

Peer Review/Quality Assurance Privilege in Long Term Care



Idaho Health
Care Assn

Kim C. Stanger
(2-18)



Preliminaries

This presentation is similar to any other legal education materials designed to provide general information on pertinent legal topics. The statements made as part of the presentation are provided for educational purposes only. They do not constitute legal advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the speaker. This presentation is not intended to create an attorney-client relationship between you and Holland & Hart LLP. If you have specific questions as to the application of law to your activities, you should seek the advice of your legal counsel.



Overview

- For our purposes today:
 - peer review privilege = quality assurance/performance improvement ("QAPI") privilege
- Discussion
 - Purpose of such privileges
 - Potentially relevant privileges
 - Idaho peer review statute
 - Federal Nursing Home Reform Act
 - Patient Safety and Quality Improvement Act
 - Others
 - Protecting the privilege



Written Materials

- Idaho Peer Review Privilege, IC 39-1392a *et seq.*
- Stanger, "Idaho Peer Review Privilege"
- Conditions for Coverage, 42 CFR 483.75
- Portions of CMS State Operations Manual, App. PP, Long Term Care Facilities

HOLLAND & HART 

Purpose of Peer Review Privilege



HOLLAND & HART 

Purpose of Peer Review Privilege

- We want healthcare entities to engage in effective QAPI to evaluate qualifications, performance, and improve outcomes.
 - Full disclosure
 - Candid discussion
 - No fear of reprisal
- Entities may not engage in QAPI activities if:
 - Info used against them in a lawsuit or administrative action.
 - Participants may be sued.
- Records may be unfairly prejudicial at trial.



HOLLAND & HART 

Kim C. Stanger
 208-383-3913
kcstanger@hollandhart.com
www.hollandhart.com
www.hhhealthlawblog.com

Idaho Peer Review Statute



HOLLAND & HART 

Idaho Peer Review Privilege IC 39-1392a *et seq.*

- **“Statement of policy.** To encourage research, discipline and medical study by certain health care organizations for the purposes of reducing morbidity and mortality, enforcing and improving the standards of medical practice in the state of Idaho, certain records of such health care organizations shall be confidential and privileged as set forth in this chapter.”

(IC 39-1392)

HOLLAND & HART 

Idaho Peer Review Privilege

- **“It is essential to the preservation of optimum medical care that the medical profession within Idaho be free to review patient care and to constantly enforce and improve the standards of medical practice within the state.** Such intraprofessional action and review is inhibited and discouraged [by] the lack of privilege for any proceedings or records which may be developed and the threat that such materials may be obtained by third parties, perhaps misinterpreted and used in litigation, against the practitioner.
- **“[The peer review privilege] impose[s] a confidential and privileged status upon certain reports, records and other materials** developed by in-hospital medical staff committees ... and other approved entities concerned with research, discipline and medical study. It would also encourage the free exchange of information in such proceedings by granting civil immunity to persons providing information or opinions to such review and study committees. Access to and court room use of individual patients' records would not be affected.”

(*Murphy v. Wood*, 105 Idaho 180 (Ct. App. 1983), quoting Statement of Purpose attached to bill that became IC 39-1392)

HOLLAND & HART 

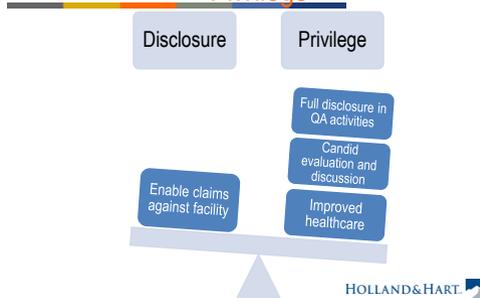
Idaho Peer Review Privilege

- “[W]e believe that the legislature intended to establish a broad privilege for the records and proceedings of [facility] committees. The privilege extends to all discussions and proceedings by [facility] committees, conducted for the purpose of research, discipline or medical study. Such confidentiality is in the public interest because it encourages a free exchange of medical information that will ultimately benefit the public in the form of improved medical care.”

(Murphy v. Wood, 105 Idaho 180 (Cl. App. 1983))



Pros and Cons of Peer Review Privilege



Idaho Peer Review Privilege/Immunity

- Applies to peer review by “healthcare organizations”, i.e., “a hospital, in-hospital medical staff committee, medical society, managed care organization, licensed emergency medical service, group medical practice, or skilled nursing facility.” (IC 39-1392a)
- We have proposed amendment to add residential assisted living facilities to the list.



