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Peer Review in Medical Malpractice Actions: A Categorical Good

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ABSTRACT

In 2016, the Pennsylvania Bar Association Quarterly *published a comprehensive analysis of the Peer Review Protection Act. Since that time, Pennsylvania courts have grappled with the Act in an attempt to clarify its parameters and application in medical negligence litigation. This article discusses the purpose of the Act, the mandates of the Act, and recent case law developments interpreting the Act.*

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I. PURPOSE OF THE PEER REVIEW PROTECTION ACT (PRPA)

The Peer Review Protection Act ("PRPA")[3] was passed in 1974 in an effort to promote patient safety. The legislature's initiative rested on "dual observations": (1) that the practice of medicine is highly complex, and (2) because of this complexity, the medical profession is best positioned to police itself.[4] One of the primary ways the field of medicine polices itself, and thereby promotes patient safety, is through peer review.

The Peer Review Protection Act serves patients, doctors and the public interest by facilitating honest assessments of medical professionals and their performance.

On a basic level, peer review is a process for doctors and other healthcare providers to evaluate each other on their quality of medical care and adherence to professional standards.[5] That peer review process is confidential and not discoverable in medical malpractice suits.[6] The reasons the peer review process is confidential are self-evident. "As privilege is constricted, meaningful peer review is diminished and in turn patient safety is compromised."[7] Meaningful peer review and the privilege protecting it are directly correlated: they "thrive or wither in concert."[8] Keeping the peer review process confidential is necessary to encourage effective peer review. If a doctor's review of a peer's patient care were not kept confidential, it is doubtful that doctors would be fully candid in their assessments. So meaningful peer review would not occur out of fear from the doctors, and other healthcare providers, that they would lose referrals, respect, and relationships, or be subject to malpractice lawsuits.[9]

II. THE ACT

For such an important statute, the PRPA is remarkably short — its entire contents fit on a two-page word document.[10] The Act has only three substantive parts: definitions, an immunity from liability provision, and the confidentiality provision.[11] The definitions section is limited to defining the following terms: peer review, professional health care provider, professional society, and review organization.[12] And although the peer review privilege applies only to "review

3 63 P.S. §425.1 *et seq.*
4 Leadbitter v. Keystone Anesthesia Co., 256 A.3d 1164, 1168 (Pa. 2021).
5 63 P.S. § 425.2 (defining "peer review" as "the procedure for evaluation by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers" and "professional health care provider" 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," including, but not limited to, an enumerated list).
6 63 P.S. § 425.4 (noting certain exceptions).
7 Brief of Appellant St. Clair Hospital, *Leadbitter* 2020 WL 8996804 at *16.
8 *Id.*
9 *Leadbitter*, 256 A.3d at 1169 (internal citations omitted).
10 At font size 12.
11 63 P.S. §§ 425.2-425.4.
12 *Id.* at § 425.2.

committees," that term is not defined.

Despite its statutory brevity — or perhaps because of that — the PRPA is "not a model of clarity."[13] "Review organization" is the only group defined under the peer review statute, but somehow this group cannot conduct peer review. And although the confidentiality provision heading is titled "Confidentiality of *review organization's* records," the provision has been interpreted to apply only to a "review committee" — a term absent from the Act.[14] To compensate for this lack of clarity, courts have adopted a circular definition that a "review committee" is any committee that undertakes peer review.[15]

Notably, information that is otherwise available from "original sources" is not privileged.[16] Thus documents such as medical records, even if submitted in the peer review process, are not privileged and protected from disclosure because they are otherwise available independently, outside of the peer review process. In other words, a professional health care provider cannot launder discoverable documents by pushing them through the peer review process.

The party asserting the privilege has the burden of showing it applies.[17] The privilege applies only to:

- Proceedings and documents created by a review committee or created at its direction,[18]
- When the review committee conducts peer review activities,[19] and
- Peer review is undertaken on behalf of a professional health care provider.

