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Professional Liability Alert

Pennsylvania Supreme Court Restores Statutory Protections For Peer Review Materials

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INTRODUCTION

The Pennsylvania Peer Review Protection Act, 63 P.S. §§425.1-425.4 ("PRPA"), provides confidentiality safeguards and limited liability to healthcare providers in the context of post-care review and investigations. Since 1975, those safeguards have allowed healthcare providers to give candid feedback and conduct open investigations to improve the quality of patient care.

However, in March 2018, the protections afforded by the PRPA to ensure that frank, probing assessments of physicians by their peers—those most qualified to conduct such reviews—came under attack. In *Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018), the Pennsylvania Supreme Court suggested for the first time that whether peer review materials were entitled to protection under the PRPA depended upon the type of committee whose records were being sought, and not the substance of those materials. Specifically, the Supreme Court drew a distinction between a "review organization" and a "review committee," finding that only a review committee engages in peer review, and therefore, only peer review materials in the possession of a review committee are protected from disclosure under the statute.

In the wake of *Reginelli*, lower courts interpreted the decision to mean that peer review materials in the possession a credentialing committee are discoverable, even though peer review is an indispensable component of the credentialing process. Fortunately, the Pennsylvania Supreme Court acted quickly to fix the problem caused by *Reginelli*. On August 17, 2021, the Supreme Court issued its decision in *Leadbitter v. Keystone Anesthesia*, holding that the name of the committee is not dispositive of whether it performs peer review, and instead, the focus is on whether the committee undertakes peer review. The Supreme Court separately held that the information the National Practitioner Data Bank ("NPDB") provides to hospitals in response to requests concerning a specific practitioner are not discoverable under the federal Health Care Quality Improvement Act ("HCQIA") and its regulations, adding that this protection exists regardless of any contrary aspect of state law.

Collectively, the Supreme Court's holdings strengthen the protections afforded to peer review and other confidential materials under the PRPA and HCQIA, and undo the mischief caused by *Reginelli*.

BACKGROUND

As recognized by the Pennsylvania Supreme Court in *Reginelli*¸ "the practice of medicine is highly complex and, as such, the medical profession is in the best position to police itself." Hospitals and physicians self-regulate through processes, including peer-review, to determine whether a particular physician should be given clinical privileges to

perform a certain type of medical activity at a hospital. Peer review is an indispensable way in which physicians and healthcare providers ensure that patients receive healthcare that meets critical standards of quality.

Yet, for as long as peer review has existed, there have been powerful disincentives to participate in the process. Many physicians have been reluctant to serve on peer review committees due to the risk of involvement in related future litigation, or fear of personal or professional retaliation.

Recognizing the impediments to meaningful peer review, as well as the critical importance of peer review to ensuring quality healthcare to the public, the Pennsylvania General Assembly adopted the PRPA. The statute fosters candor and openness in the consideration of peer-review data regarding a fellow physician by conferring upon those physicians conducting peer review safeguards like immunity from liability and confidentiality—all with the objectives of improving the quality of care, reducing mortality and morbidity, and controlling costs. The PRPA, however, is far from the model of clarity. The title of the confidentiality provision (Section 4) pertains to "review organizations," but the text sets forth confidentiality mandates and testimonial privileges relating to work and records of "review committees." Yet, a "review committee" is not a defined term in the statute.

In 2018, the Supreme Court in *Reginelli* attempted to resolve the difficulties created by the statutory language by fashioning a rule whereby peer review materials held by a "review committee" were protected from disclosure under the PRPA and peer review materials held by a "review organization" were not. However, by placing form over function, the Supreme Court drew an arbitrary distinction between the two bodies and incorrectly assumed that only review committees engaged in peer review. In the process, the Court largely stunted the effectiveness of PRPA protections.