Idaho Peer Review Privilege/Immunity

"Peer review" means the collection, interpretation and analysis of data by a health care organization for the purpose of bettering the system of delivery of health care or to improve the provision of health care or to otherwise reduce patient morbidity and mortality and improve the quality of patient care," including but not limited to:

- "(a) **Credentialing, privileging or affiliating of health care providers** as members of, or providers for, a health care organization;
- "(b) **Quality assurance and improvement, patient safety investigations and analysis, patient adverse outcome reviews, and root-cause analysis and investigation activities** by a health care organization; and
- "(c) **Professional review action**, meaning an action or recommendation of a health care organization which is taken or made in the conduct of peer review, that is based on the competence or professional conduct of an individual physician...." (IC 39-1392a)



Idaho Peer Review Immunity

- "The **furnishing of information or provision of opinions to any health care organization or the receiving and use of such information** and opinions shall not subject any health care organization or other person to any liability or action for money damages or other legal or equitable relief." (IC 39-1392c)
 - Protects participants in the peer review process.
 - Does not extend to ultimate credentialing decision by the healthcare organization. (*Harrison v. Binnion*, 147 Idaho 645 (2009))



Idaho Peer Review Privilege

- "[A]ll **peer review records shall be confidential and privileged**, and shall not be directly or indirectly subject to subpoena or discovery proceedings or be admitted as evidence, nor shall testimony relating thereto be admitted in evidence, or in any action of any kind in any court or before any administrative body, agency or person for any purpose whatsoever...." (IC 39-1392b)



Idaho Peer Review Privilege

- “Peer review records” means “all evidence of interviews, reports, statements, minutes, memoranda, notes, investigative graphs and compilations and the contents thereof, and all physical materials relating to peer review of any health care organization,” but not patient care records. (IC 39-1392a)



Idaho Peer Review Privilege

- “No order of censure, suspension or revocation of licensure ... or health care organization privilege of any physician licensed to practice medicine in Idaho shall be admissible in any civil proceeding seeking damages or other civil relief against the physician, ... or health care organization which may be a defendant in said cause.” (IC 39-1392b)



Idaho Peer Review Privilege

- Idaho courts interpret the Idaho peer review privilege very strictly.
 - *Verska v. St. Alphonsus Reg. Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011) (physician credentialing action)
 - *Montalbano v. St. Alphonsus Reg. Med. Ctr.*, 151 Idaho 837, 264 P.3d 944 (2011) (physician credentialing action)
 - *Nightengale v. Timmel*, 15 Idaho 347, 256 P.3d 755 (2011) (medical malpractice)
 - *Murphy v. Wood*, 105 Idaho 180, 667 P.2d 859 (App. 1983) (medical malpractice)



Idaho Peer Review Confidentiality

- “Custodians of [peer review] records and persons becoming aware of such data and opinions shall not disclose the same except as authorized by rules adopted by the board of medicine or as otherwise authorized by law. Any health care organization may receive such disclosures, subject to an obligation to preserve the confidential privileged character thereof and subject further to the requirement that such requests shall be made and such use shall be limited to aid the health care organization in conducting peer review.” (IC 39-1392c)



Idaho Peer Review Privilege Limits

- If a malpractice patient submits an interrogatory asking for the info, the provider must disclose:
 - Whether it conducted or has in progress an inquiry, proceeding or disciplinary matter regarding the quality or propriety of care involving the patient; and
 - Disposition of the proceeding.
 - Names of persons with direct knowledge of the care rendered, but not who gained knowledge second-hand.

(IC 39-1392e)



Idaho Peer Review Privilege Limits

- Does not apply to underlying facts giving rise to the peer review actions.
- Does not apply to underlying medical records. (IC 39-1392b)
- Facility may waive the privilege by disclosing info outside the peer review process, e.g., to defend itself.
- May not apply to claims in federal court, e.g.,
 - Suit between citizens of different states.
 - Discrimination, antitrust, etc.



Idaho Peer Review Privilege Limits

- Provider may be required to disclose QA/peer review records to surveyors...



