

## Quality Improvement Privileges for Illinois Hospitals

In Illinois, two statutes protect hospitals' quality improvement work: the Illinois Medical Studies Act<sup>1</sup> and the federal Patient Safety and Quality Improvement Act of 2005.<sup>2</sup> The general intent of these laws is similar:

The Medical Studies Act (“MSA”) is intended to “ensure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care.”<sup>3</sup> The MSA created a privilege to protect from discovery certain information used “in the course of internal quality control”<sup>4</sup> so as to encourage healthcare providers to “engage in frank evaluations of their colleagues.”<sup>5</sup>

The Patient Safety and Quality Improvement Act of 2005 (“PSQIA”) created a privilege to incentivize providers to submit patient safety information to a third party (i.e., patient safety organizations) to be aggregated and analyzed to identify common issues, trends, patterns, and opportunities for change to improve the quality and safety of healthcare delivery.<sup>6</sup>

While both laws are directed towards improving the quality of healthcare, the application and scope of the privileges differ.

### Medical Studies Act

The Medical Studies Act protects

- a) “[I]nformation, interviews, reports, statements, memoranda, recommendations, letters of reference, or other third party confidential assessments of a health care practitioner’s professional competence, and other data”<sup>7</sup>
- b) Of “. . . committees of licensed or accredited hospitals or their medical staffs, including Patient Care Audit Committees, Medical Care Evaluation Committees, Utilization Review Committees, Credential Committees, and Executive Committees, or their designees”<sup>8</sup>

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<sup>1</sup> Medical Studies Act, 735 ILCS 5/8-2101 to 8-2105 (2017).

<sup>2</sup> Patient Safety and Quality Improvement Act of 2005, Pub. L. No. 109-41, 119 Stat. 424 (codified as amended at 42 U.S.C. §§ 299b-21 to 299b-26).

<sup>3</sup> *Jenkins v. Wu*, 468 N.E.2d 1162, 1168 (Ill. 1984)

<sup>4</sup> *Roach v. Springfield Clinic*, 623 N.E.2d 246, 249 (Ill. 1993) (citing 735 ILCS 5/8-2101 (1992))

<sup>5</sup> *Wu*, 468 N.E.2d at 1168.

<sup>6</sup> See 73 Fed. Reg. 70732 (Nov. 21, 2008); see also *Frequently Asked Questions*, AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, <https://psa.ahrq.gov/faq#PurposeofaPSO> (last accessed Feb 21, 2021) (stating “PSOs create a secure environment where clinicians and healthcare organizations can collect, aggregate, and analyze data, thus identifying and reducing the risks and hazards associated with patient care and improving quality.”).

<sup>7</sup> 735 ILCS 5/8-2101.

<sup>8</sup> *Id.* Note that the Illinois Department of Public Health, local health departments, the Department of Human Services (as successor to the Department of Mental Health and Developmental Disabilities), the Mental Health and Developmental Disabilities Medical Review Board, Illinois State Medical Society, 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, tissue banks, organ procurement agencies, physician-owned insurance companies and their agents, and committees of ambulatory surgical treatment centers or post-surgical recovery centers or their medical staffs are also covered here.

- c) “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 . . .”<sup>9</sup>

Such information is “privileged, strictly confidential,”<sup>10</sup> and consequently “not . . . admissible as evidence, nor discoverable. in any action of any kind.”<sup>11</sup> This is known as the *peer review privilege*. The MSA carves out specific instances for which certain entities or their committees may gather and use certain information for certain purposes, including “the evaluation and improvement of quality care,” without being concerned that they are gathering and compiling evidence admissible against them in a lawsuit.<sup>12</sup>

To claim the MSA peer review privilege, the information must be (1) information of a committee of a licensed or accredited hospital or its medical staff<sup>13</sup> and (2) gathered as a result of such committee/medical staff investigation.<sup>14</sup> Information gathered before the committee/medical staff is made aware of an incident or before the committee/medical staff begins its investigation is not privileged.<sup>15</sup> However, individuals may be granted authority via the medical staff bylaws to conduct an investigation prior to the peer review process.<sup>16</sup>

See the footnotes for several cases that upheld<sup>17</sup> and did not uphold<sup>18</sup> the peer review privilege (note that neither are exhaustive lists).