Against this backdrop, the Superior Court issued its decision in *Leadbitter v. Keystone Anesthesia Consultants, Ltd.*, 229 A.3d 292 (Pa. Super. 2020). There, Superior Court was tasked with determining whether the statutory protections under the PRPA applied to a credentialing committee that reviewed the following peer review materials: (1) an OPPE (Ongoing Professional Practice Evaluation) Summary Report; (2) a Professional Peer Review Reference and Competency Evaluation, which contained evaluations prepared by other physicians of Defendant Dr. Petraglia's performance; and (3) three documents described as "National Data Bank Practitioner Query Response," based on queries submitted to the National Practitioner Data Bank. The trial court held that, based on *Reginelli*, all of the documents were discoverable and not protected from disclosure under the PRPA.

The Superior Court affirmed on appeal, finding that, pursuant to *Reginelli*, only documents of a "review committee" enjoyed the statutory protection, and not documents kept by a "review organization," regardless of the nature of such documents. Accepting *Reginelli* as binding precedent, the Superior Court held that all of the documents, even including the NPDB query responses, were discoverable. Notwithstanding its holding, however, the panel questioned the judicially-created distinction between a "review committee" and a "review organization" for purposes of shielding peer review documents from public disclosure, writing:

> We share the observation of the Dissent in *Reginelli* that the Majority's distinction between a review "organization" and review "committee" will result in the same chilling effect upon free and frank discussions aimed to ensure and improve an appropriate quality of care that PRPA strives to vitiate. This chilling effect will also occur when a credentialing committee is reviewing whether it should grant hospital privileges to a physician with no relationship to the hospital.

THE DECISION

On appeal, the Pennsylvania Supreme Court reversed. The Court held that a committee which performs a peer-review function, although it may not be specifically entitled a "peer review committee," constitutes a review committee whose proceedings and records are protected under the PRPA. In doing so, the Court implicitly rejected the bright-line rule announced in *Reginelli*. Now, and as the Supreme Court made clear, "the name of the committee is not dispositive of whether it performs peer review." The Court thus held that a hospital's credentialing committee qualifies as a "review committee" under the PPRA—and thus, rendering peer review materials in its possession non-discoverable—to the extent that the credentialing committee undertakes peer review.

In reaching these conclusions, the Court acknowledged that the statutory privilege may prevent civil plaintiffs from obtaining documents tending to show that their injuries were caused by the defendant's negligence. "However," the Court continued, "the legislative body is presumed to have balanced that consideration against others . . . which may be in tension with it, and to have intentionally used language applying to a variety of committees whose proceedings and records involve peer review." Accordingly, and as the record did not include the withheld documents, the Supreme Court remanded the matter to the trial court to determine whether they are protected as peer-review materials pursuant to the statutory definition of "peer review."

Among other firms giving their clients a voice on this important issue, the Appellate and Professional Liability teams at Eckert Seamans Cherin & Mellott participated in this appeal by submitting a Brief of *Amici Curiae* on behalf of the firms' clients.

IMPLICATIONS AND RECOMMENDATIONS

Based upon its holdings in *Leadbitter*, the Supreme Court has restored the protections afforded to peer review materials under the PRPA. Therefore, while hospitals and physicians had to endure three years of uncertainty due to *Reginelli*, the issue of whether peer review materials are statutorily protected from disclosure in civil proceedings should be put to bed forever. The law in Pennsylvania regarding the PRPA and its protections will now run parallel with the protections upheld by courts nationwide by affording privilege to the peer review documents of credentialing, and likewise, committees.

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This Professional Liability Alert is intended to keep readers current on developments in the law, and is not intended to be legal advice. If you have any questions, please contact authors Casey A. Coyle at 717.237.7192 or ccoyle@eckertseamans.com, Peter J. Hoffman at 215.851.8420 or phoffman@eckertseamans.com, Brooke A. Scicchitano at 215.851.8455 or bscicchitano@eckertseamans.com, or any attorney at Eckert Seamans with whom you have been working.