

## Pa. High Court Ruling Erodes Medical Peer Review Protection

By **Robin Locke Nagele** (March 30, 2018, 10:40 AM EDT)

On March 27, 2018, the Pennsylvania Supreme Court decided *Reginelli v. Boggs*, its first major peer review analysis in more than two decades since its plurality decision in *McClellan v. HMO of Pennsylvania*[1]. The opinion is striking and signals two very significant shifts in Pennsylvania peer review analysis. First, the court held that a physician practice group that employed physicians and other licensed health care providers did not qualify for peer review privilege protection either for its own internal peer review activities or for peer review activities that it had been engaged to conduct on the hospital's behalf. Second, the court, in dicta, appears to have eliminated peer review protection for hospital credentialing.



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### Background

Reginelli arose out of an incident in January 2011, in which the plaintiff, Eleanor Reginelli, was treated and discharged by Dr. Marcellus Boggs in the Emergency Department of Monongahela Valley Hospital for what she reported at the time as “gastric discomfort” but which she later alleged was an emergent, underlying heart problem that resulted several days later in a heart attack. Boggs was a member of the hospital's medical staff and employed by UPMC Emergency Medicine Inc. d/b/a Emergency Resource Management Inc. (ERMI), the hospital's contracted emergency services provider. In 2012, the Reginellis filed suit against the hospital, ERMI and Boggs, alleging negligence against Boggs, and corporate negligence and vicarious liability against the hospital and ERMI.

During discovery, the plaintiffs took the deposition of Dr. Brenda Walther, the medical director of the emergency department employed by ERMI. Walther testified that she prepared and maintained a “performance file” on Boggs as part of her regular practice of reviewing randomly selected charts of physicians in the department. The plaintiffs served discovery seeking the performance file and the hospital objected, inter alia, based on the Pennsylvania Peer Review Protection Act, or PRPA.[2] On motion to compel, the trial court ordered the file to be produced. ERMI and Boggs then filed a separate motion for protective order, which was denied. ERMI contended, in its motion, that Walther's review was conducted on behalf of ERMI and was outside the scope of the hospital's peer review process, a fact which the Supreme Court highlighted in its opinion.

The defendants filed a collateral appeal of the trial court's order. The hospital argued, before the Superior Court, that Walther, in conducting peer review of Boggs, was acting both in her capacity as an ERMI supervisor and in her capacity as a member of the hospital's medical staff, and that the

information contained in her file on Boggs was “exactly the type of information protected from disclosure by the PRPA.” ERMI, however, maintained the position that Walther’s peer review of Boggs was “created and maintained solely by Dr. Walther on behalf of her employer.” The Superior Court affirmed the trial court’s order on the following grounds: (1) that ERMI was an independent contractor and not a “professional health care provider” and as such, did not qualify for peer review protection; (2) that the hospital “neither generated nor maintained Dr. Boggs’ performance file,” and therefore could not claim the peer review protection; and (3) even if ERMI had been able to claim peer review protection, it waived that protection by disclosing the peer review file to the hospital. The Supreme Court affirmed.

### **Analysis as to ERMI: No Privilege Protection for a Nonlicensed Entity**

The crux of the Pennsylvania Supreme Court’s analysis as to ERMI was that, under the PRPA, in order to qualify as “peer review” the entity on whose behalf peer review is conducted must itself be a “professional health care provider” as defined in the PRPA, at 63 P.S. § 425.2. The statute defines a “professional health care provider” as “individuals or organizations who are approved, licensed or otherwise regulated to practice or operate in the health care field under the laws of the Commonwealth of Pennsylvania” — and enumerates a variety of specific individuals/organizations, including inter alia, physicians, dentists, other licensed professionals, health care facility administrators and corporations operating health care facilities.

