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Pennsylvania Peer Review Protection Act

MEDICAL PEER REVIEW PROTECTION IN PENNSYLVANIA

I. INTRODUCTION

This comment presents an overview of the Pennsylvania Peer Review Protection Act¹ and an outline of the Commonwealth of Pennsylvania's case law interpreting the Act.

The medical profession has been actively regulated for over a century.² Today, the peer review organization is the primary form by which hospitals exercise self-regulation.³ In order for a hospital to be eligible for federal Medicare and Medicaid programs it must exercise internal peer review.⁴ Federal standards for peer review are established by the Joint Committee on Accreditation of Hospitals (the "JCAH").⁵ Once a hospital gains JCAH accreditation, it automatically qualifies for federal Medicare reimbursements.⁶ Peer review, however, is not merely a means by which a hospital obtains funding. In fact, the primary purpose of peer review is to improve the quality of care and services rendered by the health care facility.⁷ Through this policy of self-assessment all health care professionals ought to be striving toward self-improvement.⁸

1. 63 PA. CONS. STAT. ANN. § 425.1 *et seq.* (Purdon 1986).

2. For a thorough analysis of the history of medical regulation in Pennsylvania, see Comment, *Pennsylvania Law of Hospital Supervision: Its Origin and Present Meaning*, 51 TEMP. L.Q. 187 (1978).

3. For a discussion of peer review form and policy, see Comment, *Medical Peer Review Protection in the Health Care Industry*, 52 TEMP. L.Q. 552 (1979).

4. 42 U.S.C.A. §§ 1395-96 (1987).

5. The JCAH is a private organization founded by the American College of Physicians, the American Hospital Association, and the American Medical Association. The constitutionality of such a delegation of power from the federal government to a private organization is not a subject developed in this Comment.

6. Social Security Act, Health Insurance for the Aged and Disabled, 42 U.S.C.A. § 1395(b)(a)(1)(1987).

7. See Comment, *Peer Review Protection: The Pennsylvania Approach at the Crossroads*, 91 DICK. L. REV. 329 (Fall 1986), (citing the JCAH Manual [hereinafter *Peer Review Protection*]).

8. E.K. Huffman, *Medical Record Management*, Revised by the American Medical Record Association, B.C. Campbell, RRA Editor, Physician's Record Company, 533 (1981).

The Pennsylvania Peer Review Protection Act⁹ (the "PPRPA") mandates that the "proceedings and records of a review committee shall not be subject to discovery or introduction into evidence in any civil action."¹⁰ It is with the above language that much of the present controversy arises involving the PPRPA. When do the statutory exceptions to the general rule come into play? Is the confidentiality of such proceedings necessary in order to maintain open and frank discussion in physician care review? Does open and frank review actually occur? Does this confidentiality merely perpetuate a "conspiracy of silence" among physicians? The assurance of confidentiality of peer review records can serve as a sword to stimulate more diligent review, while at the same time it may serve as a shield or a barrier to the disclosure of ineffective peer review and/or incompetent medical care.¹¹ This comment will analyze the Pennsylvania statute, the case law interpreting the statute, and the public policy arguments contained therein and will attempt to give effective answers to the issues that will effect the future of medical care.

II. THE PENNSYLVANIA PEER REVIEW PROTECTION ACT

The Pennsylvania Peer Review Protection Act¹² was enacted in 1974.¹³ The Act was later amended in part in

9. 63 PA. CONS. STAT. ANN. § 425.1 *et seq.* (Purdon 1986).

10. 63 PA. CONS. STAT. ANN. § 425.4 (Purdon 1986), states:
Confidentiality of review organization's records

The proceedings and records of a review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a professional health care provider arising out of the matters which are the subject of evaluation and review by such committee and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions or other actions of such committee or any members thereof: Provided, however, that information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his knowledge, but the said witness cannot be asked about his testimony before such a committee or opinions formed by him as a result of said committee hearings.

Id.

11. Goldberg, *The Peer Review Privilege: A Law in Search of a Valid Policy*, 10 AM. J. L. MED. 151 (Summer 1984), *reprinted in*, L.S. Goldsmith, *Hospital Liability: Law and Practice* 163 (1987).

