Privilege, Confidentiality, and Ethics: An Analysis of CRP Principles and Patient Safety Confidentiality

Collaborative for Accountability & Improvement

Wesley R. Butler

Wes.Butler@BBB-Law.com

Tel. 859.226.0312

Barnett Benvenuti & Butler PLLC

ATTORNEYS AT LAW

Scope and Conclusion

- Examine the role of confidentiality and privilege within the context of Communication and Resolution Programs (CRPs) to test whether health care providers may implement robust CRPs while preserving confidentiality and privilege interests
  - Focus on philosophies and purpose
- My preliminary legal analysis concludes that patient safety confidentiality and privilege claims can be compatible with the principles and purpose of CRP, if care is exercised in the implementation of CRP and the boundaries of privilege and confidentiality are understood and observed

Organization

- The purposes of confidentiality and privilege, with a focus on the federal Patient Safety Act
- The purposes supporting the common elements of CRPs
- A comparison of the CRPs and confidentiality and privilege interests to identify complementary and divergent points
- Discussion of practical questions in balancing CRPs with confidentiality and privilege protections

Caveats

- Me and my work, my limitations, and my perspectives
  - I have no conflicts of interest to disclose
  - This presentation is not legal advice – I'll speak in generalities and won't dive deeply into exceptions and nuances
  - Views are my own and not those of my clients or the Collaborative
  - Today's topic implicates questions of legal philosophy and public policy, not so much legal compliance and operations
  - My hope is to stimulate your own philosophical thoughts

Confidentiality and Privilege

- Confidentiality and privilege are related concepts, but distinct – the terms are not interchangeable

- It is important to put each term in its proper context

Confidentiality - Generally

- Something intended to be private or secret
- Confidentiality may seem somewhat subjective at first blush
- Confidentiality may be recognized by statutes or common law
- Our laws reflect society's notions on confidentiality, which have changed over time
  - Ex: a company's proprietary information
  - Ex: protected health information
- Confidentiality involves elements of personal judgment and appreciation of legal compliance

Privilege – Generally

- A special legal right, exemption, or immunity, often from a duty
- Often a right to do *or* not do something
- Privileges are recognized more formally than confidentiality:
  - Court's may develop privileges through the common law
  - Legislatures may develop statutory privileges
- Ex: the privilege for attorney-client communications
- The applicability of privilege requires evaluation of law and facts

Privilege and Confidentiality

- The concepts can be confusing because they occasionally overlap, but have different applications and may be subject to different laws
  - Information that is privileged is often assumed to be confidential
  - And information may be confidential, but not privileged
- When used together, privilege and confidentiality indicates that a party has a legal right to keep something private
- Questions of privilege and confidentiality often arise in litigation

Privilege and Confidentiality – Why?

- Why do we have privilege and confidentiality laws?
- Let's briefly examine the "why?" question through examples
  - HIPAA
  - The attorney-client communication privilege
- Common purposes:
  - to promote candor in communication,
  - to protect individual dignity, and
  - to protect the integrity of certain relationships

Privilege and Confidentiality – Why?

- Do we value these purposes?
- Do privilege and confidentiality protections actually promote these purposes?
- If so, do we value the benefits more highly than the consequences of privilege and confidentiality?
- Are there other, better means to accomplish these purposes?
- Should our laws promote an ideal, or acknowledge practical experience, or attempt a balance of the two?

Patient Safety Activities

- Federal courts
- State statutory laws
- More recently federal Patient Safety and Quality Improvement Act of 2005
- Laws vary in scope, degree, and the requirements, but the underlying premise of such laws is to give health care providers confidentiality and privilege rights to hold patient safety activities as private
- Why?

