



7th Annual Meeting of PSOs

April 22 - 23, 2015

Case Law Update: *Charles v. Southern Baptist Hospital of Florida (Baptist Medical Center) & Progeny*

Jack E. Holt, III, Esq.

Grower, Ketcham, Rutherford,
Bronson, Telan, & Eide, P.A.



Disclaimer

The opinions expressed in this presentation are those of the presenter and do not reflect the official position of the Department of Health and Human Services (HHS), the Agency for Healthcare Research and Quality, or the Office for Civil Rights. The statements do not constitute legal advice from either the HHS Office of the General Counsel or the presenter.



“Patient’s Right-To-Know”

- Art. 10 Sec. 25 of the Florida Constitution (“Amendment 7”)
- Patients have a right to have
- access to
- **any records**
- **made or received** in the course of business by a health care facility or provider
- relating to any **adverse medical incident**.



"Adverse Medical Incident"

- medical negligence, intentional misconduct, and any other act, neglect, or default
- of a health care facility or health care provider
- that caused or could have caused
- injury to or death of a patient,
- including, ... incidents required ...to be reported to any governmental agency or body, [or] reported to or reviewed by ... peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.



The Request

“**adverse incident reports**” (as defined by Amendment 7 – which uses different term “**adverse medical incidents**”) relating to the

- [Patient];
- Defendant doctors;
- Any physicians working at Baptist Medical Center - South between 2007 and the present;
- Any physicians working at any Baptist Medical Center facility between 2007 and the present;
- Emergency care at any Baptist Medical Center facility between 2007 and the present;
- Any care and/or treatment at Baptist Medical Center - South between 2007 and the present
- Any care and/or treatment at any Baptist Medical Center facility between 2007 and the present;



The Orders granted Motion to Compel Production of "Amendment 7 Documents."

- **All adverse medical incident reports, ... ,** which are
 - created, or maintained
 - pursuant to
 - any
 - **statutory, regulatory, licensing, or accreditation requirements**
- are **not protected** from discovery under the Federal Patient Safety and Quality Improvement Act ("PSQIA").
- Latest order: immediate production of Amendment 7 documents after costs of production are calculated.



The trial court's rationale - 1

The Patient Safety Act establishes

- **a protected space or system**
- that is **separate, distinct**, and **resides alongside but does not replace *other* information collecting activities** [such as]

- mandated by laws, regulations, and accrediting and licensing requirements
- as well as voluntary reporting activities that occur for the purposes of maintaining accountability in the health care system.

73 Fed. Reg. 70732, 70742 (Nov. 21, 2008)



The trial court's rationale - 2

- “**Documents are not PSWP** if those documents were collected or maintained for a purpose other than submission to a PSO *or for a dual purposes.*”



Exist Separately?

S. Rep. No. 108-196 (2003), at 5

- said that original records that underlie PSWP, *such as* medical records, nursing notes, billing information, and insurance forms, remain unprotected.



Traditional operations?

H.R. Rep.109-197 at 14 (2005) at 14 –

- “On the other hand, there may be documents or communications that are part of traditional health care operations or record keeping (including but not limited to medical records, billing records, guidance on procedures, physician notes, hospital policies, logs of operations, records of drug deliveries, and primary information at the time of events.”



Provider choice?

- Once something is patient safety work product, **a person may disclose such work product for a variety of purposes under subsection 922(c).** ...[and] such **work product remains confidential and privileged** and does not lose its status as patient safety work product. Thus, [the clarification clause] would not operate to change the status of the patient safety work product in this circumstance.
- On the other hand, nothing requires a provider to disclose such patient safety work product to an accrediting organization. A provider may choose to collect, develop, or maintain information separately from a patient safety evaluation system. That separate information or analysis may be similar or identical in substance or subject matter to patient safety work product. A provider may choose this route in disclosing such separate material to an accrediting organization.



Duplicate systems?

- “[P]roviders **need not maintain duplicate systems** to separate information to be reported to a PSO from information that may be required to fulfill state reporting obligations.”

73 Fed. Reg. at 70742



Surprising!!!!

- Plaintiffs argue Florida law authorizes regulators and patients to inspect all licensee's required records so the records cannot be PSWP.
 - § 395.0197(13), Fla. Stat. (2014) ("The agency shall have access to licensed facility records necessary to carry out the provisions of this section.").
- Can State enact a statute authorizing inspection of all documents to nullify/negate the PSQIA throughout the State?
 - Cf. Dep't of Fin. & Prof'l Regulation v. Walgreen Co., 970 N.E.2d 552 (Ill. App. Ct. 2012). Illinois state law authorized regulators to "subpoena and compel the production of documents, papers, files, books, and records in connection with any hearing or investigation" concerning potential violations by pharmacies, but access to PSWP was denied.



"Appeal" by Writ of Certiorari

- **Petition** on limited record
- **District Court of Appeal (DCA)**
 - 3 judges
- **Binding on ALL trial courts in Florida**
unless:
 - **Another DCA disagrees**
 - **Supreme Court reverses**



No review by Florida Supreme Court unless (1 of 7) :

- **Invalid Fla. Statute or Fla. Constit'l Provision**
- **Express and direct conflict** w/ other DCA or Fla. Sup. Ct.
- **DCA Certifies Conflict** with another DCA
- **DCA Certifies Question** to be of great public importance
 - (DCA must actually rule on issue and frame question)
- **“Pass through” jurisdiction** : Trial court order certified to be of great public importance or to have “great effect” on the “proper administration of justice throughout the state & to “require immediate resolution” by the supreme court
- **Expressly construes state or federal constitution**
- **Expressly affects a class of constitut'l or state officers**



Questions