12. Pa. H.B. 2067 (1978).

13. Commonwealth of Pa., *Combined History of Senate and House Bills*, H.B. 1729 at A-237 (1974).

1978.¹⁴ The PRRPA's definition section¹⁵ codifies the meaning of

14. Commonwealth of Pa., Combined History of Senate and House Bills, H.B. 2067 at A-269 (1978).

15. 63 PA. CONS. STAT. ANN. § 425.2 (Purdon 1986), provides in pertinent part:

As used in this act:

"Peer review" means the procedure for evaluation by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers, including practice analysis, inpatient hospital and extended care facility utilization review, medical audit, ambulatory care review, claims review, and the compliance of a hospital, nursing home or convalescent home or other health care facility operated by a professional health care provider with the standards set by an association of health care providers and with applicable laws, rules and regulations.

"Professional health care provider" means 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, individuals or organizations:

- (1) A physician.
- (2) A dentist.
- (3) A podiatrist.
- (4) A chiropractor.
- (5) An optometrist.
- (6) A psychologist.
- (7) A pharmacist.
- (8) A registered or practical nurse.
- (9) A physical therapist.
- (10) An administrator of a hospital, a nursing or convalescent home, or other health care facility.
- (11) A corporation or other organization operating a hospital, a nursing or convalescent home or other health care facility.

"Professional society" includes medical, psychological, nursing, dental, optometric, pharmaceutical, chiropractic and podiatric organizations having as members at least a majority of the eligible licentiates in the area or health care facility or agency served by the particular society.

"Review organization" means any committee engaging in peer review, including a hospital utilization review committee, a hospital tissue committee, a health insurance review committee, a hospital plan corporation review committee, a professional health service plan review committee, a dental review committee, a physicians' advisory committee, a nursing advisory committee, any committee established pursuant to the medical assistance program, and any committee established by one or more State or local professional societies, to gather and review information relating to the care and treatment of patients for the purposes of (i) evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean any hospital board, committee or individual reviewing the professional qualifications or activities of its medical staff or applications for

“peer review.” The Pennsylvania legislature enacted the PPRPA in order to: 1) aid in evaluating and improving the quality of health care rendered; 2) reduce the morbidity or mortality; and 3) help establish guidelines to keep costs down.¹⁶ The PPRPA established two types of protection: confidentiality of review organization records¹⁷ and immunity from liability for good faith participation in the peer review process.¹⁸ In order to enhance the likelihood of honest and critical review of medical professionals, with the goal of improved health care at lower costs, the legislature made a policy decision to allow physicians to review their own professional conduct without outside interference.¹⁹

A. Immunity

The immunity provision of PPRPA, section 425.3, provides a general civil and criminal immunity to those persons “providing information to any review organization.”²⁰ The individual is granted this protection unless such information is unrelated to the function

admission thereto. It shall also mean a committee of an association of professional health care providers reviewing the operation of hospitals, nursing homes, convalescent homes or other health care facilities.

Id.

16. *Id.* See *supra* note 15 for definition of “review organization” for this policy statement.

17. 63 PA. CONS. STAT. ANN. § 425.4 (Purdon 1986), see *supra* note 10 for the pertinent language of the Act.

18. 63 PA. CONS. STAT. ANN. § 425.3 (Purdon 1986), provides:
Immunity from liability

(a) Notwithstanding any other provision of law, no person providing information to any review organization shall be held, by reason of having provided such information, to have violated any criminal law, or to be civilly liable under any law unless:

(1) such information is unrelated to the performance of the duties and functions of such review organization, or

(2) such information is false and the person providing such information knew, or had reason to believe, that such information was false.

(b)(1) No individual who, as a member or employee of any review organization or who furnishes professional counsel or services to such organization, shall be held by reason of the performance by him of any duty, function, or activity authorized or required of review organizations, to have violated any criminal law, or to be civilly liable under any law, provided he has exercised due care.

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to any action taken by any individual if such individual, in taking such action, was motivated by malice toward any person affected by such action.

Id.