In practice, application of the PRPA privilege may require an *in camera* inspection by the court.[20] If the court finds that the privilege exists, the adverse party then has the burden to establish waiver of the privilege.[21]

III. THE PRIVILEGE TODAY — CASE LAW REVIEW

The Pennsylvania Bar Association Quarterly last published a comprehen-

13 Reginelli v. Boggs, 181 A.3d 293, 308 (Pa. 2018) (Wecht, J., dissenting).
14 63 P.S. §§ 425.2. 425.4 (emphasis added).
15 *Reginelli*, 181 A.3d at 308 n.8.
16 63 P.S. § 425.4.
17 Yocabet v. UPMC Presbyterian, 119 A.3d 1012, 1019 (Pa. Super. 2015) (internal quotations and citations omitted) (noting the adverse party also has the burden to establish any exceptions to an evidentiary privilege but that "there are no exceptions to the peer review privilege articulated in the case law thus far").
18 63 P.S. § 425.4; *see also Reginelli*, 181 A.3d at 308 n.8 (defining "review committee" as any committee that undertakes peer review).
19 63 P.S. § 425.2 (defining "peer review" as "the procedure for evaluation by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers").
20 *Leadbitter*, 256 A.3d at 1178.
21 *Id.*

sive article on the PRPA nearly a decade ago in 2016.[22] Since that time, the Pennsylvania Supreme Court first neutralized the Act in 2018 in *Reginelli v. Boggs*,[23] and then revitalized it in 2021 in *Leadbitter v. Keystone Anesthesia Company.*[24]

A. *Reginelli v. Boggs* (Pa. 2018)

In *Reginelli*, a hospital contracted with a private entity ("ERMI") to staff the hospital's emergency room.[25] According to the amended complaint, Mrs. Reginelli was taken to the hospital's emergency room complaining of gastric discomfort. She was treated by Dr. Boggs. "Mrs. Reginelli and her husband, Orlando Reginelli, allege[d] that Dr. Boggs failed to diagnose an emergent, underlying heart problem and discharged her without proper treatment. Several days later, Mrs. Reginelli suffered a heart attack." [26] An employee of ERMI, Dr. Brenda Walther, functioned as the supervising physician of the ER physicians and conducted performance reviews of the ER physicians — including Dr. Boggs.[27] After the plaintiffs sought Dr. Boggs' performance file in discovery, the hospital and ERMI claimed PRPA privilege to prevent its disclosure.

The Supreme Court, by a vote of 4-3, rendered two important holdings. First, it held that ERMI was not a professional health care provider under the PRPA because it was merely a business entity contracting with a hospital to provide medical staff and not an organization "approved, licensed or otherwise regulated to practice or operate in the health care field under the laws of the Commonwealth."[28] In the majority's view, even though ERMI was "comprised of hundreds of 'professional health care providers' (namely, physicians)," it could not claim PRPA privilege.[29]

Second, the Court held that only proceedings and documents of a review *committee* are privileged under the PRPA, not reviews conducted by a review organization — even though the statutory provision is paradoxically titled "Confidentiality of review organization's records." While an individual can constitute a review organization, an individual cannot constitute a committee. Therefore, because the performance review process at issue was managed by a single supervising physician, and not a committee, the performance review was not protected by the PRPA privilege.[30] As a result of these holdings, neither defendant could claim PRPA privilege. Nevertheless, in dicta, the Court continued to emphasize the difference between "review organization" and "review committee." The Court noted that the PRPA privilege does not extend to a com-

22 Wendy O'Connor R.S., *The Peer Review Protection Act ("PRPA"): Looking Back, Looking Ahead*, 87 Pa. Bar Ass'n Q. 49 (April 2016).
23 *Reginelli*, 181 A.3d 293 (Pa. 2018).
24 *Leadbitter*, 256 A.3d 1164 (Pa. 2021).
25 *Reginelli,* 181 A.3d at 296.
26 *Id.*
27 *Id.*
28 *Id.* at 303 (citing 63 P.S. § 425.2).
29 *Id.*
30 *Id.* at 306.

mittee engaging in reviewing credentials.[31]

Justice Wecht issued a dissenting opinion which was joined by Chief Justice Saylor and Justice Todd.[32] Justice Wecht's dissent emphasized the unwarranted distinction between review organizations and review committees:

> The Majority's analysis builds upon the premise that, the language of the Act being plain and unambiguous, we must follow it where it leads, no matter how unintuitive or even counterintuitive the result. . . .[33]
>
> I am reluctant to impute to the General Assembly the belief that effective peer review, and the objects it seeks to advance, can be achieved only when engaged in by two or more qualified professionals, so as to constitute a 'committee.' . . . If the legislature intended to protect health care providers who render candid opinions that serve the overarching goal of improving the quality of care, this interpretation undermines that intent. In doing so, it violates the presumption that 'the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.' 1 Pa.C.S.A. § 1922(1).[34]

The dissent likewise rejected the majority's conclusion that ERMI was not a professional health care provider under the PRPA because it was merely a business entity:

