# Hospitals Successfully Assert Peer Review Privileges Under Two Different Statutes

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Getting the trial court to protect the product of peer review materials can often seem like a daunting task for the hospital and its defense counsel. Two 2018 decisions by different First District Illinois Appellate Court panels demonstrate that **a carefully described privilege log, well thought out affidavits, the use of appropriate triggers to mark the start of the investigative process, and an *in camera* inspection** should be sufficient to invoke the privileges afforded under the Illinois Medical Studies Act ("MSA") or the Patient Safety Act, ("PSA"). When read together the cases also highlight important differences between the types of information protected under the statutes, as well as the appropriate process to pursue in court when invoking the privileges afforded under either act. Additionally, both cases confirm that where the trial court fails to recognize the privilege, the defendant hospital and counsel should be prepared to take a contempt finding to obtain appellate court clarification.

In *Mnookin,* Northwest Community Hospital ("NCH") sought to protect the contents of 24 documents as privileged under the MSA in a medical malpractice case where plaintiff alleged that decedent went into cardiac arrest following surgery and subsequently died. The trial court held that 17 of the documents contained information from the decedent's medical records and should have been turned over to the plaintiff.

NCH filed 4 affidavits from quality service excellence administrators and the Chief Medical Officer, which explained the quality improvement and peer review processes at the hospital, and noted the quality indicators and triggers for committee review and root cause analysis ("RCA"). The affidavits also established that some of the documents were submitted to the Joint Commission, NCH's independent accrediting organization, as part of its "Sentinel Event" reporting. The documents consisted of notes taken during the RCA, as well as "framework documents" for the RCA process, worksheets used by the committees, and meeting minutes from the hospital's quality control committee.

The appellate court ruled that NCH met its burden to show that the documents were privileged under the MSA, overruling the the trial court's order requiring production and vacating the contempt fines. The court noted that some of the documents on their face were clearly documents authored for use by the peer

review committees. Additionally, documents submitted to the Joint Commission were also protected by the MSA. The court noted that the RCA documents were also protected because NCH had demonstrated, through both affidavit and memorandum, when the RCA investigation began. Importantly, the court addressed the fact that documents prepared for use in the RCA, which occurred following the patient's procedure, and before her death, and **which preceded the peer review process**, were still protected under the MSA. This is an implicit acknowledgement that quality review may take on different forms based on the hospital's process.

## Hospitals Successfully Assert Peer Review Privileges Under Two Different Statutes

In *Daley*, medical malpractice defendants were alleged to have failed to adequately monitor and treat the decedent's glucose levels over a two day period. Ingalls Memorial Hospital ("Ingalls") initially sought to protect multiple documents, but Ingalls ultimately claimed privilege to 3 documents under the Federal Patient Safety Act. The Act provides multiple "pathways" for protection of information. One path provides protection if information meets criteria as "patient safety work product", and that information is submitted to a certified Patient Safety Organization ("PSO") to promote patient safety and improved outcomes.

Ingalls sought to protect two incident reviews, one created 2 weeks after the incident and one about 2 months after the events, and a document detailing a complaint made by a family member several weeks after the decedent's hospitalization. Originally, Ingalls claimed that the documents in question were privileged and protected by both the MSA and PSA. Later in the discovery process, Ingalls apparently abandoned its claim that the documents were protected under both statutes, when it submitted a supplementary affidavit from its associate general counsel, who averred that the documents were assembled, developed and prepared "solely" for submission to its PSO.

While the *Daley* court acknowledged that privileges are to be "strictly construed," it held that Ingalls demonstrated, through its affidavits and an *in camera* inspection, that documents were protected through the PSA. Ingalls showed that the documents were "patient safety work product" assembled for and reported to a PSO, and the information had the ability to improve patient safety and the quality of health care. The date of the reporting was clearly indicated.

Of note, neither statute protects a patient's medical record, billing, discharge information, or other records such as policies and procedures; logs of operations, records of drug deliveries, or other primary information at the time of the events. The PSA specifically does not protect information developed separately from the patient safety evaluation system (i.e. reports to a licensing or regulatory agency of the government).

Though the *Daley* court did not address whether documents could be protected under both the MSA and the PSA, the court noted the express preemption clause in the PSA, indicating Congress's "intent to supersede any court order requiring

the production of documents that meet the definition of patient safety work product." Accordingly, best practices would suggest that when documents could potentially fall under the protection of either statute, the privilege afforded under the PSA is more comprehensive than the privilege afforded under the MSA.

For a comparison of the two statutes: Peer Review Comparison Table

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