19. See *Peer Review Protection supra* note 7.

20. See 63 PA. CONS. STAT. ANN. § 425.3, *supra* note 18.

of the review committee or the information was in fact false and the provider knew, or should have known, that the information was false.²¹ The immunity provision also applies to members or employees²² of review organizations acting in furtherance of the organization's activities. As long as the members act with due care and without malice,²³ their action is immune from criminal or civil prosecution.²⁴

B. Confidentiality

Section 425.4 of the PPRPA addresses the requirement of confidentiality of the review organization's records.²⁵ This section mandates the "proceedings and records of a review . . . shall not be subject to discovery."²⁶ This section also provides that "no person who was in attendance at a meeting of such committee shall be permitted or required to testify" concerning matters properly brought before the committee.²⁷ However, there is an exception to the general rule set forth in this section. Information "otherwise available from the original sources are not to be construed as immune from discovery . . . merely because they were presented" before the committee.²⁸ This section attempts to balance the need for confidentiality in order to promote frank review with the need for those individuals wronged to reach relevant information in support of their case. The legislature reached this delicate balance by allowing plaintiffs continued access to information that can be obtained from original sources or from those individuals with first hand knowledge of the event. The Pennsylvania courts have found it difficult to implement this discrete balancing scheme and until recently, there was much confusion in the judicial interpretation of the Act.

III. JUDICIAL INTERPRETATION OF THE ACT

There has not been a flood of litigation reported involving interpretation of the PPRPA. This however, as any medical malpractice

21. *Id.* at § 425.3(a)(2), *supra* note 18.

22. *Id.* at § 425.3(b)(1), *supra* note 18.

23. *Id.* at § 425.3(b)(1) & (2), *supra* note 18.

24. *Id.* at § 425.3, *supra* note 18. For an in-depth discussion of the immunity provisions of the PPRPA see Comment, *Medical Peer Review Protection in the Health Care Industry*, 52 TEMP. L. Q. 552, 579 (1979).

25. See 63 PA. CONS. STAT. ANN. § 425.4, *supra* note 10.

26. *Id.*

27. *Id.*

28. *Id.*

litigator would assert, does not belittle the importance of the Act. Most of the confrontations concerning the PPRPA arise in front of motion judges and unfortunately few of these arguments are reported. An unlimited number of other confrontations are avoided for fear of contempt charges²⁹ or sanctions.³⁰ A recent Pennsylvania Superior Court case decision should, however, help clarify the law in this area.

A. Cases Allowing Discovery

There are three judicial interpretations of the PPRPA that have allowed discovery of peer review documents and/or records. The most noteworthy of these cases is *Fowler v. Pirris*.³¹ The *Fowler* case concerned a medical malpractice claim that arose after a woman died as a result of complications suffered during and then after childbirth.³² The plaintiff, by the way of a motion for production, sought a number of documents relating to the professional expertise of Dr. Pirris.³³ The Washington Hospital requested a protective order pursuant to section 425.4 of the PPRPA.³⁴ The court relied upon the "obtainable from original sources"³⁵ exception stating that the plaintiff shall be able to discover such information as he could obtain it from the original source, the JCAH.³⁶ The court, Judge Bell presiding, did not limit its invasion to the JCAH reports. The court allowed the discovery of Dr. Pirris' application for staff privileges; documents

29. Pa. R.C.P. 1910.13 which provides:
Disobedience of Order of Court

If a person disobeys an order of court other than a support order, the court may issue a bench warrant for the arrest of the person and if the disobedience is wilful may, after hearing, adjudge the person to be in contempt.

Id.

30. Pa. R.P.C.P. 4019 which provides in relevant part:
Sanctions

(a)(1) The court may, on motion, make an appropriate order if
(i) a party fails to serve answers, sufficient answers or objections to written interrogatories. . .

(viii) a party or person otherwise fails to make discovery or to obey an order of the court respecting discovery.

Id.

31. 34 Pa. D. & C.3d 530 (1981).

32. *Id.* at 532.

33. *Id.*

34. *Id.* See *supra* note 10 for the language of § 425.4.

35. *Fowler*, 34 Pa. D. & C.3d at 532. See *supra* note 10 for relevant statutory language.