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<sup>9</sup> *Id.* Such information may also be used in the course of “medical study for increasing organ and tissue donation”. *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 5/8-2102.

<sup>12</sup> *Id.* at 5/8-2101. It may also be used for “medical research, increasing organ and tissue donation, . . . or granting, limiting or revoking staff privileges or agreements for services. . .” *Id.*

<sup>13</sup> “‘Information of’ [the committees and other bodies described in the MSA] has a specific meaning here: it encompasses only information ‘initiated, created, prepared or generated by’ a peer-review or quality-control committee.” *Kopolovic v. Shah*, 967 N.E.2d 368, 376 (Ill. App. Ct. 2012) (citing *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill. App. 3d 541, 549 (2004)).

<sup>14</sup> *Chicago Trust Co. v. Cook County Hosp.*, 698 N.E.2d 641, 646 (Ill. App. Ct. 1998) (“[D]ocuments generated specifically for the use of a peer-review committee receive protection under the Act.”); *Stricklin v. Becan*, 689 N.E.2d 328, 331 (Ill. App. Ct. 1997); *Toth v. Jensen*, 649 N.E.2d 484, 487 (Ill. 1995); *Springfield Clinic*, 623 N.E.2d at 251; *Sakosko v. Memorial Hosp.*, 522 N.E.2d 273, 276 (Ill. App. Ct. 1988).

<sup>15</sup> *Giangiullo v. Ingalls Memorial Hosp.*, 850 N.E.2d 249, 260 (Ill. App. Ct. 2006)

(“‘[T]he Act . . . does not protect against the discovery of information generated before the peer-review process begins or information generated after the peer-review process ends.’ *Pietro*, 348 Ill.App.3d at 549, 284 Ill. Dec. 564, 810 N.E.2d 217 . . . ”); *Chicago Trust Co.*, 698 N.E.2d at 646; *Grandi v. Shah*, 633 N.E.2d 894, 898 (Ill. App. Ct. 1994); *Springfield Clinic*, 623 N.E.2d at 251 (“If the simple act of furnishing a committee with earlier-acquired information were sufficient to cloak that information with the statutory privilege, a hospital could effectively insulate from disclosure virtually all adverse facts known to its medical staff, with the exception of those matters actually contained in a patient’s records.”).

<sup>16</sup> See *Springfield Clinic*, 623 N.E.2d at 252 (“The bylaws contained no provision conferring on the chairman, or on any individual, the authority to act for the department in conducting interviews or investigations preliminary to the review process.”).

<sup>17</sup> The following cases upheld the MSA peer review privilege: *Eid v. Loyola Univ. Med. Ctr.*, 72 N.E.3d 851, 865 (Ill. App. Ct. 2017); *Ardisana v. Northwest Comm. Hosp., Inc.*, 795 N.E.2d 964, 970–71 (Ill. App. Ct. 2003); *Toth*, 649 N.E.2d at 487; *Zajac v. St. Mary of Nazareth Hosp. Ctr.*, 571 N.E.2d 840, 846–47 (Ill. App. Ct. 1991); *Sakosko*, 522 N.E.2d at 276. This is not an exhaustive list.

<sup>18</sup> The following cases did not uphold the MSA peer review privilege: *Grosshuesch v. Edward Hosp.*, 83 N.E.3d 1185, 1189 (Ill. App. Ct. 2017); *Kopolovic*, 967 N.E.2d at 377-82; *Giangiullo*, 850 N.E.2d at 260–61; *Chicago Trust Co.*, 698 N.E.2d at 648-49; *Springfield Clinic*, 623 N.E.2d at 251. This is not an exhaustive list.

