



# NC Quality Center PSO and Center for Patient Safety

## PSO and Peer Review: To Include or Not Include: That is the Question

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# Disclaimer

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# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? – North Carolina

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- North Carolina
  - N.C. Gen. Stat. § 131E-95(B)
    - Proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not subject to discovery or introduction into evidence in any civil action against a hospital, surgicenter or provider of health services which results from matters which are subject to evaluation and review by the committee.
    - If information is otherwise available, it cannot be protected.

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? – North Carolina (cont'd)

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- Information can be disclosed to a professional standards review organization, such as The Joint Commission, or to a PSO or its designated contractors.
- Minimum necessary standard applies.
- Protections arguably apply to peer review conducted in a physician group, but no case law on this question.
- Can be sent to a PSO and still be kept confidential.
- Appears that protections could be waived if information is disclosed outside of peer review process.

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? – North Carolina (cont'd)

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- One court held that protections do apply in federal proceedings.
- Not clear if information can be shared throughout system.

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? - Missouri

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- Missouri
  - Missouri Revised Statutes, Chapter 537, Section 537.035
    - “Peer Review Committee” is a committee of health care professionals (physician, surgeon, dentist, podiatrist, pharmacist, psychologist, nurse, social worker, professional counselor or mental health professional) with the responsibility to evaluate, maintain, or monitor the quality and utilization of health care services or to exercise any combination of such responsibilities.

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? - Missouri (cont'd)

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- Entities covered include committees of:
  - Health care professional societies
  - Professional corporation of health care professionals
  - Health care professionals employed by or affiliated with a university
  - Licensed hospitals or other health care facilities, including long term care
  - Organizations formed pursuant to state or federal law to exercise responsibilities of a peer review committee
  - HMOs

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? - Missouri (cont'd)

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- Interviews, memorandums, proceedings, findings, deliberations, reports and minutes concerning the health care provided any patient are not subject to discovery and is not admissible into evidence in any judicial or administrative action for failure to provide appropriate care.
- Persons in attendance cannot be required to disclose or testify.
- Information is discoverable if otherwise available.
- Can be required to testify as to personal knowledge.
- Protections cannot be waived.
- Protections do not apply in peer review litigation.
- Not clear whether the state protections would apply where plaintiff brings a federal cause of action in federal court, i.e., antitrust, discrimination.
- Not clear as to whether information can be freely shared throughout the system.



# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? - Illinois

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- Illinois
  - 735 ILCS 5/8-2101
    - All information, interviews, reports, statements, memoranda, recommendations, letters of reference or other third party confidential assessments of a health care practitioner's professional competence, or other data.
    - Allied medical societies, health maintenance organizations, medical organizations under contract with health maintenance organizations or with insurance or other health care delivery entities or facilities.
    - Their agents, committees of ambulatory surgical treatment centers or post-surgical recovery centers or their medical staffs, or committees of licensed or accredited hospitals or their medical staffs.

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? - Illinois (cont'd)

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- Including Patient Care Audit Committees, Medical Care Evaluation Committees, Utilization Review committees, Credential Committees and Executive Committees,, or their designees (but not the medical records pertaining to the patient), used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation.
- Shall be privileged, strictly confidential and shall be used only for medical research, the evaluation and improvement of quality care, or granting, limiting or revoking staff privileges or agreements for services.
- Information can be used in disciplinary hearings and subsequent judicial review.

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? - Illinois (cont'd)

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- Protections have been interpreted fairly broadly but information produced for a different purpose, i.e., risk management, is not protected even if used by a peer review committee.
- Although the Medical Studies Act references “medical organizations” under contract with HMOs or other healthcare delivery entities or facilities, surgicenters and hospitals, Appellate Courts have not extended protections to nursing homes or pharmacies.

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? - Illinois (cont'd)

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- Protections cannot be waived if used for statutory purposes.
- Information arguably can be shared throughout the system among controlled affiliates subject to physician authorization.
- Protections do not apply to federal claims brought in federal court.

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? – Patient Safety Act

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- Patient Safety Act
  - The confidentiality and privilege protections afforded under the PSA generally apply to reports, minutes, analyses, data, discussions, recommendations, etc., that relate to patient safety and quality if generated or managed, or analyzed within the PSES and collected for reporting to a PSO.