36. *Fowler*, 34 Pa. D. & C.3d at 533.

in the possession of the hospital concerning an investigation into Dr. Pirris' qualifications; and any document showing how the medical staff standards applied to Dr. Pirris.³⁷ This opinion renders the confidentiality provisions of the PPRPA meaningless.³⁸

In *Bolton v. Holy Spirit Hospital*,³⁹ the hospital objected to the plaintiff's request for documents so far as this production concerned prior complaints, corrective action, supervision and information contained in personnel files.⁴⁰ The court focused its attention on the "arising out of the matters which are subject of evaluation and review" language of section 425.4.⁴¹ The court emasculated the protections afforded under the PPRPA by allowing discovery of personnel files, notes of committee members that did not arise "solely" from peer review, other patient complaints, and peer review records concerning patients other than the plaintiff.⁴²

In *Trent v. Lancaster General Hospital*,⁴³ an action was brought against a hospital for negligent care and treatment, failure to obtain informed consent, and failure to disclose all pertinent dangers involved in the procedure.⁴⁴ The plaintiff had lost an eye as the result of a post operative infection.⁴⁵ Counsel for the plaintiff was allowed access to the infection control policy records despite the fact that

37. *Id.* at 534.

38. The court stated:

It [PPRPA] was not meant to insulate a hospital group from liability if that group in their negligent review of staff applications permitted one not fully qualified to administer expert medical services. As the documents requested in 3(C) [investigation of qualifications] also do not deal with the particular circumstances from which the civil action arises, we will permit discovery.

Fowler, at 537.

It is important to realize that the action against the hospital was for negligence in permitting unqualified medical practitioners to render services to the plaintiff. *Id.* at 532. It is not at all clear how the court concluded that the requested documentation did "not deal with the particular circumstances from which the civil action arises." *Id.*

39. 105 Dauph. 40 (Pa. C. 1984).

40. *Id.* at 41.

41. *Id.* at 42. The court stated that the legislature did not intend to grant an absolute privilege. The legislature intended to balance the plaintiff's right to information with the need for confidentiality of peer review records. However, once the court cited Pa. R.C.P. 126 and discussed the policy of broad discovery in Pennsylvania, it had reached its determination to allow discovery. *Bolton*, *supra* note 39, at 45.

42. *Id.* at 48.

43. 70 LANCASTER L. REV. 170 (Pa. C. 1986).

44. *Id.* at 171.

45. *Id.*

the information was part of the hospital's internal review mechanism.⁴⁶ The *Trent* court, without much discussion, held that the requested information "in no way concerns plaintiff's specific case" and fell within the 425.4 exception.⁴⁷

B. Cases Upholding Confidentiality

There have been a number of cases supporting the protections offered by the PPRPA. Many of these opinions have given an overly strict, confined and confused interpretation of the PPRPA. For the most part, the opinions in this section, as in the preceding section, do not adequately apply the Act.

Pennsylvania courts first interpreted the PPRPA in *Schwartz v. Tri-County Hospital*.⁴⁸ The plaintiff in *Schwartz* brought a wrongful death and survival action against two physicians and a hospital.⁴⁹ A supplemental set of interrogatories were imposed upon all three defendants requesting information concerning appearances before medical committees and review groups in reference to the treatment of the decedent.⁵⁰ The court held that this information could not be reached as it would interfere with the open and frank discussion of reviewing authorities.⁵¹

In *Holliday v. Klimosky*,⁵² a malpractice action was brought claiming incompetent surgery by a member of the hospital surgical staff.⁵³ The plaintiff requested discovery of internal hospital records and the hospital moved for a protective order.⁵⁴ The plaintiff's request was filed prior to the passage of the PPRPA and the court relied upon pre-PPRPA case law in reaching its determination.⁵⁵ Except for the

46. *Id.* at 171-72.

47. *Id.* at 173.

48. 74 Pa. D. & C.2d 52 (1975).

49. *Id.* at 53.

50. *Id.*

51. *Id.*

52. 75 Pa. D. & C.2d 408 (1976).

53. *Id.* at 409.