Patient Safety Act

- Congress examined whether to protect patient safety activities when it enacted the Patient Safety & Quality Improvement Act of 2005, 42 USC §299b-21 *et seq*.
- Creates the Patient Safety Organization (PSO) Program – a voluntary program within which health care providers share lessons from experience with quality experts (PSOs)
- PSO Program seeks to improve health care safety and quality by aggregating, studying, and disseminating safety and quality data
- Shared learning is confidential and privileged

Patient Safety Act

- A look at legislative history
- Patient Safety Act was prompted by the IOM (now the National Academy of Medicine) report *To Err Is Human* in 2000
  - Health care quality improvements are chronically stagnant
- Congressional hearings found many contributing factors to the impediments in safety and quality
  - Fragmented systems do not incentivize data aggregation
  - Lessons learned are not shared outside the organization

Patient Safety Act

- Congress emphasized that a punitive culture in health care ("Blame and Shame" Culture) posed the most substantial threat to quality improvements because it suppresses vigorous discussion and the sharing of lessons learned
- Congress' response was to insulate the health care culture from "Blame and Shame" through confidentiality and privilege
  - Punitive culture *inside* the health care provider
  - Punitive culture *outside* the health care provider

Patient Safety Act

- The Patient Safety Act protects patient safety activities that are performed within the construct of the PSO Program
  - Confidentiality protects those who participate in patient safety activities and encourages health care workers to be vocal and participate in such activities freely
  - Privilege protects against the punitive culture outside the health care provider by protecting against the external threat of litigation discovery
- Protects post-patient-encounter safety and quality analyses so participants can speak openly and theorize on improvements "away from the prying eyes of litigating attorneys"

CRPs

- CRPs are an approach to responding to patients who have been harmed by their health care
  - A component within a larger commitment to patient quality and safety
  - Implemented for the benefit of both patients and the professionals who deliver care
  - Focuses on the needs of a patient and their family when something goes wrong during their care

CRPs

- A few core commitments of CRPs:
  - Analyzing adverse events, and developing and implementing action plans to prevent recurrences caused by system failures or human error
  - Being transparent with patients and supporting their emotional needs following an event
  - Proactively and promptly offering financial and non-financial resolution to patient when adverse events were caused by unreasonable care

CRPs

- Key steps in CRPs:
  - Immediately report the adverse event internally
  - Ensure the patient's immediate clinical needs are met
  - Ensure the clinicians' needs are addresses
  - Engage the patient and family after the event discovery
  - Undertake a rigorous event analysis that incorporates information and perspectives from the patient and family

CRPs

- Key steps in CRPs:
  - Develop and implement plans for preventing recurrences
  - Hold a resolution discussion with the patient and family and share the results of the event analysis and prevention plans
  - Proactively offer fair financial and non-financial resolution for adverse events determined to be caused by unreasonable care, rather than waiting for a request for compensation
  - Summarize the lessons learned and disseminate throughout the organization and other clinicians and institutions

CRP and the Patient Safety Act

- Complementary Points
  - Both expect adverse event reporting
  - Both expect rigorous post-encounter analysis of an event to consider safety and quality improvements
  - Both expect the development and implementation of plans to prevent recurrences of the event
  - Both expect the provider to summarize and disseminate the lessons learned to promote institutional knowledge and compliance

CRP and the Patient Safety Act

- Neutral Points
  - Patient Safety Act is silent on family engagement
  - Patient Safety Act is silent on resolution activities
  - Patient Safety Act focuses on post-encounter patient safety activities, so active treatment considerations or clinical issues are not addressed

CRP and the Patient Safety Act

- Point of Potential Divergence
  - CRP expects the provider to share the results of the event analysis and prevention plans with the family
  - If a provider participates in the Patient Safety Act, can the provider also include a patient/family in patient safety activities or share the results of the patient safety activity?
    - Yes, but there are limitations and consequences
    - Generally, information cannot be both disclosed and confidential (the Act has unique exceptions to this rule)

CRP and the Patient Safety Act

- Questions and Operational Suggestions
- What is the standard for transparency your organization intends?
  - Moral, ethical, and legal considerations
- What criteria will you follow in determining the circumstances that trigger CRP?
  - The protections of the Patient Safety Act are voluntary so a provider can participate in the PSO Program in a custom-designed manner to accomplish both goals

Questions?

Thank you for listening.

Wes Butler

T. 859.226.0312

Wes.Butler@BBB-Law.com