

VIRGINIA CIRCUIT COURT UPHOLDS PATIENT SAFETY WORK PRODUCT PRIVILEGE, DIRECTS PLAINTIFF TO DISCOVER FACTS ELSEWHERE

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Facts are facts, but it does matter where they reside. The Patient Safety and Quality Improvement Act of 2005 (the PSQIA) was never intended to prevent a medical malpractice plaintiff from discovering facts related to his or her care. However, a Virginia Circuit Court has recently explained it is not appropriate for a plaintiff to discover those facts within confidential and privileged Patient Safety Work Product (PSWP) a provider creates as part of its participation with a Patient Safety Organization (PSO). The September 28, 2021, letter opinion was from the *Swanson v. Centra Health, Inc.* matter, pending in the Circuit Court of the City of Lynchburg.¹ The decision is a positive step forward for hospitals participating with federally certified PSOs, particularly providers within the Commonwealth of Virginia.

In *Swanson*, Lynchburg General Hospital had identified five documents as confidential and privileged PSWP, including patient safety interview notes, Serious Event Review Team (SERT) meeting notes prepared by patient safety, SERT follow-up meeting notes prepared by Patient Safety, an action plan following patient safety's review of the event, and a post-discharge update regarding the patient's condition. After receipt of the Hospital's privilege log, Swanson moved to compel these five documents. Plaintiff argued that Virginia law required the hospital to disclose all facts surrounding the adverse event and that any facts contained within the PSWP must be disclosed on a document-by-document basis.

The Hospital did not dispute the Plaintiff was entitled to discover the facts of the relevant event – the same facts used to create the PSWP at issue. Yet, the Plaintiff was not entitled to discover those facts from the documents themselves. The Honorable F. Patrick Yeatts agreed and explained, "To be clear, Swanson is not entitled to the documents or facts in the documents; she is entitled to discover the same information likely used in those documents."² The distinction is significant.

While the Virginia state quality assurance statute ([Va. Code § 8.01-581.17](#)) references factual information specifically, no such exception exists within the federal PSQIA. Judge Yeatts explained:

*The PSQIA did not manufacture a vacuum to suck up undesirable facts. It did not hand hospitals a brush designed to paint over mistakes. It created a forum in which to discuss the facts and share information openly, without worrying about their analysis being read back to them in court.*³

The decision confirms the correct analysis in the application of the PSQIA is not in whether the documents contain "factual" information or not. Rather, the analysis is whether the documents meet the federal statute's definition of PSWP. If the document is PSWP, all information contained in the document is privileged by the federal statute and not subject to discovery.⁴ In *Swanson*, the Hospital produced the Centra Vice President of Quality and Safety at the hearing to testify as to the Hospital's ability to satisfy all required elements of the federal privilege. In addition, the Hospital provided Plaintiff with a copy of the Hospital's PSO contract.

If you have questions relating to recent PSO litigation in Virginia or elsewhere, or other aspects of PSO development, strategy, implementation, and policies, please contact a member of Hancock Daniel's [Patient Safety and PSOs](#) Team.

¹ Hancock Daniel was retained to represent Centra Health, Inc. on issues relating to the PSQIA. This advisory is published with client permission.

² Letter opinion for Case No. CL20-879 available upon request. Full citation to be supplemented.

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⁴ 42 U.S.C. § 299b-22(a).

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