54. *Id.*

55. *Id.* See *Petrusky v. Charleroi Monessen Hospital*, No. 367 (Pa. C.P. Washington Co. 1974). *Petrusky* stated:

We are going to allow the discovery because to refuse it would be to tell the Plaintiff that he may not even try to prove that the hospital staff, including the defendant dentists, engaged in either an actually deceitful, a merely willful, or an inexplicably negligent review of the case. It may turn out that some of the matters are too privileged within the processes of the hospital and organized medicine itself to wave around in the courtroom. They do not however seem to us to be too privileged to be inquired into at private deposition, the record of which we can always seal, if it becomes necessary.

Id., slip opinion at 3 (emphasis omitted).

records held by the Utilization Review Committee, the discovery request was granted.⁵⁶ The court concluded that the records held by the Utilization Review Committee were specifically protected from discovery by section 425.4 of the newly enacted PPRPA.⁵⁷ This court actually misconstrued the PPRPA⁵⁸ as it allowed discovery of information concerning: 1) Dr. Klimoski's review by the medical staff and the Board of Trustees and, 2) charges filed against the physician by members of the hospital staff.⁵⁹ The *Holliday* court put unwarranted importance on the nomenclature involved in review rather than on the function of the "review organization".⁶⁰

In *Bandes v. Klimowski*,⁶¹ the professional abilities of Dr. Klimowski (A/K/A Dr. Klimoski)⁶² were again at issue in a medical malpractice action. The plaintiff, at deposition, attempted to ascertain whether or not Dr. Klimowski had broken any hospital rules besides the late filing of records.⁶³ The court ruled that this question need not be answered because it related to information that the PPRPA was designed to protect from discovery.⁶⁴ This conclusion is correct only if the answer to the inquiry would disclose records or proceedings of a review organization. This is an important point that was not addressed in the opinion.

In *Obenski v. Brooks*,⁶⁵ a motion to compel discovery was brought in a medical malpractice action.⁶⁶ The court began its inquiry by stating that the general rule in Pennsylvania is that "discovery shall

56. *Holliday*, *supra* note 52, at 411.

57. *Id.*

58. Such a misconstrued reading of the PPRPA was, although not directly cited, probably based on the opinion in *Bolton*. See *supra* notes 39-42 and accompanying text.

59. *Holliday*, *supra* note 52, at 410.

60. *Id.* The reason this case is discussed under this heading and not under cases allowing discovery is that this court, even though it gave a much too restrictive reading of the PPRPA, protected the information and records of the Utilization Review Committee. *Id.* See *supra* note 15 for the definition of "review organization" which includes utilization review.

61. 3 Pa. D. & C.3d 11 (C.P. Fayette Co. 1977).

62. See *Holliday* *supra* notes 52-60 and accompanying text.

63. *Bandes*, 3 Pa. D. & C.3d 11, 15-16 (1978). The precise question at deposition was: "Has there ever been any infraction of the rules concerning Dr. Klimowski other than the late reporting of hospital records?" *Id.*

64. *Bandes*, *supra* note 63, at 16. The court made specific reference to § 425.4 in reaching this conclusion. See *supra* note 10 for the relevant portion of the Act.

65. 7 Pa. D. & C.3d 253 (1978).

66. *Id.* at 255.

be liberally permitted."⁶⁷ The court noted that the defendant/physician was the only practical source of the requested information and if such inquiry was prohibited, it would probably foreclose the plaintiff's investigation into the subject.⁶⁸ The court allowed discovery of information relating to the physician's applications to professional societies and, the physician's own inquiries into gaining hospital privileges.⁶⁹ The court however, affirmatively stated that "discovery in this area must, . . . exclude inquiries into areas that are immune from discovery by virtue of the Peer Review Protection Act."⁷⁰ The court did not state with any specificity what documents or information were to be protected by the Act.

In January of 1987, Judge Wettick of the Allegheny County Court, authored an opinion interpreting the PPRPA. In *O'Neill v. McKeesport Hospital*,⁷¹ the plaintiff alleged that the hospital was negligent in its administration of anesthesia and in failing to diagnose O'Neill's condition.⁷² The plaintiff requested production of documents, reports, or recommendations issued by the JCAH dealing with the anesthesia and surgery procedures of McKeesport Hospital.⁷³ Initially, the court had to determine if the JCAH records were "records of a review committee" within the meaning of 425.2. The court held that the purpose of the JCAH was to evaluate the quality and efficiency of the services of the hospital.⁷⁴ The *O'Neill* court

67. *Id.* at 256. The court cited Pa. R.C.P. 126 and 4007 for this proposition. Rule 4007 was rescinded Nov. 28, 1978, however, the subject matter of former rule 4007 has been transferred to rules 4001(c), 4003.1, 4007.1 and 4007.2.