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? – Patient Safety Act (cont'd)

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- Any licensed provider, i.e., physician, physician group, surgicenters, clinic, hospital, nursing home, home health facility, etc., can be covered under the PSA whereas in many states the kinds of providers that can be protected is more limited.
- The confidentiality and privilege protections afforded under the PSA generally apply to reports, minutes, analyses, data, discussions, recommendations, etc., that relate to patient safety and quality if generated or managed, or analyzed and collected within the PSES for reporting to a PSO.

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? – Patient Safety Act (cont'd)

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- The scope of what can be protected under the PSA, generally speaking, is broader than the North Carolina, Missouri and Illinois statutes.
- Any licensed provider, i.e., physician, physician group, surgicenters, clinic, hospital, nursing home, home health facility, etc., can be covered under the PSA.
- The protections apply in both state and, for the first time, federal proceedings.
- The protections can never be waived.
- If the protections are greater than those offered under state law the PSA pre-empts state law.

# 1. How do state confidentiality/privilege protections compare to those offered under the Patient Safety Act? – Patient Safety Act (cont'd)

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- PSWP is not admissible into evidence nor is it subject to discovery.
- Key to these protections is the design of the provider's and PSO's patient safety evaluation system ("PSES").



## 2. What is Just Culture?

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- A just culture recognizes that individual practitioners should not be held accountable for system failings over which they have no control.
- A just culture also recognizes that many errors represent predictable interactions between human operators and the systems in which they work.
- A just culture recognizes that competent professionals make mistakes.
- A just culture acknowledges that even competent professionals will develop unhealthy norms (shortcuts, “routine rule violations”)
- But, a just culture has zero tolerance for reckless behavior

## 2. What is Just Culture? (cont'd)

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- Goal is to create an environment where professionals can feel comfortable acknowledging and reporting their mistakes without fear of reprisal or disciplinary action.
- Instead, the adverse event or mistake is seen as a learning opportunity so as to avoid future errors and to correct at-risk behavior.
- There are clear differences between human error, at-risk behavior and reckless behavior.

### 3. How Does Just Culture Affect Peer Review and the Patient Safety Act?

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- Under the PSA, peer review information relating to adverse events, remedial actions, analysis, third party reviews, etc., collected within a PSES and reported to a PSO arguably cannot be used for disciplinary action – i.e., suspensions and terminations – supports a just culture.
- Peer review PSWP can be used for internal educational efforts and other remedial measures.
- Can use the facts of events to support a disciplinary action.

### 3. How Does Just Culture Affect Peer Review and the Patient Safety Act? (cont'd)

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- Peer review information collected within a PSES but not yet reported to a PSO, physically or functionally, can be “dropped out” and used for disciplinary action.
  - But does this undermine commitment to just culture?
- Medical records and other information not reported to the PSO can be re-reviewed outside of the PSES and used for disciplinary action.
  - Information can be protected under existing state confidentiality statute.

# Hypothetical: Post Op Infections

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- Ortho group identified as having several post op infections as per screening criteria.
- Department of Surgery and Committee on Infection Control and Prevention decide to conduct review of all ortho groups in order to compare practices and results.
  - Data and review collected as part of PSES for reporting to PSO.
- Review identifies a number of questionable practices generally, which are not consistent with established infection control protocols.
  - Data and analysis and recommendations eventually reported to PSO
- Review also discloses member of targeted ortho group as having other identified issues including:
  - Total shoulder procedures in elderly patients
  - Questionable total ankle procedures

# Hypothetical: Post Op Infections (cont'd)

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- Untimely response to post op infections
- Issues identified are significant enough to trigger 3rd party review.
- Third party review identifies and confirms issues relating to poor judgment and sub-standard practices that may lead to remedial/corrective action.
- Decision is made by Department Chair that consistent with “just culture” policy physician’s cases will be monitored for six month period rather than recommended disciplinary action.
- This monitoring is taking place outside of the PSES.
  - Monitoring reveals repeat problems relating to questionable judgment and surgical technique which have resulted in adverse outcomes.
  - Department Chair recommends formal corrective action.

# Hypothetical: Post Op Infections (cont'd)