HOLLAND & HART 

Idaho Peer Review Privilege Limits

Peer Review Privilege

"All peer review records shall be confidential and privileged, and shall not be directly or indirectly subject to subpoena or discovery proceedings or be admitted as evidence, nor shall testimony relating thereto be admitted in evidence, or in any action of any kind in any court or before any administrative body, agency or person for any purpose whatsoever." (IC 39-1392b)

SNF and ALF Regulations

- Must monitor, investigate, document incidents, accidents, complaints, etc. (See, e.g., IDAPA 16.03.02.100.12, 16.03.22.010.19, 16.03.22.153.08, 16.03.22.350, 16.03.22.711.02)
- Records of incidents, accidents, complaints, investigations, etc. are open to surveyors. (See, e.g., IDAPA 16.03.02.003.01(a); Informational Letter #2014-03 (5/23/14))

HOLLAND & HART 

Surveyor Access to Records

- "[The Department] must have unimpeded access to all incident reports that have occurred in the last year or since the last survey, whichever is greater.... [T]he facility [must] maintain these reports on-site, at the facility.... Failure to provide incident and accident reports ... will be cited."

(Informational Letter #2014-03 (5/23/14))

HOLLAND & HART 

Surveyor Access to Records

- Surveyors likely have right to immediate access per:
 - Participation agreements.
 - State and federal
 - Federal regulations.
 - Grounds for automatic exclusion
 - State regulations.
 - SNF and ALF regulations
- Be careful about refusing them access...
 - Suspension or termination of participation agreement.
 - Adverse licensure action.



Idaho Rule of Evidence 519

- “A **hospital**, in-hospital medical staff committee, medical society, and maker of a confidential communication has a privilege to refuse to disclose and to prevent any other person from disclosing [a] confidential communication” made in the course of peer review. (IRE 519(b))
 - Does not apply to:
 - Nursing facilities
 - Assisted living facilities
- (See IRE 519(a)(1))



Federal Privileges



- Federal Nursing Home Reform Act (“FNHRA”)
- Accountable Care Act (“ACA”)
- Federal Patient Safety and Quality Improvement Act (“PSQIA”)
- Others



Federal Nursing Home Reform Act

- **Quality assessment and assurance.** A nursing facility must maintain a quality assessment and assurance committee, consisting of the director of nursing services, a physician designated by the facility, and at least 3 other members of the facility's staff, which (i) meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and (ii) develops and implements appropriate plans of action to correct identified quality deficiencies. **A State or the Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph.**

(42 USC 1396f(b)(1)(B); 42 USC 1395i-3(b)(1)(B);



Federal Nursing Home Reform Act

- Applies to:
 - Nursing facilities that participate in Medicare/Medicaid (42 USC 1396f(a))
 - Skilled nursing facilities that participate in Medicare/Medicaid. (42 USC 1395i-3(a))
- **Not assisted living facilities.**



Federal Nursing Home Reform Act

- Applies to:
 - All documents made by or at the behest of the QA committee, including conclusions, reports, minutes and communications.
 - Probably not:
 - Records prepared outside the QA committee's process even though QA committee reviewed them; or
 - Records required to comply with federal regulations, e.g., incident reports, plan of correction, etc.

(See, e.g., *In re Jane Doe*, 99 N.Y.2d 434 (2003))



Federal Nursing Home Reform Act

Incident Report

- Factual document contemporaneously generated at time of accident or incident describing the incident.
- Should contain limited analysis.
- **Not protected.** (See, e.g., CMS SOM 42 CFR 483.75(h); *Jewish Home v. CMS*, 413 Fed. Appx. 532 (3d Cir. 2011); *Brown v. Sun Healthcare*, 2008 WL 1751675 (E.D. Tenn. 2008))

QA Committee Records

- Records created by or at the behest of the QA committee analyzing cause of incident, actions to correct such issues, etc., including deliberations, internal working papers, minutes of QA committee, etc.
- Protected unless needed to confirm compliance with regulations.



LTC Conditions for Coverage

- Now: LTC facilities must maintain requirements for quality Assessment and Assurance ("QAA") Committees.
- By 11/28/19: long term care facilities must develop, implement and maintain an effective quality assurance and performance improvement ("QAPI") program, which includes:
 - Identification, reporting, investigation, analysis and prevention of adverse events.
 - Development, implementation, evaluation of corrective actions or performance improvement activities.
 - Quality assurance committee.
- **"Disclosure of information. A State or the Secretary may not require disclosure of the records of such committee except in so far as such disclosure is related to the compliance of such committee with the requirements of this section."**

(42 CFR 483.75)



LTC Conditions for Coverage

Reports and Logs

- "Incident and accident reports, wound logs, or other reports or records used to track adverse events are not protected from disclosure. Surveyors may request these documents as part of their normal investigation of other areas of concern throughout the survey to support their findings."

