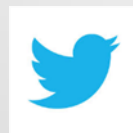


Legal Update

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Conflicts and Caveats

- I have no conflicts to disclose
- My presentation is educational and not legal advice
 - Seek competent legal counsel for specific guidance
- The law is evolving



Objectives

- State hospital licensure regulations
- Kentucky's new peer review privilege law
- Case update on the PSWP privilege



Hospital Licensure Regulation

- Current language – 902 KAR 20:016 Sec. 3 (3)(a)

“Administrative reports shall be established, maintained and utilized as necessary to guide the operation, measure productivity, and reflect the programs of the facility.

Administrative reports shall include:

* * *

5. Incident investigation reports; and

6. Other pertinent reports made in the regular course of business.”



Hospital Licensure Regulation

- Pending language – 902 KAR 20:016 Sec. 3 (3)(a)
“(a) The hospital shall establish administrative records that reflect and guide the administrative operations of the hospital, including:
 1. Minutes of the governing authority;
 2. Financial records;
 3. Personnel records; and
 4. Employee health records.(b) A hospital shall have discretion as to the form or content of any administrative record it establishes.”



Hospital Licensure Regulation

- Current language – 902 KAR 20:016 Sec. 3 (3)(g)
“(g) An effective procedure for recording accidents involving a patient, visitor, or staff member, including incidents of transfusion reactions, drug reactions, medication errors, and similar events, and a statistical analysis shall be reported in writing through the appropriate committee;”



Hospital Licensure Regulation

- Pending language – 902 KAR 20:016 Sec. 3 (3)(g)
“(g) Effective procedures for tracking incidents, including transfusion reactions, drug reactions, and medication errors that may occur in the facility. A hospital shall have discretion as to its process, and the procedures shall encourage statistical analysis to inform process improvement activities;”



KY Peer Review Statute

- Kentucky's tortured history on peer review privilege
 - *Raikes* and *Saleba* opinions
- HB 4 (2018) amends KRS § 311.377(2)
 - Extends privilege to **“medical malpractice actions, actions arising out of review of credentials or retrospective review and evaluation,...and actions by an applicant for...staff privileges...”**
 - Privilege available only to providers that **“attest to participating in a patient safety and quality improvement initiative, including the [PSQIA].”**



KY Peer Review Statute

- Other provisions of KRS § 311.377
 - (3) Nothing in subsection (2) of this section shall be construed to restrict or limit the right to discover or use in any civil action or other administrative proceeding any evidence, document, or record which is subject to discovery independently of the proceedings of the entity to which subsection (1) of this section refers.



KY Peer Review Statute

- Other provisions of KRS § 311.377

(4) No person who presents or offers evidence in proceedings described in subsection (2) of this section or who is a member of any entity before which such evidence is presented or offered may refuse to testify in discovery or upon a trial of any civil action as to any evidence, document, or record described in subsection (3) of this section or as to any information within his own knowledge, except as provided in subsection (5) of this section.



KY Peer Review Statute

- Other provisions of KRS § 311.377
 - (5) No person shall be permitted or compelled to testify concerning his testimony or the testimony of others except that of a defendant given in any proceeding referred to in subsection (2) of this section, or as to any of his opinions formed as a result of the proceeding.



KY Peer Review Statute

- Other provisions of KRS § 311.377
 - (6) In any action in which the denial, termination, or restriction of staff membership or privileges by any health care facility shall be in issue, agents, employees, or other representatives of a health care entity may with the consent of the health care entity testify concerning any evidence presented in proceedings related to the facility's denial of staff membership or privileges.



KY Peer Review Statute

- Other provisions of KRS § 311.377

(7) Nothing in this section shall be construed to restrict or prevent the presentation of testimony, records, findings, recommendations, evaluations, opinions, or other actions of any entity described in subsection (1) of this section, in any statutory or administrative proceeding related to the functions or duties of the entity.



KY Courts and PSWP

- *Univ. of Ky v. Bunnell* (KY CoA 2017)
 - 84-page published opinion on “what is PSWP”
 - Explains the Patient Safety Act, the 2016 Guidance by AHRQ, and health care oversight laws (Medicare and KY)
 - Explains prior KY cases on the Patient Safety Act to clarify confusion
 - Unanimous opinion in favor of the PSWP privilege



KY Courts and PSWP

- *Univ. of Ky v. Bunnell* (KY CoA 2017)
 - Facts
 - One (1) event report in med mal case
 - Hospital submitted an affidavit and privilege log to confirm the event report was prepared within a PSES and was submitted to a PSO
 - The event report was not required by KY health oversight regulations
 - Court: Can Hospital's event reports qualify as PSWP?
 - Yes, event reports are eligible to be PSWP in KY
 - Yes, Hospital proved this event report is PSWP



KY Courts and PSWP

- *Univ. of Ky v. Bunnell* (KY CoA 2017)
 - Court explained the legal analysis for PSWP is:
 1. What is it?
 2. Might it improve overall patient care?
 3. Why was it generated?
 - 1st and 2nd questions are necessary, but easy
 - 3rd question requires analysis by the court
 - Was the info prepared for a PSO or for some other purpose?



KY Courts and PSWP

- *Univ. of Ky v. Bunnell* (KY CoA 2017)
 - “If a provider’s report of medical error, knowledge of which could improve health care, is submitted to a PSO, then that report is PSWP and it is privileged”
 - “In fact, the event report here was privileged under the Act even before it was submitted to the PSO”
 - “It is clear that what affords protection of the Act’s privilege is the provider’s intent to submit information to a PSO.”
 - “[T]he report under review has been PSWP and privileged since its collection within the [provider’s] PSES.”



KY Courts and PSWP

- *Univ. of Ky v. Bunnell* (KY CoA 2017)
 - Court identified and analyzed 3 Exceptions to PSWP:
 - Patient records
 - Records created to satisfy an “external obligation”
 - Documents the provider creates to satisfy an external record-keeping or reporting obligation
 - Records existing outside the PSES for business reasons
 - Documents the provider maintains separate from its PSES for some business purpose



KY Courts and PSWP

- *Univ. of Ky v. Bunnell* (KY CoA 2017)
 - PSWP exception for “external obligations”
 - Do hospital laws and regulations “require” the document?
 - Does the gov’t have a form for the document?
 - Does the provider have discretion in the contents of the document?
 - Has the gov’t given guidance on the document?
 - Court examined KY health oversight laws, Medicare CoPs, and TJC accreditation
 - Ruling: Event reports are not an external obligation

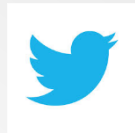


Thank you

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