

## BUSINESS LITIGATION ALERT

AUGUST 24, 2012

### Post-Event Investigatory And Analytic Documents Created In Compliance With The 2004 Patient Safety Act Are Absolutely Privileged From Disclosure

**For the first time, a New Jersey appellate court considered the breadth of the confidentiality provisions of the Patient Safety Act ("PSA"), N.J.S.A. 26:2H-12.23 to 12.25.** The court held that post-event investigatory and analytic documents exclusively created by a health care facility in compliance with the PSA are absolutely privileged from disclosure. *Applegrad v. Bentolila*, A-1261-11 (August 9, 2012). For the purposes of the PSA, a health care facility is defined to include diagnosis centers. The *Applegrad* court also noted that the PSA guards against disclosure of communications created within the PSA process, such as the self-critical and deliberate analyses performed by a health care facility's patient safety committee.

However, if materials are developed by a health care facility through some other "source or context" and not exclusively under the PSA, such as peer-review material from the health care facility's continuous quality improvement program, those materials may be discoverable, subject to the qualified privilege as set forth in *Christy v. Salem*, 366 N.J. Super. 535 (App. Div. 2004). The qualified privilege test provides that a health care facility is entitled to preserve the confidentiality of its opinions, analysis and fact findings, including self-critical analysis of peer review reports, except where a party shows a "compelling need."

The *Applegrad* court determined that when considering the discoverability of PSA documents, courts must apply an exclusivity text requiring the court to consider whether an item was developed solely under the procedures of the PSA. The exclusivity approach is reflected in PSA regulation N.J.A.C. 8:43 E-10.9(b).

The court further delineated that the PSA does not insulate the underlying facts related to a patient mishap. In other words, health care facility employees with personal knowledge of the patient's care, which knowledge does not stem solely from the PSA materials and factual reports, are not protected by the privilege. The court noted that "the PSA is not an invitation to health care providers to shield information that was previously accessible, under *Christy* or otherwise, by indiscriminately labeling items 'PSA materials' or giving PSA job titles to hospital personnel who are not performing true PSA functions."

Knowledge of the *Applegrad* opinion is important for New Jersey health care facilities when conducting a self-critical analysis. To ensure confidentiality, health care facilities must ensure that the proper PSA procedures are followed.

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