(CMS State Operations Manual ("SOM") App. PP, Long Term Care Facilities (Rev. 11-22-17), relevant to 42 CFR 483.75(h)).

QA Committee Records

- "Protection from disclosure is generally afforded documents generated by the QAA committee, such as minutes, internal papers, or conclusions. However, if those documents contain the evidence necessary to determine compliance with QAPI/QAA regulations, the facility must allow the surveyor to review and copy them."



Kim C. Stanger
208-383-3913

kcstanger@hollandhart.com
www.hollandhart.com
www.hhhealthlawblog.com

LTC Conditions for Coverage

- “Surveyors may only require facilities to disclose QAA committee records if they are used to determine the extent to which facilities are compliant with the provisions for QAA.”
- “Information gleaned from disclosure of QAA committee documents will not be used to cite new issues (not already identified by the survey team) or to expand the scope or severity of concerns identified on the current survey.”

(CMS SOM for 483.75)



LTC Conditions for Coverage

- “The surveyor task to review the QAPI Plan/QAA is intended to occur at the end of the survey, after completion of investigation into all other requirements to ensure that concerns are identified by the survey team independent of the QAPI Plan/QAA review. Surveyors must use critical thinking and investigatory skills to identify noncompliance, rather than using information provided during the QAA review as a source to identify deficiencies. The intent of §483.75(h), (i) is to:
- Ensure information obtained from QAA committee documents that is related to the committee’s good faith attempt to identify and correct quality deficiencies are not used by surveyors to identify additional concerns not previously identified during the survey; and
 - Foster a culture where nursing homes can openly conduct their internal QAA investigations and performance improvement efforts.”
- (CMS SOM for 42 CFR 483.75)



LTC Conditions for Coverage

- “CMS may terminate the agreement with any provider if CMS finds that any of the following failings is attributable to that provider ... fails to furnish information that CMS finds necessary for a determination as to whether payments are or were due under Medicare and the amounts due.”
- “Since access to QAA committee records may be necessary to determine whether a facility meets the Medicare requirements at 483.75, denial of such access risks termination of the provider agreement.”

(42 CFR 489.353(a)(4))

(CMS SOM for 42 CFR 483.75)



Patient Safety Quality Improvement Act



Source: Katten Muchin Rosenman, LLP, headquartered in Chicago.

Patient Safety Quality Improvement Act

"[P]atient safety work product shall be privileged and shall not be—

"(1) subject to a Federal, State, or local civil, criminal, or administrative subpoena or order, including in a Federal, State, or local civil or administrative disciplinary proceeding...;

"(2) subject to discovery in connection with a Federal, State, or local civil, criminal, or administrative proceeding, including in a Federal, State, or local civil or administrative disciplinary proceeding...

"(4) admitted as evidence in any Federal, State, or local governmental civil proceeding, criminal proceeding, administrative rulemaking proceeding, or administrative adjudicatory proceeding, including any such proceeding against a provider..." (42 USC 299b-22)

HOLLAND & HART 

Patient Safety Quality Improvement Act

- "Notwithstanding any other provision of Federal, State, or local law, and subject to [limited exceptions], patient safety work product shall be confidential and shall not be disclosed." (42 USC 229b-22(b))
- "An accrediting body may not require a provider to reveal its communications with any patient safety organization..." (42 USC 229b-22(d)(4)(B))

HOLLAND & HART 

Patient Safety Quality Improvement Act

Applies to "providers", i.e., "an individual or entity licensed or otherwise authorized under State law to provide health care services, including—
 "(i) a hospital, **nursing facility**, comprehensive outpatient rehabilitation facility, home health agency, hospice program, ... ambulatory surgical center, pharmacy, physician or health care practitioner's office, **long term care facility**, behavior health residential treatment facility, clinical laboratory, or health center; or
 "(ii) a physician, physician assistant, nurse practitioner, clinical nurse specialist, certified registered nurse anesthetist, certified nurse midwife, psychologist, certified social worker, registered dietitian or nutrition professional, physical or occupational therapist, pharmacist, or other individual health care practitioner; or
 "any other individual or entity specified in regulations promulgated by the Secretary."
 (42 USC 299b-21(8); see also 42 CFR 3.20)



