

## STATE SUPREME COURT FINDS PSQIA PRIVILEGE IS ABSOLUTE AND NONWAIVABLE

May 10, 2024

The Supreme Court of Nevada recently issued perhaps the strongest opinion to date on the issue of the waiver (or more specifically, lack thereof) of the confidentiality and privilege protections available under the Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. §§ 299b-21, *et seq.* (the “PSQIA”).<sup>1</sup> The procedural posture was unique, filed on a writ with the underlying matter still pending in the trial court as well as the fact that no specific documents were at issue at the stage of the appeal – the issue was nearly exclusively whether the privilege could be waived.<sup>2</sup>

### BACKGROUND

The PSQIA establishes a voluntary, confidential, and non-punitive system of data sharing of healthcare errors in order to improve patient safety and healthcare quality through the creation of PSOs. Providers participating with PSOs have an opportunity to collect, analyze, and create confidential and privileged Patient Safety Work Product (“PSWP”) within a protected space that can then be shared with PSOs to further their quality improvement efforts. PSWP can also be used within the provider to further patient safety activities.

In the case at issue, certain hospital representatives were deposed during discovery, where certain team members’ testimony had included a discussion of the patient safety investigation at issue. When a physician member of the patient safety committee (whose only knowledge was through his work on the committee) was later deposed, counsel raised the PSQIA objection and instructed the deponent not to answer. A motion to compel was filed, and the trial court ruled that the PSQIA privilege was waived on those issues by allowing the initial deponents to speak on those topics. The trial court found that the PSQIA privilege was not absolute and had been waived. The trial court granted the motion to compel the remainder of the physician’s deposition and ordered that he testify regarding the committee’s findings and the investigation at issue. The defendant hospital filed a writ to the state supreme Court seeking a review of the trial court’s ruling.

---

<sup>1</sup> *Sunrise Hosp. & Med. Ctr., LLC v. Eighth Jud. Dist. Ct.* 544 P3d 241 (Nev. 2024).

<sup>2</sup> This case remains pending, and this client advisory was published with the permission of Sunrise Hospital and Medical Center.

## STATE SUPREME COURT

The Supreme Court of Nevada granted the writ. In the March 7, 2024 opinion, the Court noted that this was an important public policy issue to help medical providers and attorneys understand the extent to which PSWP is privileged and also remarked it was a case of first impression in Nevada.

Ultimately, the Court found that PSWP is privileged from discovery, and that the PSQIA privilege is not waivable. The Court explained the district court erred by finding that hospital could waive the privilege over PSWP when no exception applied. The Court found this was abuse of discretion to create a necessary condition for privilege where none exists in the PSQIA or its implementing regulations. “We reject the district court’s interpretation and determine that PSQIA privilege is absolute.” Further “[b]ecause the PSQIA does not contemplate waiver of the privilege over identifiable PSWP, we conclude that such a privilege cannot be waived.”

The decision is a positive step forward for PSOs and their participating providers. If you have questions relating to recent PSO participation, development, strategy, implementation, and policies, please contact a member of Hancock Daniel’s [Patient Safety and PSOs](#) Team.

*The information contained in this advisory is for general educational purposes only. It is presented with the understanding that neither the author nor Hancock, Daniel & Johnson PC, is offering any legal or other professional services. Since the law in many areas is complex and can change rapidly, this information may not apply to a given factual situation and can become outdated. Individuals desiring legal advice should consult legal counsel for up-to-date and fact-specific advice. Under no circumstances will the author or Hancock, Daniel & Johnson PC be liable for any direct, indirect, or consequential damages resulting from the use of this material.*