discovery in order to safeguard certain physician-related or event-related documentation (including physician credential files, employment files, employment applications, event reports and peer review reports). However, between 2015 and 2020, the Pennsylvania Superior Court issued four opinions that limited the protections afforded by the statutes, and unequivocally stated that physical credentialing files were not protected from discovery in malpractice litigation. The drastic narrowing of discovery privileges and creation of bright line rules potentially threaten the objective set forth by Congress to improve the quality of medical care.

In *Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018), the Pennsylvania Supreme Court granted allocatur to address the question of whether the Peer Review Protection Act (PRPA) afforded statutory privilege to physicians' credentialing files and performance reviews. The defendants, a staffing and administrative services agency and a hospital, objected to the disclosure of performance reviews created by a single individual. At the outset, the court determined the staffing agency's challenge was invalid and that it was not entitled to the protections of the PRPA because they were not "approved, licensed, or otherwise regulated to practice or operate in the healthcare field in Pennsylvania." See *Reginelli v. Boggs*, 181 A.3d 293, 304 (Pa. 2018). It was inconsequential that an employee created a performance file akin to that which is generated by a peer review committee. Likewise, the court found that the hospital was not entitled to the evidentiary privileges afforded under the PRPA. In doing so, the court focused specifically upon the definition of "review organization" and its application to the evidentiary privilege, concluding that the evidentiary privilege extends to "review committees" only; not review organizations. The court further reasoned that a single individual did not meet the definition of a "review committee," and therefore the resulting performance reviews could not be protected.

Whether intentional or not, this holding allows for naming conventions to dictate whether protections are afforded. Therefore, even where a "review organization" (such as a credentialing committee) engages in peer

review, its findings, discussions and exchange of materials are not exempt from disclosure in discovery.

The Superior Court followed *Reginelli's* essential holding in *Estate of Krappa v. Lyons,* 211 A.3d 869 (Pa. Super. 2019). The Supreme Court refused to subsequently take up the case, but, importantly, Justice David Wecht authored an opinion warning of the failure to extend the evidentiary privileges provided by the PRPA by virtue of a naming convention. Specifically, Wecht cautioned the courts "to remain mindful of the potential for variability and overlap of different providers' peer review and credentialing processes … Only by doing so can courts ensure that the people best qualified to assess and police physician performance may do so forthrightly and without fear of reprisal."

Despite the warnings and concerns enumerated by Wecht, the courts of this commonwealth are constrained by the narrow holding of *Reginelli*. In *Leadbitter v. Keystone Anesthesia Consultants, Ltd.,* 2020 Pa. Super. LEXIS 116 (Pa. Super. 2020), the Superior Court once again held that the complete, unredacted credentialing file of a physician is not entitled to evidentiary privilege under the PRPA.

This holding, however, was not promulgated without reference to the problems created by the courts' opinions in *Reginelli* and *Krappa*. In a footnote in the *Leadbitter* opinion, the court stated, "in light of the fact that the Supreme Court assumed that documents in a credentialing file are not peer review documents and in this case, the documents at issue are peer review documents, it would be helpful for the Supreme Court to grant allocator and address this issue directly." See *Leadbitter v. Keystone Anesthesia Consultants, Ltd.,* 2020 Pa. Super. LEXIS 116 (Pa. Super. 2020). Further, the court did recognize the argument set forth by Wecht, supra, though was not inclined to incorporate the same within its holding.

The Superior Court again heard argument on these issues in *Ungurian v. Beyzman,* 2020 Pa. Super. LEXIS 335 (Pa. Super. 2020). Additionally, however, in a matter of first impression, the court looked past the PRPA and scrutinized the protections afforded by the Patient Safety and Quality Improvement Act, 42 U.S.C.A. Section 299b-21, et seq. (PSQIA).

At its core, the PSQIA protects patient safety work product (PSWP) from disclosure during discovery in civil matters. PSWP is defined as any data, reports, records, memoranda, analyses, or written or oral statements which are assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization, or that are deployed by a patient safety organization for the conduct of patient safety activities, and which could result in improved patient safety, health care quality, or health care outcomes, which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system.

In *Ungurian*, the plaintiffs sought the production of a number of documents, including a Serious Event Report and a Root Cause Analysis. The defendant hospital invoked the PSQIA, and provided an affidavit, which became the focus of the Superior Court's ruling. The trial and Superior Court interpreted the statutory definition of PSWP to require that such material be generated for the exclusive purpose of reporting to a patient safety organization and that such material be

immediately reported to a patient safety organization. Other outside use or delay in the reporting of the materials seemingly destroys the privilege.

On March 9, 2021, the Pennsylvania Supreme Court granted allocatur to review the Superior Court's opinions in *Leadbitter*, and address two essential questions: Whether the Superior Court's holding directly conflicts with the Pennsylvania Peer Review Protection Act, 69 P.S. Sections 425.1, et seq., and misapplies *Reginelli v. Boggs*, 645 Pa. 470, 181 A.3d 293 (2018), by ordering the production of acknowledged "peer review documents" solely because they were maintained in a physician's credentialing file; and whether the Superior Court's holding directly conflicts with the Federal Healthcare Quality improvement Act, 42 U.S.C. Section 11137(B)(1), and federal regulations which protect from disclosure, responses to statutorily required inquiries of the national practitioner data bank, by ordering the production of such documents solely because they were maintained in physician's credentialing file?

Furthermore, challenges to the Superior Court's holdings in *Ungurian* were scheduled to be heard by the Pennsylvania Supreme Court in summer 2021. The argument was to feature a substantial number of groups, including federally qualified patient safety organizations, that petitioned the Supreme Court for leave to file amicus briefs in support of the defendant hospital. The objective of these groups was twofold: to address the concerns raised by Wecht and abolish the bright-line rule allowing a naming convention to dictate protections under the PRPA, and to expand the interpretation of the PSQIA and evidentiary privileges afforded thereby. Unfortunately, the Supreme Court issued a stay of proceedings in *Ungurian* until an opinion is entered in *Leadbitter*. In response to the stay, the *Ungurian* appellant withdrew its application for appeal, thereby putting an end to these challenges.

However, in the face of recent statutory interpretation, the clear public policy that favors the improvement of health care must be maintained in future challenges to the present state of the law. The courts should be reminded of the dangers imposed by chilling the effect of anonymous peer review.

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