## Patient Safety Quality Improvement Act of 2005

Under the Patient Safety Quality Improvement Act of 2005, patient safety work product (“PSWP”) is privileged and confidential. For the privilege and confidentiality to apply, a provider can follow *either* the reporting pathway *or* the deliberations and analysis pathway. Under the reporting pathway, a provider:

- a) Assembles or develops certain information “*for the purpose of reporting*” to a patient safety organization (“PSO”);<sup>19</sup>
- b) The information that qualifies for the protection is “[A]ny data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements (or copies of any of this material)” that “could improve patient safety, health care quality, or health care outcomes”;<sup>20</sup> and
- c) The provider, in fact, reports such information to a PSO or the provider documents the qualifying information as within a patient safety evaluation system for reporting to a PSO and such documentation includes the “date the information was entered into the patient safety evaluation system.”<sup>21</sup>

If the provider follows these steps, the information qualifies as PSWP under the reporting pathway and the privilege and confidentiality protections apply to the qualifying information.

Under the deliberations and analysis pathway, the provider may obtain the privilege and confidentiality protections for the same qualifying information if such information *either*

- a) Identifies or constitutes the deliberations or analysis of a patient safety evaluation system, which is the provider’s overall process of collecting PSWP to report to a PSO;<sup>22</sup> or
- b) Identifies the fact of reporting pursuant to a patient safety evaluation system.<sup>23</sup>

Unlike the MSA, the PSQIA applies to a broader category of healthcare providers and entities and permits broader disclosure of PSWP

“Provider” under the PSQIA means an “individual or entity licensed or otherwise authorized under State law to health care services.”<sup>24</sup> See [42 C.F.R. § 3.20](#) for the list of individuals and entities included within the provider definition.

PSWP may be disclosed, for example, among affiliated providers for “patient safety activities” or by a provider or PSO to a contractor undertaking patient safety activities on its

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<sup>19</sup> *Daley v Teruel*, 107 N.E.3d 1028, 1037 (Ill. App. Ct. June 28, 2018) (citing Patient Safety Act Guidance, 81 Fed. Reg. 32,655, 32,656 (May 24, 2016) (to be codified at 42 C.F.R. pt. 3)); *Schlegal v. Kaiser Found. Health Plan*, No. CIV 07-0520 MCE KJM, 2008 WL 4570619, at \*6 (E.D. Cal. Oct. 14, 2008).

<sup>20</sup> 42 C.F.R. § 3.20; 42 U.S.C. § 299b-21(7)(A).

<sup>21</sup> *Id.* at § 299b-21(7)(A)(i)(I); 42 C.F.R. § 3.20; *Daley*, 107 N.E.3d, at 1037-38 (stating the requirements for information to be protected as PSWP under the reporting pathway).

<sup>22</sup> *Daley*, 107 N.E.3d, at 1037.

<sup>23</sup> 42 U.S.C. § 299b-21(7)(A)(ii); 42 C.F.R. § 3.20.

<sup>24</sup> 42 U.S.C. §§ 299b-21(8).

behalf;<sup>25</sup> “by a provider or PSO for business operations to attorneys, accountants, and other professionals”;<sup>26</sup> or to individuals “carrying out research.”<sup>27</sup>

The Illinois Appellate Court in the *Daley v. Teruel* case affirmed that providers may assert the PSQIA privilege and that state court will recognize and apply such privilege.<sup>28</sup> IHA filed an amicus brief in the *Daley* case on behalf of all Illinois hospitals. Click [here](#) to view the brief and the court opinion.

For information about how to join a patient safety organization, contact the Midwest Alliance for Patient Safety (“MAPS”) at [MAPSHelp@team-iha.org](mailto:MAPSHelp@team-iha.org) or 630-276-5657. MAPS is a federally certified patient safety organization and an IHA company.

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*This document is intended to be a guide for IHA members and does not constitute legal advice. For questions about this document, please contact the IHA Legal Affairs Department at [legal@team-iha.org](mailto:legal@team-iha.org) or 630-276-5506.*

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<sup>25</sup> 42 C.F.R. § 3.206(b)(4)(ii)-(iii).

<sup>26</sup> *Id.* at §3.206(b)(9).

<sup>27</sup> *Id.* at § 3.206(b)(6).

<sup>28</sup> *Daley*, 107 N.E.3d 1028 (Ill. App. Ct. June 28, 2018).