IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

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IN THIS ISSUE

The Patient Safety Act is a federal law that provides a privilege and confidentiality protections for patient safety information under certain circumstances. This article discusses a recent Illinois Appellate Court decision that addressed the scope of the privilege established by the Act.

Illinois Appellate Court Considers Scope of Privilege Established by Patient Safety Act

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The Patient Safety and Quality Improvement Act of 2005 (Patient Safety Act), 42 U.S.C. § 299b-21, establishes a reporting system in an effort to resolve issues relating to patient safety and health care quality. To encourage the reporting and analysis of medical errors, the Patient Safety Act provides a federal privilege and confidentiality protections for patient safety information. Likewise, the Illinois Medical Studies Act (Medical Studies Act), 735 ILCS 5/8-2101, establishes that certain information generated by healthcare committees remain privileged, particularly as it relates to peer review and quality control, in the interest of advancing the quality of healthcare.

Nevertheless, plaintiffs' attorneys typically seek to compel production of these privileged records. In its recent decision in *Daley v. Teruel*, 2018 IL App (1st) 170891, the Illinois Appellate Court, First District considered the scope of the privilege established by the Patient Safety Act and upheld the hospital's claim of privilege over certain documents.

In *Daley*, the plaintiff, Terri Daley, was the administrator of the estate of the deceased, Rosalie Galmore Jones. 2018 IL App (1st) 170891, ¶ 1. The plaintiff filed a medical malpractice claim against Ingalls Memorial Hospital (Ingalls) and various medical personnel, alleging that their failure to adequately monitor and treat blood glucose levels contributed to the decedent's death. *Id*. ¶ 7.

During written discovery, the plaintiff requested that Ingalls state whether the incident identified in the complaint was reported to, or investigated by, any hospital or governmental committee, agency, or body. *Id*. ¶ 9. Ingalls objected to the interrogatory, noting in the privilege log that certain documents were privileged under the Patient Safety Act because they were assembled for submission to a certified Patient Safety Organization (PSO) for the purposes of improving patient safety and quality of health care. *Id*. The defendants argued that two incident reviews, two complaints, and a security department incident report were privileged under the Patient Safety Act and Medical Studies Act. *Id*.

The plaintiff filed a motion to compel production of the documents, and the trial court ordered Ingalls to submit the documents for an *in camera* review. *Id*. ¶ 11. The trial court eventually granted the motion and ordered Ingalls to produce certain portions of the privileged incident reports, noting that certain information was "obtained prior to the peer review" and therefore discoverable. *Id*. ¶ 16. In a motion to reconsider, Ingalls argued that it maintained a patient safety evaluation system for collecting information to report to the PSO and, as noted in a supplemental affidavit, the information contained in the incident review reports was prepared "solely" for submission to the PSO. *Id*. ¶ 17. The trial court disagreed and Ingalls appealed. *Id*. ¶18.

On appeal, the appellate court considered two issues. First, the court was tasked with determining whether the trial court erred in ordering the disclosure of the documents because they constituted patient safety work product and were therefore privileged under the Patient Safety Act. *Id*. ¶ 22. Second, the court considered whether the Patient Safety Act's privilege protection on such work product preempted the court's production order. *Id*.

The court looked first at the methods in which information can be considered patient safety work product. *Id*. ¶ 37 (citing 42 U.S.C. § 299b-21(7)(A)). Patient safety work product must meet one of the following requirements: (1) it must be assembled or developed by a provider for reporting to a PSO and in fact reported to that PSO; (2) it must be developed by a PSO for the conduct of patient safety activities and could result in improved health care; or (3) it must constitute the analysis of a patient safety evaluation system. 42 U.S.C. § 299b-21(7)(A). Ingalls argued that the disputed documents constituted patient safety work product under the first method (known as the reporting pathway method) because the information contained within the documentation was created for the sole purpose of reporting it to the PSO. *Daley*, 2018 IL App (1st) 170891, ¶ 37.

The plaintiff, however, argued that the documents met three of the statutory exceptions to patient safety work product. *Id*. ¶ 49 (citing 42 U.S.C. § 299b-21(7)(B)). Plaintiff first argued the decedent's medical records were not privileged under the "medical records" exception because information contained in a patient's medical record is excluded from the definition of patient safety work product. *Daley*, 2018 IL App (1st) 170891, ¶ 49. The court, however, noted that the medical records exception to patient safety work product is interpreted to mean that the patient's original medical records cannot become part of the patient safety work product merely by reference. *Id*. ¶ 50. The court therefore rejected this argument. *Id*.

The plaintiff also argued that the documents were subject to the second exception to the definition of patient safety work product—that the information contained in the documents was not collected solely for the purpose of reporting to a PSO. *Id*. ¶ 54. The plaintiff cited the circuit court's ruling, which stated that the content of the documents appeared to be "obtained prior to the peer review." The court disagreed, noting that Ingalls submitted an affidavit stating that the information contained in the documents was prepared "solely" for submission to a PSO. *Id*. ¶ 55.

Lastly, plaintiff argued that the documents fell under the third exception to the patient safety work product because the information was collected to satisfy a reporting requirement to a state agency, and therefore, it cannot be considered patient safety work product. *Id*. ¶ 56. The plaintiff referenced the Illinois Adverse Health Care Events Reporting Law of 2005, 410 ILCS

522/10-10, 10-15 (2016), which requires Illinois hospitals to report an adverse health care event to the Illinois Department of Public Health within 30 days, as support. *Daley*, 2018 IL App (1) 170891,¶ 56 (citing 42 U.S.C. § 299b-21(7)(B)(iii)(II)). The court rejected the argument, and reasoned that the Illinois Adverse Events Law has not yet been implemented. *Daley*, 2018 IL App (1st) 170891, ¶ 59. Ingalls had no obligation to report any adverse health care events under that law and the exception did not apply. *Id*.

Finally, in addressing whether the Patient Safety Act preempted the discovery order, the court held that the express preemption clause contained within the Patient Safety Act demonstrated Congress's intent to supersede any court order requiring the production of documents that met the definition of patient safety work product. *Id*. ¶¶ 66-67. Thus, when information is deemed patient safety work product, the Patient Safety Act should be construed as preempting any state action requiring a provider to disclose such work product. *Id*. ¶ 68. The court therefore concluded that the Patient Safety Act preempted the circuit court's production order. *Id*.

The court ultimately concluded that the plaintiff failed to demonstrate that the disputed documents fell under any exception to the definition of patient safety work product. *Id*. ¶ 60. The court held that the incident reviews, complaints, and the incident report constituted patient safety work product under the Patient Safety Act. *Id.* ¶ 48. The documentation consisted of data, reports, and discussions which were included in the definition of patient safety work product. Furthermore, Ingalls established that the documents were prepared solely for submission to the PSO and were intended to improve patient safety and the quality of health care. *Id.* The appellate court overturned the trial court's order, holding that the reports constituted privileged patient safety work product under the Patient Safety Act because documents were prepared for a PSO, were reported to a PSO, and otherwise met the statutory requirements to qualify as patient safety work product. *Id*. The court emphasized that its ruling was consistent with the intent of the legislature, which was to create a "system of voluntary, confidential, and non-punitive sharing of health care errors to facilitate and promote strategies to improve patient safety and the quality of health care." *Id*. ¶ 31.

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