> Thus, the Majority's apparent conclusion that ERMI is not 'a corporation . . . operating a . . . health care facility' is suspect, given that ERMI operates an entire hospital department, with all the hiring, oversight, and administration that this entails. . . . Thus, I would hold that ERMI is an operator of a health care facility by virtue of having taken sole responsibility for operating the department. The Majority's contrary interpretation guts the privilege, given that contractual staffing and administration agreements are commonplace.[35]

Due to the Court's commentary on credentialing, subsequent litigants argued over whether the *Reginelli* Court drew a bright line between a credentialing review (which is not privileged under the PRPA) and a peer review (which

31 *Id.*
32 *Id.* at 308.
33 *Id*. at 311.
34 *Id*. at 315.
35 *Id*. at 319-320.

would be privileged under the PRPA).[36]

B. *Leadbitter v. Keystone Anesthesia Co*. (Pa. 2021)

In 2021, the Supreme Court alleviated those apprehensions with its unanimous decision in the case of *Leadbitter v. Keystone Anesthesia Consultants, Ltd.*[37] In *Leadbitter*, a former patient and his wife filed a medical malpractice action arising from a series of debilitating strokes he suffered after having undergone spinal surgery. The plaintiffs requested the credentialing file of the surgeon from the credentialing committee at the defendant hospital. The hospital produced 141 pages of the file but withheld 17 pages, claiming those pages were privileged under the PRPA.[38] The 17 withheld pages consisted of performance-related information.[39] The hospital also redacted professional opinions of the surgeon's competence from certain produced documents.[40]

Unsurprisingly, plaintiffs filed a motion to compel seeking the entire unredacted credentialing file. In response, the hospital argued that there is a distinct difference between credentialing and privileging functions. The hospital explained that privileging assesses a physician's experience, capabilities, and competence, which "inherently involve" peer review functions, while credentialing involves reviewing objective criteria such as the physician's academic degrees, board certifications, and licensure, which are not peer review functions.[41] The hospital acknowledged that the credentialing file at issue was prepared by a committee called the "credentialing committee." But the hospital argued that, to the extent the credentialing committee engaged in peer review functions like privileging, such information should be protected by the PRPA, notwithstanding the denomination applied to the committee.

Distinguishing *Reginelli*, the Supreme Court agreed, holding "that a committee which performs a peer-review function, although it may not be specifi-

36 Est. of Krappa By & Through Krappa v. Lyons, 222 A.3d 372, 374-75 (Pa. 2019) (Wecht, J., concurring stmt.) ("I am concerned that the marked difference [between credentialing and peer review] posited by the *Reginelli* court will prove more difficult to discern in practice than it is to describe in the pages of a judicial opinion. . . . Regardless of whether such records were sought from a committee named 'peer review' or 'credentialing,' or whether they were utilized for purposes of assessing care in itself or for purposes of determining whether a given physician deserved to be credentialed or recredentialed. . . , peer assessments are precisely what the General Assembly sought to protect from discovery in the PRPA to ensure that physicians freely and candidly assess each other's performances. Allowing disclosure simply because such documents were sought in connection with a credentialing process rather than as a targeted committee review of the quality of a physician's care for its own sake would invite the chilling effect that the General Assembly sought to prevent.").

37 *Leadbitter,* 256 A.3d 1164 (Pa. 2021).

38 Brief of Appellant, St. Clair Hospital, *Leadbitter*, 2020 WL 8996804 at *6.

39 *Id.* In addition, the defendant also withheld three National Practitioner Data Bank Query Response documents pursuant to the federal Health Care Quality Improvement Act. Apart from the PRPA analysis, the Court held the National Practitioner Data Bank Query documents were protected by the federal Health Care Quality Improvement Act. The defendant did not contend that the PRPA applied to these documents. *See also* Morrissey v. Geisinger Cmty. Med. Ctr., No. 3:19-CV-894, 2020 WL 6877183, at *2 (M.D. Pa. Nov. 23, 2020) ("Pennsylvania courts have repeatedly held that disclosure of information contained within National Practitioner Data Bank ("NPDB") reports is prohibited pursuant to the PRPA and federal statute.") (footnote omitted).