68. *Obenski, supra* note 65, at 265. The plaintiff sought to discover information relating to the defendant/physician's application for hospital staff privileges. *Id.* at 262.

69. *Obenski, supra* note 65, at 265.

70. *Id.* at 264.

71. 135 P.L.J. 217 (1987).

72. *Id.* at 217. The plaintiff's complaint alleged that McKeesport Hospital was negligent in the following respects:

- (1) failure to adopt rules, regulations, and procedures for the safe administration of anesthesia;
- (2) failure to require hospital employees to monitor the patient's body temperature during surgery;
- (3) failure to comply with JCAH policy; and
- (4) failure to recognize and diagnose O'Neill's condition.

Id.

73. *O'Neill*, at 217.

74. *Id.* at 219. The court relied upon the *JCAH Accreditation Manual for Hospitals*, (1983 ed.) which states that the purpose of the certificate of incorporation is:

1. [T]o establish standards for the operation of hospitals and other health-

openly disagreed with the Washington County opinion in *Fowler v. Pirris*.⁷⁵ Judge Wettick analyzed the goals and objectives of PPRPA and concluded that the Act protected from discovery any peer review materials of a medical care provider in any lawsuit against that provider.⁷⁶

In late March of 1987, the Superior Court of Pennsylvania filed an opinion interpreting the PPRPA. In *Sanderson v. Bryan*,⁷⁷ the medical malpractice plaintiff filed a request for production of documents from the defendant Carlisle Hospital.⁷⁸ The plaintiff requested documents and recordings maintained by a peer review organization involving an evaluation of the defendant/physician.⁷⁹ The lower court had not protected this information to the extent requested by the defending parties.⁸⁰ The superior court granted appeal in this case because of the importance of the issue involved and because of the conflicting lower court opinions interpreting the PPRPA.⁸¹

The court began its analysis of the PPRPA by stating that hospital peer review records are generally protected from public scrutiny by either legislation or judicial decision.⁸² The court's research uncovered at least forty-six states that had enacted legislation concerning peer review.⁸³ The privilege in Pennsylvania was not intended to be ab-

related facilities and services;

2. to conduct survey and accreditation programs that will encourage members of the health professions, hospitals, and other health-related facilities and services voluntary:

- a. to promote high quality of care in all aspects in order to give patients the optimum benefits that medical science has to offer,
 - b. to apply certain basic principles of physical plant safety and maintenance, and of organization and administration of function for efficient care of the patient, and
 - c. to maintain the essential services in the facilities through coordinated effort of the organized staffs and the governing bodies of the facilities; [and]
3. to recognize compliance with standards by issuance of certificates of accreditation.

JCAH Manual, at ix.

75. *O'Neill*, *supra* note 71, at 219. For a discussion of *Fowler v. Pirris*, see *supra* notes 31-38 and accompanying text.

76. *O'Neill*, *supra* note 71, at 220.

77. 361 Pa. Super. 491, 522 A.2d 1138 (1987).

78. *Id.* at 493, 522 A.2d at 1139.

79. *Id.*

80. See 33 Cumberland L.J. 443 (Pa. C. 1983).

81. *Sanderson*, *supra* note 77, 361 Pa. Super. at 492, 522 A.2d at 1138.

82. *Id.* at 494, 522 A.2d at 1139.

83. The court relied upon, Note, *The Missouri Rule: Hospital Peer Review is Discoverable in Medical Malpractice Cases*, 50 Mo. L.Rev. 459 (1985), and listed

solute, because if it was, the legislature would have simply stated it as an absolute.⁸⁴ The court did, however, hold that the Act protected the information sought in this case.⁸⁵ However, this protection did not result in a summary judgment for the defendant because the plaintiff still had access to his own records and he could depose of those with first hand knowledge of the factual circumstances.⁸⁶ In its final analysis the court explained that the plaintiff was also able to employ his own expert to give opinions concerning the factual matters discoverable in the case.⁸⁷ It is precisely in this fashion that the goals of the legislature and the rights of the injured are properly balanced.