Patient Safety Quality Improvement Act

- Applies to "patient safety work product," i.e., "any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements
 "(i) which are **assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization** ... and which could result in improved patient safety, health care quality, or health care outcomes; or
 "(ii) which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system."
 (42 USC 299b-21(7); see also 42 CFR 3.20)



Patient Safety Quality Improvement Act

"Patient safety work product" does not include:
 • "a patient's medical record, billing and discharge information, or any other original patient or provider record."
 • "information that is collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system. Such separate information or a copy thereof reported to a patient safety organization shall not by reason of its reporting be considered patient safety work product."
 (42 USC 299b-21(7); see also 42 CFR 3.20)



Additional Privileges



HOLLAND & HART 

Additional Privileges that May Apply

- Self-Critical Analysis Privilege aka Self-Evaluative Privilege or Self-Investigation Privilege
- Federal Rule of Evidence 407
- Idaho Rule of Evidence 407
- Attorney-Client Communication
- Attorney Work Product Doctrine
- Idaho Apology Law

HOLLAND & HART 

Self-Critical Analysis Privilege aka "Self-Evaluative Privilege" or "Self-Investigation Privilege"

- Generally protects confidential assessments, evaluations, investigations, or audits designed to improve a company's processes.
- Has limited acceptance.
 - Only recognized by some courts
 - Narrowly applied when recognized

HOLLAND & HART 

Kim C. Stanger
 208-383-3913
kcstanger@hollandhart.com
www.hollandhart.com
www.hhhealthlawblog.com

Federal Rule of Evidence 407

“When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.”

(FRE 407)



Idaho Rule of Evidence 407

“When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct This rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.”

(IRE 407)



Attorney-Client Privilege

- Communications between attorney and client are privileged if:
 - Intended to be and was kept confidential; and
 - Made for the purpose of obtaining or providing legal advice.
- May be able to protect investigation results if expressed in and through a communication to or from attorney.
- Does not apply to:
 - Underlying facts.
 - Documents prepared for other purposes even though attorney reviewed them.



Attorney Work Product Doctrine

- An opposing party generally may not discover or compel disclosure of written or oral materials prepared by or for an attorney in the course of legal representation, especially in preparation for litigation. (See *Hickman v. Taylor*, 329 US 495 (1947); FRE 26(b)(3))
- May be able to protect investigations performed by or for an attorney in anticipation of litigation.
- Does not apply to documents prepared for other purposes even though attorney reviewed them.

HOLLAND & HART 



Apologizing

- In appropriate circumstances, you may want to apologize and accept responsibility.
 - May help address concerns and avoid litigation.
 - May be the “right” thing to do.
- But carefully consider before doing so.
 - You may not have all the facts.
 - Consult with your malpractice insurer and/or attorney.
 - Admissions may adversely affect coverage.
 - Admissions may adversely affect litigation.
 - Remember Idaho apology law...

HOLLAND & HART 

Idaho Apology Law

Applies to a “health care professional”:

“Health care professional” means any person licensed, certified, or registered by the state of Idaho to deliver health care and any clinic, hospital, nursing home, ambulatory surgical center or other place in which health care is provided.

(IC 9-207)

HOLLAND & HART 

Idaho Apology Law

(1) "... All statements and affirmations, whether in writing or oral, and all gestures or conduct **expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence**, including any accompanying explanation, made by a health care professional or an employee of a health care professional to a patient or family member or friend of a patient, which relate to the care provided to the patient, or which relate to the discomfort, pain, suffering, injury, or death of the patient as the result of the unanticipated outcome of medical care shall be inadmissible as evidence for any reason including, but not limited to, as an admission of liability...."

(2) "A **statement of fault** which is otherwise admissible and is part of or in addition to a statement identified in subsection (1) of this section shall be admissible."
(IC 9-207)

Idaho Apology Law

Expression of Sympathy

- "I'm sorry that this occurred..."
- "We regret the discomfort or inconvenience..."

➤ **Not Admissible; cannot be used against you.**

- *But remember: they may not hear, interpret, or remember exactly what you say, so be very careful.*
 - *May want to document in writing.*
 - *May want to have witnesses.*

Statement of Fault

- "It was our fault..."
- "It was my mistake..."

➤ **Admissible; can be used against you!**

Protecting the Privilege



Protecting the QAPI/Peer Review Privilege

- Establish a QA/performance improvement/peer review ("QAPI") committee authorized to engage in QAPI activities.
 - Ensure QAPI committee has broad scope, e.g.,
 - Quality assurance and performance improvement
 - Credentialing providers
 - Incident investigations
 - Root cause analysis
 - Others?
 - Confirm confidentiality of QAPI records.