40 *Id.*

41 *Id.* at 1175.

cally entitled a 'peer review committee,' constitutes a review committee whose proceedings and records are protected" under the PRPA.[42] The Court remanded the case to the lower court to conduct an *in camera* inspection of the withheld information to determine whether the PRPA protection applied.[43]

Justice Wecht wrote a concurring opinion in which he agreed with the Court's disposition of the case, but maintained his criticisms of the *Reginelli* framework:

> . . . I cannot support the Majority's attempt to reconcile today's holding with *Reginelli's* involuted and ultimately unconvincing analysis. That endeavor, though salutary in its intent, only highlights *Reginelli's* flaws.[44]
>
> . . . the Court takes one step back when it insists that it can reshape how courts approach the PRPA in this fashion while honoring *Reginelli's* clearly incompatible approach. This only ensures that the confusion and discomfort with Reginelli's prescriptive approach that the lower courts have expressed in the years since this Court issued the decision will persist.[45]

IV. THE PRIVILEGE TODAY — QUESTIONS REMAIN

Whether the PRPA privilege applies is a fact intensive inquiry that focuses on whether the purpose of the information in question is to improve patient care and whether it was generated pursuant to a peer review function. For example, incident reports are generally considered business records, falling into the PRPA original source documents exception. Thus, if an incident report is generated in accordance with a reporting policy, it is not generated during peer review and is not protected by the PRPA.[46]

Reginelli and *Leadbitter* provided guidance for hospitals and medical providers engaging in peer review. But several questions still remain:

- Pursuant to *Reginelli*, an individual cannot perform peer review. Yet as confirmed in *Leadbitter*, an individual physician's evaluation of another physician is peer review entitled to protection. Therefore, courts must still confirm whether an individual may be retained to perform peer review when the results are reviewed by a committee.[47]
- Hospitals, doctors, and other professional health care providers can waive the PRPA privilege if they disclose peer review information for another purpose. While certain disclosures will waive the privilege, others may not. For example, can peer review findings be shared with a

42 *Id.* at 1177.
43 *Id.* at 1178.
44 *Id.* at 1183.
45 *Id*. at 1191 (footnote omitted).
46 Ungurian v. Beyzman, 232 A.3d 786 (Pa. Super. 2020).
47 *Reginelli*, 181 A.3d 293 (Pa. 2018).

hospital's patient safety committee or board of directors in furtherance of patient safety?[48]

- Business entities providing peer review services do not benefit from the PRPA privilege if they do not meet the definition of professional health care provider ("approved, licensed, or otherwise regulated to practice or operate in the health care field"[49]). But hospitals sometimes retain those business entities to perform peer review services. Courts have not yet analyzed whether the records and documents of the peer review conducted by the contracted entity are discoverable when utilized by the hospital.[50]
- Any committee that performs peer review, even committees that perform other functions, will be protected by the PRPA evidentiary privilege for the peer review related process. *Leadbitter* analyzed a formal hospital committee, but the courts have not yet considered the numerous hospital committees that are formed on an ad hoc basis.[51]
- The Pennsylvania Superior Court has provided conflicting guidance about the composition of peer review committees. According to *Ungurian v. Beyzman (*Pa. Super. 2020),[52] a review committee must be composed only of professional healthcare providers for the PRPA's protection to apply. Therefore, a hospital's, or other defendant's, failure to identify the members of a review committee may be fatal to a claim of privilege under the PRPA because there is no prima facie showing that the committee members were professional health care providers as required by the PRPA.[53] But this guidance conflicts with the Superior Court's decision in *Piroli v. Lodico*, 909 A.2d 846 (Pa. Super. 2006).[54] According to *Piroli*, the presence of a "billing manager" on a review committee did not "serve to eviscerate the protections that the legislature intended the PRPA to provide."[55] *Piroli* reasoned that the PRPA was intended "not only to evaluate and improve the quality of health care, but *also* to establish and enforce guidelines designed to keep within reasonable bounds the cost of health care."[56] Therefore, a non-health-

48 BouSamra v. Excela Health, 270 A.3d 1156 (Pa. Super. 2021) (disclosing peer review information at a press conference waives the privilege).

49 63 P.S. § 425.2.

50 There are no limitations providing that the physician performing the review must be affiliated with the hospital. *See* Yocabet v. UPMC Presbyterian, 119 A.3d 1012, 1024 (Pa. Super. 2015) (agreeing with the proposition that peer review can apply to investigations performed "by outside entities"); Piroli v. Lodico, 909 A.2d 846, 851 (Pa. Super. 2006) (finding that "the review process undertaken by [a non-party physician] in response to the incident constituted a 'peer review' that the legislature intended would be protected by the PRPA").

51 *Leadbitter,* 256 A.3d 1164 (Pa. 2021).

