

Beyond Peer Review and PSWP:
Exploring Other Confidentiality Protections in
Medical Staff Operations

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Presenter Info



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Disclosure Statement

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Agenda

- Importance of Privilege in Healthcare
- Peer Review Privilege/PSO PSWP
- Attorney-Client Privilege
- Attorney Work Product Doctrine
- Practical Implications for Peer Review
- Best Practices and Risk Mitigation Strategies

A photograph showing four medical professionals (three women and one man) in a modern office or meeting room. They are seated around a white table, looking at a laptop and smiling. The room has large windows in the background showing a city street with a motorcycle.

**MEDICAL STAFF
SEMINAR 2024**

Importance of Privilege in Healthcare

- **Confidentiality:** The obligation to keep certain information private and not disclose it to unauthorized individuals or entities
- **Privilege:** A legal right which allows a person to resist compulsory disclosure of documents and information
- Privilege ensures that confidential information remains confidential to:
 - Encourage open and honest communication
 - Promote better patient care
 - Protect patient information
 - Support compliance
 - Mitigate risk

Importance of Privilege in Peer Review

- Privilege is critical in protecting sensitive information related to medical staff functions and peer review processes
 - Creates safe environment for frank and candid discussions
 - Encourages participation and engagement
 - Encourages accountability and professionalism
 - Safeguards the peer review process
 - Keeps the focus on quality improvement and improves patient care and safety

Privileges Applicable to Peer Review Activities

- Peer Review Privilege
- Patient Safety Work Product Protection
- Attorney Client Privilege
- Attorney Client Work Product

Peer Review Privilege

- Scope:
 - Generally, applies to communications, documents, and discussions that occur as part of a hospital's or healthcare organization's formal peer review process
 - such as meeting minutes, committee reports, and internal communications
 - Limited to documents and discussions related directly to the peer review process, not to all documents related to patient care
 - Protects materials generated during this review process from being disclosed in court or in other legal proceedings
- Limitations and Exceptions
 - Applies to communications and documents; NOT underlying facts
 - Jurisdiction specific
 - Government Investigations and Reporting Requirements
 - Waiver and Voluntary disclosure
 - Others

Patient Safety Work Product Protection

- Scope:
 - Applies to patient safety work product
 - PSWP: Documents, reports, analyses, and data that are gathered, created, or generated for purpose of reporting to a PSO in the process of improving patient safety and quality of care. Includes incident reports, safety event logs, root cause analyses, and any records created specifically for quality improvement initiatives.
 - Cannot be used in legal proceedings to establish liability or fault.
 - Immune from discovery in malpractice cases, regulatory investigations, and other legal proceedings.
- Limitations and Exceptions
 - For patient safety work product protection to apply, the information must be created specifically for the purpose of improving patient safety.
 - If the information is created for other purposes (e.g., clinical documentation for patient care), it may not be protected
 - Data and materials submitted to PSOs are protected, but care must be taken to ensure that only relevant information is shared and that confidentiality is maintained.
 - If information is shared with parties outside of the PSO or used for non-safety-related purposes, the protection may be waived.

Attorney-Client Privilege

- Legal doctrine that protects communications between a client and their attorney from being disclosed without the client's consent.
- Designed to encourage open and honest communication between clients and their attorneys, allowing clients to seek legal advice without fear that their disclosures will be used against them in court.
- Serves an important role in protecting sensitive legal communications, especially those related to patient care, risk management, compliance, and healthcare operations.

Attorney-Client Privilege: What It Is

- The Privilege Protects only:
 - A **communication**
 - In **confidence**, between a **client** and an **attorney**
 - For the purpose of securing or providing **legal advice** or opinion
- Constant Tension for Courts:
 - Privilege is an obstacle to the truth and forces courts:
“To make difficult tradeoff[s] between the broad institutional goal of preserving the vitality of the adversary system and the sometimes incompatible goal of achieving justice in the matter before it”

KW Muth Co. v. Bing-Lear Mfg., 219 FRD 554, 566 (E.D. Mich 2003)

Attorney-Client Privilege: Limitations and Exceptions

- Only applies if the person seeking legal advice is the client (e.g., a healthcare provider or institution) and the communication is with a licensed attorney acting in their professional capacity.
 - Healthcare provider (or organization) communicates with their in-house counsel or external attorneys about matters like regulatory compliance, medical malpractice, or risk management.
- Corporations as clients
 - Majority Rule: Subject-Matter Test
 - Applied in Missouri, Arkansas, and Kansas, among other states
 - Minority Rule: Control Group Test
 - Applied in Oklahoma, among other states