C. Conclusion on Pennsylvania Case Law

To say that the Pennsylvania case law in the area of peer review is confused would be an understatement. The practical effect of this

the statutory enactments as follows:

ALA. CODE § 22-21-8-(b) (1984); ALASKA STAT. § 18.23.030 (1981); ARIZ. REV. STAT. ANN. § 36-445.01 (Supp. 1975-1984); ARK. STAT. ANN. § 28-934 (1979); CAL. EVID. DOC § 1157 (West Supp. 1985); COLO. REV. STAT. ANN. § 13-21-110(1) (1973) & Supp. 1984; CONN. GEN. STAT. ANN. § 19a-25 (West Supp. 1984); DEL. CODE ANN. tit. 24, § 1768 (1981); FLA. STAT. ANN. § 768.40(4) (West Supp. 1984); GA. CODE ANN. § 88-1908 (Supp. 1984); HAWAII REV. STAT. 624-25.5 (Supp. 1983); IDAHO CODE § 39-1392b (1977 & 1984 Supp.); ILL. ANN. STAT. ch. 110 § 8-2101 (1984); IND. CODE ANN. § 16-4-3-1 (Burns 1983); IOWA CODE ANN. § 135.42 (West 1972); 1984 KAN. SESS. LAWS ch. 238 § 7(c); KY. REV. STAT. § 311.377(2) (1983); LA. REV. STAT. ANN. 13 § 3715.3 (West Supp. 1984); ME. REV. STAT. ANN. tit. 24 § 2510(3) (1964); MD. HEALTH OCC. CODE ANN. § 14-601(d) (1981 & Supp. 1984); MICH. COMP. LAWS ANN. § 333.2632 (West 1980); MINN. STAT. ANN. § 145.64 (West Supp. 1984); MISS. CODE. ANN. § 41-63-9 (1972 & Supp. 1984); MO. ANN. STAT. § 537.035.4 (Vernon Supp. 1985); MONT. CODE ANN. §§ 50-16-203, 50-16-205 (1983); NEB. REV. STAT. § 71-2048 (1981); NEV. REV. STAT. § 49.265 (1981); N.H. REV. STAT. ANN. § 151:13-a (Supp. 1983); N.J. STAT. ANN. § 2A:84A-22.8 (West Supp. 1984-85); N.M. STAT. ANN. § 41-9-5 (1982 Supp. Pamphlet); N.Y. ADMIN. CODE tit. 10 § 405.24(k) (1984); N.C. GEN. STAT. § 131E-95 (Supp. 1983); N.D. CENT. CODE § 23-01-02.1 (Supp. 1983); OHIO REV. CODE ANN. § 2305.251 (Page 1983); OKLA. STAT. ANN. tit. 63, § 1-709 (West 1984); OR. REV. STAT. § 41.675 (1983); PA. STAT. ANN. tit. 63, § 425.4 (Purdon Supp. 1984-85); R.I. GEN. LAWS § 5-37.3-7 (Supp. 1984); S.D. CODIFIED LAWS ANN. § 36-4-26.1 (1977); TEX. REV. CIV. STAT. ANN. 4447d § 3 (Vernon 1973); VT. STAT. ANN. tit. 18, §§ 1958-1960 (Supp. 1984); VA. CODE § 8:01-581.17 (1984); WASH. REV. CODE ANN. § 4.24.250 (Supp. 1963-1985); W. VA. CODE § 30-3C-3 (Supp. 1984); WIS. STAT. ANN. § 146.38 (West Supp. 1975-1984); WYO. STAT. § 35-2-602 (1977).

Sanderson, supra note 77, at 495, 522 A.2d at 1140.

84. *Id.* at 498, 522 A.2d at 1141.

85. *Id.* at 501, 522 A.2d at 1143.

