



TIP OF THE MONTH

October 2015

Privilege

Tip: Understand what information is privileged under the Patient Safety and Quality Improvement Act of 2005 (PSQIA), and be aware that your state reporting requirements may affect that privilege.

The PSQIA provides that information reported to a PSO, known as patient safety work product (PSWP), is given privilege and confidential protections against discoverability and disclosure. A key benefit to offering such broad protections is to encourage providers to undertake patient safety activities and drive safer care delivery. It is important that you fully understand the protections available and be aware that a number of challenges to these protections are progressing through state and federal courts.

Privilege Protections found in the PSQIA

In general, the PSQIA protects data, reports, records, memoranda, analyses (such as root cause analyses) or written or oral statements which could improve patient safety, health care quality or outcomes which are assembled or developed for reporting to a PSO. This information is generally protected in the following ways:

- It cannot be subpoenaed by a court for use against a healthcare provider.
- It cannot be subject to discovery in connection with a proceeding against a provider.
- It cannot be disclosed under the Freedom of Information Act.
- It cannot be admitted as evidence in a lawsuit, including in proceedings against a provider.
- It cannot be admitted in a disciplinary proceeding by a professional disciplinary body.

While these provisions afford a great deal of protection, they are not absolute. In rare circumstances, the regulations allow information reported to a PSO to be used in legal or administrative proceedings. (The most current can be found at [42 C.F.R. § 3.204 \(b\) Exceptions to privilege](#).) In addition, certain information placed in a patient safety evaluation system is not protected simply by virtue of submitting it to a PSO. For example, a patient's medical record, billing and discharge information or any other original patient or provider information is not PSWP because the original documents are created and maintained outside of the PSES.

This category of information excluded from the definition of PSWP -- "information that is collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system." -- has been challenged in state courts where states already have a collecting and/or reporting requirement for patient safety events. Because laws and state requirements vary from state to state, it is important

that you are familiar with these requirements. If your state requires you to maintain and/or submit reports to the state, consider whether you should maintain separate processes and other steps to keep that information separate from your PSWP.

State Challenges

Below is a summary of three states where active challenges to the privilege protection afforded by the PSQIA are being faced:

Kentucky: The Kentucky Supreme Court found that incident reports that are required to be created but not submitted under the Kentucky Administrative Regulations did not qualify as PSWP and therefore are not privileged. The hospital has appealed and the U.S. Supreme Court is considering whether to hear the appeal in Tibbs v. Bunnell. The Supreme Court has asked the federal government to submit a brief on the issue, which is an indication that it is seriously considering hearing the Kentucky hospital's appeal.

Florida: The courts in Florida are considering a challenge to the PSO protections based on the provisions of Florida law requiring the collection and reporting of incident reports by licensed healthcare facilities. The case of Charles v. Southern Baptist Hospital involves information that was gathered by a hospital but not provided to the government. The Florida First District Court of Appeal heard oral arguments in this case on September 15 and that court is now deliberating whether the hospital must turn over its reports.

Rhode Island: The case of Carron v. Rosenthal involves a medical malpractice suit following the death of an infant. Under the Rhode Island Patient Safety Act, a law similar to the PSQIA, the hospital submitted an incident report to its PSO following the infant's death. A trial court ordered the hospital to show the incident report to its nurses to refresh their memory of the incident prior to being deposed by the plaintiff. The hospital has filed an appeal to the Rhode Island Supreme Court.

ASTRO and Clarity PSO continue to monitor these cases and, where possible, participate as "friends of the court" in favor of greater protection for patient safety work product and the PSQIA.

Resources

- ❖ [***Final Rule implementing the Patient Safety and Quality Improvement Act of 2005. 73 Fed. Reg. 70,732 \(Nov. 21, 2008\).***](#)
- ❖ [***42 C.F.R. Part 3***](#)

Please note that these are general suggestions and should not be construed as legal advice. RO-ILS participants with concerns about legal issues in their state should consult a competent attorney in their jurisdiction.