Attorney-Client Privilege: Limitations and Exceptions

- Corporations as Clients
 - Subject-Matter Test (Majority Rule):
 - The broader rule
 - Communication is privileged if made:
 - To secure **legal advice**
 - By an **employee at the direction of a superior**
 - The superior requested the communication to secure legal advice for the **corporation**;
 - Subject matter is within the **scope** of the employee's duties, and
 - Communication is not disseminated beyond **need-to-know** individuals

Attorney-Client Privilege: Limitations and Exceptions

- Corporations as Clients
 - Control Group Test (Minority Rule):
 - The narrow rule
 - The communication is privileged only if it is made by:
 - Corporate employees
 - In a **position to control**, or to take a **substantial role**
 - In the **determination of** the course of **action** a corporation may take
 - Based on **legal advice**
 - Rationale: Certain management employees, by virtue of his/her position in the corporation, will be acting as the corporation when he/she is consulting with counsel

Attorney-Client Privilege: Limitations and Exceptions

- Common Misapplications:
 - Privilege only protects communications relating to legal advice, so it does not protect:
 - Situations where attorneys are not acting as legal advisor
 - Facts and circumstances
 - Information that attorneys learn from third parties and relay to clients
 - Communications or documents not intended to be confidential
- Common Exceptions
 - Crime Fraud Exception
 - Disputes between the attorney and client
 - Waiver of privilege

Attorney Work Product Doctrine

- Scope:
 - Covers documents, notes, memoranda, and other materials prepared by an attorney in anticipation of litigation
 - Research, analysis, case strategies, witness interviews, investigative notes, and draft documents
 - Includes materials reflecting the attorney's thought processes, legal strategies, and legal opinions
 - Protects the mental processes of attorneys and to allow them to prepare their cases without concern that their strategies will be exposed to the opposing party
- Limitations and Exceptions
 - In certain situations, the work product can be discovered if the opposing party can show a substantial need for the material and cannot obtain the equivalent information by other means without undue hardship.

Attorney Work Product Doctrine

- The work product doctrine protects from disclosure to third parties materials that are both:
 - Prepared by or for a party or its representative.
 - In anticipation of litigation.
- The document's "primary purpose" must relate to litigation.
- Any client "representative" can create protected work product.
- Although not strictly necessary, a lawyer's participation helps.

A/C Privilege v. WP Doctrine

- Attorney Client Privilege asserted only by the client; Work Product protection asserted by client or the attorney
- A waiver of Attorney Client Privilege does not necessarily mean a waiver of the Work Product doctrine
- Attorney Client Privilege is an absolute privilege; Work Product Doctrine is a quasi-privilege, at best

A/C Privilege v. WP Doctrine

	Attorney-Client Privilege	Attorney Work Product
What is Protected	Communications between attorney and client seeking legal advice	Documents and materials prepared by an attorney in anticipation of litigation
Scope	Covers legal advice or communications about legal matters	Covers legal strategies, notes, research, and case preparation materials
Ownership	Owned by the client (hospital/provider)	Owned by the attorney who created it
Duration of Protection	Continues as long as communication remains confidential	Protection remains as long as materials are prepared in anticipation of litigation
Applicability in Peer Review	Protects legal advice provided during peer review processes	Protects materials created by attorneys related to peer review or litigation preparation

Application: Privilege in Peer Review

- **Scenario 1:** A physician at a hospital has received multiple complaints regarding their performance, leading to an internal peer review investigation. During this process, the hospital's legal counsel advises the peer review committee on how to conduct the investigation to minimize legal risks, such as ensuring compliance with hospital policies, avoiding defamation claims, and protecting patient confidentiality.
- **Takeaway:** The privilege allows the hospital's legal counsel to provide candid legal advice to the peer review committee without the risk of that advice being disclosed in potential legal proceedings.

Application: Privilege in Peer Review

- **Scenario 2:** During a peer review investigation, a member of the peer review committee raises concerns about the legal ramifications of certain corrective actions under consideration (e.g., suspending a physician or reporting to the state medical board). The hospital's attorney is brought in to offer advice on the best course of action to avoid legal challenges.
- **Takeaway:** The privilege ensures that the committee can ask legal questions and receive confidential advice to help guide the peer review process, without risking the disclosure of legal strategies or advice in future litigation.

Application: Privilege in Peer Review

- **Scenario 3:** A member of the hospital's peer review committee accidentally discloses details of a privileged conversation with the hospital's attorney to a colleague outside the committee. This disclosure is made during a casual conversation in the hospital's break room.
- **Takeaway:** Inadvertent disclosures can jeopardize the attorney-client privilege. Hospitals must educate committee members on the importance of maintaining confidentiality and ensuring that privileged communications are not shared outside the approved channels.