ERMI argued that it qualified as a “professional health care provider” with regard to its peer review activities. ERMI pointed out that in the McClellan decision, decided two decades ago, the Supreme Court found that the statutory text “including but not limited to” in the definition of “professional health care provider” should be interpreted to include “persons or things of the same general kind or class as those specifically mentioned in the list of examples.” ERMI argued that as an emergency services contractor, it was sui generis to two different enumerated categories of “professional health care provider.” First, although not a “physician” it was a “physician organization comprised of hundreds of individual emergency medicine physicians ... that exists specifically to provide emergency medical services.” Second, as an entity operating under contract with a hospital to manage its emergency department, it qualified as “corporation operating health care facilities.”

The Supreme Court rejected these arguments, finding that the “fundamental” requisite to meet the definition of “professional health care provider” is that the entity be “approved, licensed or otherwise regulated to practice or operate in the health care field” — and that ERMI was disqualified because it was “unregulated and unlicensed.” The court also rejected ERMI’s argument that, because Walther was a professional health care provider reviewing another provider, those activities constituted privilege “peer review.” The court explained that “the privilege does not apply any time that an activity consistent with the PRPA’s definition of “peer review” occurs.” Instead, the PRPA strictly limits the evidentiary privilege to the “proceedings and records of a review committee” — which it defined as committee acting on behalf of a “professional health care provider.”

### **Analysis as to Monongahela Valley Hospital: No Peer Review Protection for a Contractor’s Review Activities or for Hospital Credentialing**

The hospital argued that, unlike ERMI, it clearly qualified as a “professional health care provider” under the statute and that the peer review privilege attached to the activities of Walther, a member of its medical staff, evaluating the clinical performance of Boggs, another member of its medical staff. The hospital pointed out that hospitals “routinely contract with independent physician groups (like ERMI)

[and] could not function without them.” The Supreme Court rejected this argument on the basis that the hospital “did not contend that Walther was a member of the hospital’s peer review committee and the certified record contains no evidence to support such a finding.” The court ignored the arguments that the hospital had contracted with ERMI to conduct peer review on its behalf, noting that the hospital had not included its emergency services agreement in the certified record, and held that by failing to do so it had “waived” that argument. In that regard, the court left open the possibility that, when presented on the basis of a fully developed record, it would find that a hospital could engage its contracted services provider to conduct peer review on its behalf.

However, the court then went beyond the specific issues in the case and held, expressly, that hospital credentialing review is not peer review privileged under the PRPA. The court reached this surprising conclusion based on its construction of the definition of “review organization.” The first sentence of the definition of “review organization” is “any committee engaging in peer review” — and to that extent, the proceedings and records of a “review organization” are clearly protected under Section 425.4 of the PRPA. The court noted that the second sentence of the definition of “review organization” states that “it shall also mean any hospital board, committee or individual reviewing the qualifications or activities of its medical staff ...” The court held that, as to that second sentence, the statutory peer review privilege does not apply. The court stated that while “individuals reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto ... are defined as a type of “review organization” such individuals are not “review committees entitled to claim PRPA’s evidentiary privilege in its Section 425.4.”

The court then stated that “we must disapprove of Superior Court decisions to the extent that they hold that credentialing review is entitled to protection from disclosure under the PRPA’s evidentiary privilege,” citing to Troescher v. Grody<sup>[3]</sup> and Dodson v. DeLeo.<sup>[4]</sup> Notably, Troescher, at 1022, focused specifically on the issue of whether credentialing review documents are privileged when prepared by an individual as opposed to a committee. Dodson, at 1243, addressed the broader question as to whether quality review documents prepared for the purpose of credentialing review are peer review privileged. It is unclear from the majority’s discussion in Reginelli whether the newly articulated limitations on peer review protection of the credentialing process are intended to extend to the proceedings and records of review committees engaged in credentialing evaluation or only individual reviews and other ancillary documents prepared to facilitate the credentialing process.