Protecting the QAPI/Peer Review Privilege

- Consider participating in a PSO.
 - Establish provider safety evaluation system ("PSES").
 - Use PSES to address issues or incidents that may reported to the PSO.
 - Run info that is to be reported to the PSO through the PSES.
 - Privilege will likely not apply to:
 - Records created outside the PSES process.
 - Records required to be kept as part of normal business.



Protecting the QAPI/Peer Review Privilege

- Conduct QAPI activities through the designated QAPI committee.
 - Investigations
 - Interviews
 - Record reviews
 - Reports
- Disclosure outside the QAPI committee may jeopardize privilege.

May still need to disclose to surveyors, but may be able to keep them from civil lawsuit.



Protecting the QAPI/Peer Review Privilege

- Educate QAPI participants re confidentiality.
- Retain outside consultants under QAPI authority.
- Require QAPI participants to maintain confidentiality.
 - Limit QAPI communications to authorized process and personnel.
 - No QAPI communications in nonprivileged documents.
 - No informal discussions re QAPI issues.
 - No unauthorized disclosure of QAPI records.



Protecting the QAPI/Peer Review Privilege

- Designate qualified and trained personnel to maintain QAPI records.
- Separate and secure QAPI records from other records.
 - Separate room or storage area.
 - Separate, labeled file.
 - Other?
- Distinguish incident reports but apply protections.
 - May be QAPI for purposes of third party litigation.
 - May not be protected from surveyors.



Protecting the QAPI/Peer Review Privilege

- Designate QAPI documents as confidential, e.g.,

**CONFIDENTIAL QUALITY ASSURANCE
INFORMATION PROTECTED BY
42 CFR 483.75(h) and IC § 39-1392a et seq.**

**DO NOT DISTRIBUTE OR DISCLOSE WITHOUT
AUTHORIZATION.**



Protecting the QAPI/Peer Review Privilege

- Maintain tight control over QAPI records.
 - Beware copying or distributing records.
 - Require recipients to acknowledge duty of confidentiality.
 - Return or destroy the documents upon completion of the recipient's participation.
- Do not disclose QAPI records outside authorized QAPI process.



Protecting the QAPI/Peer Review Privilege

- When responding to an incident, complaint or other issue, consider who should conduct the response:
 - Non-QAPI entity.
 - May not be protected.
 - QAPI committee or delegee.
 - May be protected depending on circumstances.
 - Attorney or entity retained by attorney.
 - May maximize protection under:
 - Attorney-client privilege
 - Work product doctrine.



Protecting the QAPI/Peer Review Privilege

- Confirm what should/should not be included in:
 - QAPI communications.
 - Incident reports.
 - Limit to info required by regulations.
 - Medical records.
 - Limit to factual information, e.g., pertinent, objective facts concerning what happened, patient's condition before/after, medical care rendered, and who notified.
 - No analysis, opinion, or speculation.
 - No reference to separate incident or QAPI report.
 - Other required documents.

Not protected in litigation



Protecting the QAPI/Peer Review Privilege

- Educate staff concerning requirements.
- Enforce the confidentiality rules.
 - Warn or reprimand participants who violate rules.
 - Impose appropriate sanctions.



Protecting the QAPI/Peer Review Privilege

- Carefully consider the consequences before waiving the peer review privilege, e.g.,
 - Disclosing peer review info in response to discovery requests or subpoenas.
 - Using peer review documents to defend self.
- It may be that the healthcare organization is better off asserting the privilege instead of using or disclosing the privileged documents in its defense.



Protecting the QAPI/Peer Review Privilege

- When in doubt, check with an attorney who knows and understands the peer review statutes and the consequences of waiving any privilege.



Always Assume the Records May Be Disclosed

- Use qualified, trained persons to document.
 - More serious the issue → more important to document.
- Document accurately and professionally.
- Don't speculate or cast aspersions.
- Supplement the records as appropriate.
 - Use appropriate late entries.
 - Never falsify the record.
- Report up the chain.
- Follow through on whatever you write.
- Other suggestions?



Questions



Kim C. Stanger
kcstanger@hollandhart.com
(208) 383-3913



Kim C. Stanger
208-383-3913
kcstanger@hollandhart.com
www.hollandhart.com
www.hhhealthlawblog.com