52 Ungurian v. Beyzman, 232 A.3d 786 (Pa. Super. 2020).

53 *Id.*

54 Piroli v. Lodico, 909 A.2d 846 (Pa. Super. 2006).

55 *Id.* at 852.

56 *Id.*

care provider could be a member of the review committee.

Note that the PRPA is only one of several privileges that protect this type of information and may overlap with other applicable privileges that are not the subject of this Article.[57]

V. RESPONSE TO CONCERNS ABOUT THE PRIVILEGE

Peer review is a categorical good, which is why it is mandated as a part of accreditation. But the positive impact on society comes at a cost to litigants and their counsel, as all privileges do. "Exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[58] Therefore, the Plaintiffs' Bar often criticizes the peer review privilege, mistakenly framing the issue as hiding the truth.[59] Such an approach may be warranted where the information sought — the truth — exists independent of and without regard to the privilege, e.g., marital privilege protection. The choice, however, is not whether peer review materials should be discoverable. The choice is whether to have peer review at all. The creation of peer review materials is "entirely dependent upon the protection afforded by the privilege, they will thrive or wither in concert."[60]

Peer review is the product of the confidential environment in which it occurs; the degree of candor is commensurate with the degree of confidentiality attached to the process. Without an assurance of confidentiality, the entire peer review framework would collapse. A review committee would never receive candid and potentially career-damaging assessments. And the central mission of the PRPA — to encourage the medical profession to police itself — would be a nullity.

As written by the esteemed Judge Wettick over twenty-five years ago, "The purpose of the privilege is to prevent a party suing a medical provider from obtaining information that would assist the party in the litigation if disclosure of the information would discourage medical providers from conducting the peer review activities described in 63 P.S. § 425.2."[61] Therefore, there must be

57 *See* Medical Care Availability and Reduction of Error ("MCARE") Act, 40 P.S. § 1303.101, *et seq.*; Patient Safety and Quality Improvement Act ("PSQIA"), 42 U.S.C. § 299b-21, *et seq.* (*see also* Faben, Peter; Melamed, Elizabeth; Nankerville, Tasha, *An Uncertain Privilege is No Privilege At All: How Courts And Litigants Misunderstand the Federal Patient Safety Work Product Privilege Under the Patient Safety and Quality Improvement Act (PSQIA)*, 95 Pa. Bar Ass'n Q. 16 (January 2024)); *See also In re BayCare Medical Group, Inc.*, 101 F.4th 1287 (11th Cir. 2024), which found that PSQIA protections are broader than some courts have recognized based on the plain text of the PSQIA. The circuit could discern no basis for the district court's holding that to be protected under the PSQIA the records sought had to be created or maintained for the "sole purpose" of making reports to a patient safety organization; Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11111, *et seq.*

58 *Reginelli*, 181 A.3d at 300 (*quoting* Commonwealth v. Stewart, 690 A.2d 195, 197 (Pa. 1997)).

59 *See e.g.*, Clifford A. Rieders, *Is Secretive Peer Review Good or Bad for Patients and Doctors?,* 94 Pa. Bar Ass'n Q. 123 (July 2023).

60 Brief of Appellant St. Clair Hospital, *Leadbitter*, 2020 WL 8996804 at *16.

61 Lindsay v. Bosta, 1999 Pa. Dist. & Cnty. Dec. LEXIS 222, *16-17 (C.C.P. Allegheny County March 18, 1999).

a "guarantee of confidentiality rather than a possibility of confidentiality" in order to facilitate the effective policing of the medical profession.[62] Peer review committees could never fulfill their core function without this guarantee.

The purpose of the PRPA is to provide "for the increased use of peer review groups by giving protection to individuals and data who report to any review group."[63] The legislature's goal in enacting the PRPA was to expand the invaluable mission of peer review in the field of medicine. And the guarantee of confidentiality is the central means to achieve that goal. The medical consensus is still that peer review fosters improvements in health care. As long as the General Assembly desires these improvements, then the PRPA should remain untouched. Its confidentiality provision must be regarded as sacrosanct.

VI. CONCLUSION

The purpose of the PRPA is to promote patient safety and encourage the health care system and providers to improve delivery of healthcare services. While the language of the PRPA remains non-specific, and some of the case law is contradictory, in recent years the Pennsylvania Supreme Court has affirmed that the privilege protects all peer review functions as defined by the Act, regardless of where or when that peer review takes place.

62 *Id.*
63 63 P.S. § 425.1.