### **Dissenting Opinion**

Justice David Wecht filed a dissent, joined in by Chief Justice Thomas Saylor and Justice Debra Todd. In it, Justice Wecht made the following key points:

- It is the reviewing court’s obligation to ascertain and fulfill the statutory intent. In this case, the PRPA fulfills a salutary public purpose in encouraging “frank, probing assessments of physicians by their peers” and it is “beyond question that peer review committees play a critical role in the effort to maintain high professional standards in the medical practice.”
- Although the majority treats the PRPA as “plain and unambiguous” it is actually ambiguous and contradictory, particularly when it comes to reconciling the definitions of “professional health care provider,” “review organization,” “peer review” and “review committee.”
- The bright line that the majority attempts to draw between “review organization” and “review committee” cannot be sustained by the statutory text read holistically. In particular, the majority’s conclusions, based on its strained interpretation of the definition of “review

organization” that (1) the privilege extends only to committees and not to individuals conducting peer review, and that (2) credentialing review is not privileged, undermines the statutory intent because it “leaves the door open to precisely the same chilling effect upon free and frank discussions aimed to ensure and improve an appropriate quality of care that the PRPA strives to vitiate.”

- ERMI meets the definition of “professional health care provider” under the sui generis principles articulated in McClellan.
- The sharing of peer review privileged information between two entities engaged in peer review, i.e., ERMI and the hospital, did not effectuate a “waiver” of the peer review privilege because the PRPA contemplates and authorizes the sharing of peer review privilege information and “the simultaneous possession of peer review materials by multiple individuals and entities.”
- Because the PRPA creates specific statutory exceptions to the privilege (such as the “original source rule” articulated in Section 425.4), it is not the court’s role to “manufacture additional exceptions to that privilege by judicial fiat.”

The dissent’s concluding remarks are as follows:

The well-established statutory mechanism for [ensuring that the care delivered in the Department meets the standard of care] is professional peer review, and the legislature clearly has found that confidentiality is critical to such review. Nothing in the PRPA suggests that sharing review materials among a chain of vertically integrated providers who collectively are responsible for a given health care facility should result in waiver of that confidentiality.

### **Impact on Pennsylvania Health Care Providers**

Health care providers in Pennsylvania should be extremely troubled by this decision, which, with one stroke, casts substantial doubt on the availability of peer review privilege protection in a wide range of settings, including:

- Credentialing review in any setting;
- Peer review conducted by contracted providers for hospital-based services such as emergency medicine, radiology, anesthesiology, laboratory medicine, hospitalist services, intensivist services and other service lines;
- Peer review conducted by entities that employ physicians;
- Peer review conducted by health systems and/or nonregulated health care facilities
- Peer review conducted by and on behalf of ACOs and other clinically integrated networks;
- Peer review conducted by health care facilities that do not require state licensure.

There are some immediate steps that hospitals and other health care provider entities should undertake. First, hospitals should evaluate their contracts, policies and procedures relative to peer review activities by contracted providers, to make sure that all policies and contractual provisions are

fully aligned and clear that the contracted providers are providing peer review services on behalf of the hospital. The documents should specify clearly what peer review services the contractor is providing, and with whom the information will be shared in furtherance of the peer review process.

In addition, hospitals should review their credentialing policies and procedures to analyze and determine the impact of Reginelli on credentialing, and determine if the process requires modification in light of this decision. To the extent that providers determine that there are some documents contained within their credentialing files that are still peer review privileged after Reginelli, hospitals should work with their malpractice defense counsel to ensure that they are removed and logged in an appropriate privilege log before their credentialing records are produced in litigation.

All providers should be prepared for a flood of new demands for peer review protected information in malpractice cases, as this decision will no doubt embolden the plaintiff malpractice bar to continue its efforts to vitiate this important privilege protection.

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[1] McClellan v. HMO of Pennsylvania, 686 A.2d 801 (Pa. 1996).

[2] Pennsylvania Peer Review Protection Act, 63 P.S. § 425.1 et seq.

[3] Troescher v. Grody, 869 A.2d 1014, 1022.

[4] Dodson v. DeLeo, 872 A.2d 1237, 1243 (Pa. Super. 2005).