Application: Privilege in Peer Review

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Application: Privilege in Peer Review

- **Scenario 4:** A hospital administrator forwards an email containing legal advice from the hospital's attorney to a colleague in a different department, mistakenly believing the email is related to routine administrative tasks and not involving privileged legal communications.
- **Takeaway:** Even unintentional sharing of privileged information outside the authorized group (such as via email forwarding) can result in a waiver of attorney-client privilege.

Best Practices and Risk Mitigation Strategies

- **Document Privilege Policies:** Establish and document clear policies defining what is covered under each type of privilege (e.g., peer review, attorney-client, patient safety work product). Ensure these policies are consistent with both federal and state laws.
- **Designate Privileged Information:** Clearly identify which discussions, documents, and materials are considered privileged, including meeting minutes, reports, performance evaluations, and safety reports.
- **Staff Training:** Regularly train medical staff, leadership, and legal teams about the boundaries and scope of privilege protections to avoid inadvertent waiver or misuse of privilege.
- **Create Clear Guidelines for Peer Review:** Develop a formal and consistent procedure for conducting peer review activities. This ensures that all materials generated during the process (e.g., reports, recommendations, meeting notes) are protected under peer review privilege.
- **Separate Patient Care Documentation:** Keep peer review materials separate from standard patient care records. This helps ensure that the privilege applies exclusively to the peer review process and not to routine clinical documentation, which may not be privileged.

Best Practices and Risk Mitigation Strategies

- **Use Privilege Notices:** Include a disclaimer or notice on documents that states they are confidential and protected by peer review privilege, attorney-client privilege, or patient safety work product protection.
- **Avoid Mixing Privileged and Non-Privileged Documents:** To avoid waiving privilege, ensure that privileged materials are not mixed with non-privileged documents in the same file or report.
- **Limit Access to Privileged Materials:** Restrict access to privileged materials to those who are directly involved in the peer review or safety improvement process. Ensure that unauthorized individuals do not have access to these documents.
- **Engage Legal Counsel Early:** In cases involving complex peer review or safety issues, involve legal counsel early to ensure that any discussions or documents are properly protected by privilege. For example, if the hospital is considering the possibility of litigation, the legal team can help ensure that the attorney-client privilege applies.
- **Establish Attorney-Client Communication Protocols:** Set clear guidelines for when and how legal counsel should be involved in peer review meetings or safety discussions. This ensures that the privilege is upheld when legal advice is sought during these processes.

Questions?

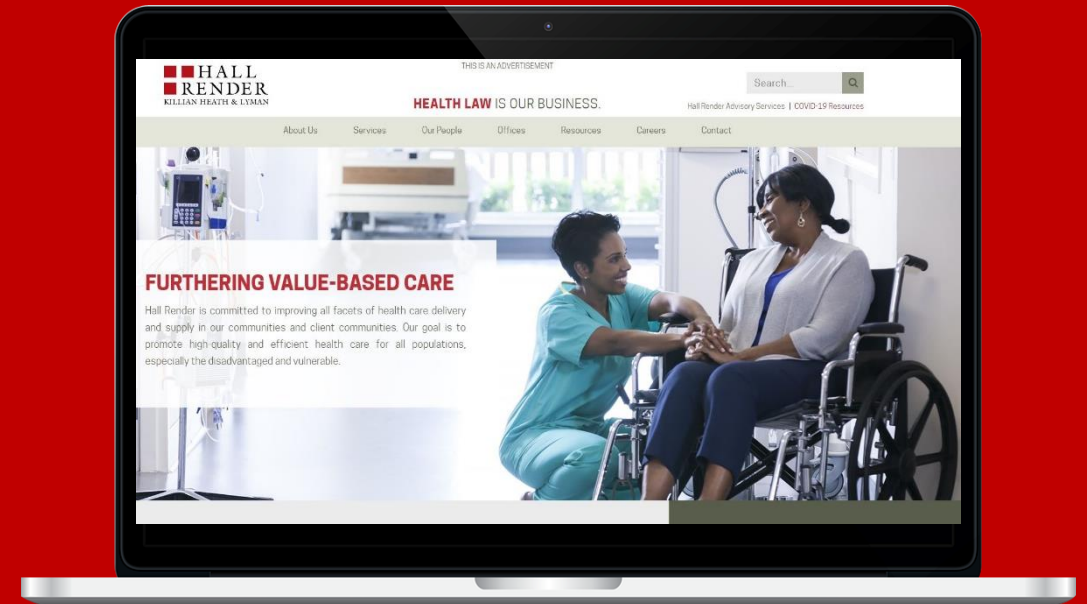


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