86. *Id.*

87. *Id.*

is that review is not as frank and effective because of the threat of disclosure in any impending litigation. The *Sanderson* opinion has tried to clear up much of the confusion concerning the PPRPA. Many courts and practitioners have found it difficult to reconcile the Act with the broad discovery rules. The fact remains that the Act does not protect physicians from responsibility for the injuries that they inflict upon the innocent. The PPRPA merely protects the review committees and organizations that perpetuate the health care self-evaluation process. The plaintiff is neither foreclosed from reaching his/her own medical records nor from those individuals with first hand knowledge of pertinent events. The review committee process and its records should not be discoverable because review is to be professionally critical, even in cases in which there is no injury. If there is an actual injury coupled with the requisite degree of fault, the plaintiff can use a qualified expert to advance this line of thought. The court in *Sanderson* realized this, and that opinion offers a good path for future decisions interpreting the PPRPA to follow.

IV. CONCLUSION

It has been estimated that five percent of all practicing physicians are unfit for practice, because they are mentally ill, addicted to drugs, or ignorant of modern medical techniques.⁸⁸ Over thirty thousand Americans die annually from faulty prescriptions alone, and ten times that amount suffer dangerous side effects.⁸⁹ Incompetent and unnecessary surgery are also serious problems that seem to be growing.⁹⁰ These facts, coupled with the fact that many patients suffer from the Lazarus Syndrome,⁹¹ give rise to an ever increasing amount of malpractice litigation. Therefore, a uniform interpretation of the Pennsylvania Peer Review Protection Act is necessary in order to gain predictability of result in the court room and give sanctity to internal hospital peer review proceedings.

Those that argue for disclosure of all information, records, and review committee notes, state that disclosure is the only way to

88. A.L. Strauss, *Where Medicine Fails*, 4th edition (1984); *Medicine & Malpractice*, by David Makofsky, 385.

89. *Id.*

90. *Id.*

91. The Lazarus Syndrome is a psychological condition in which the patient feels that the physician, being God-like, will be able to cure any ailment. This term is derived from the Biblical character Lazarus, brother of Mary and Martha of Bethany who, after four days in the tomb, was brought back to life by Jesus. *John* 11.1-44;12.1,2.

remedy the rights of the individuals that have been injured. They allege that self-regulation has failed and inept physicians use peer review protection in perpetuation of their professional conspiracy of silence.⁹² There are cases in which such an evaluation is in fact true. The most grotesque example of the failures of peer review were made apparent in *Miofsky v. Superior Court*.⁹³ The physician in the *Miofsky* case committed over eighty acts of sexual misconduct upon patients, during surgery, and remained fully licensed because "professionals do not publicly speak critically of fellow professionals."⁹⁴ Such extreme examples of the failure of peer review only feed the fire under the argument that peer review is a public policy experiment that has failed. The Pennsylvania Legislature has confidence in the medical professionals of this Commonwealth. Thus the legislature has decided to protect and promote the purpose of peer review, that being the maintenance and continued growth of high professional standards. The public interest will be best served in the long run by the preservation of the confidentiality of peer review. Pennsylvania is trying to promote increased use of peer review⁹⁵ by offering an environment in which free, open, frank and critical discussion can occur. Peer review, in its utopian sense, will lead to a higher quality of care at lower costs to the consumer. Peer review, is the hope for the future. It can only be effective if its mission is taken seriously by those at all levels of medical care.⁹⁶

The *Sanderson* opinion has helped in overcoming some of the confusion in the courts and in the review committees concerning PPRPA. In the long term, the PPRPA will help lead to a higher quality of care, at lower cost, for all Pennsylvania residents.

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92. See *supra* note 11.

93. 703 F.2d 332 (9th Cir. 1983).

94. See *supra* note 11. Dr. Miofsky was ranked first on a list of *The 10 Most Bizarre Sex Crimes of the 20th Century*, Penthouse, May 1982. The Physician, an anesthesiologist, allegedly placed his penis in the mouths of over eighty female patients during surgery.

95. H.B. 1729, Act of July 20, 1974, P.L. 564, No. 193.

96. J. Greenspan, *Accountability and Quality Assurance in Health Care*. The Charles Press Publishers (1980), 201. Jack Greenspan, M.D., is the Director of the Quality Assurance Program of the Institute of Pennsylvania Hospital.