Judge Martin asserted that the majority incorrectly dismissed the "mountain of rigorous evidence" from various professional organizations, e.g., American Psychological Association, that SOCE was harmful to minors. She stated that since the ordinances allowed therapists to practice SOCE on adults, the ordinances were narrowly tailored and would have survived strict scrutiny. Justice Martin noted that the majority opinion invited unethical research in its demand for additional studies, which would be both harmful and futile. She said that the ordinances did not affect a therapist's ability to discuss SOCE but rather limited a therapist's ability to practice a form of medicine, i.e., speech therapy. Justice Martin concluded that the ordinances were constitutionally permissible restrictions of professional speech that did not violate the First Amendment.

### Discussion

The Eleventh Circuit was the first federal circuit court of appeals to strike down a SOCE ban that applied to minors (Harvard Law Review. *Otto v. City of Boca Raton*: Eleventh Circuit invalidates minor conversion therapy bans. *Harvard L. Rev*. 2021;134: 2863-2870). Governments are constitutionally allowed to regulate professional speech that is itself part of the practice of medicine because such speech is not protected by the First Amendment. But, the Eleventh Circuit determined that speech-based SOCE for minors is content-based speech and thus is protected by the First Amendment despite acknowledging that speech-based SOCE can be harmful to minors.

This case is significant as it established, in the Eleventh Circuit, that ordinances prohibiting therapists from practicing therapy to change a minor's sexual orientation or gender identity or expression are violations of the First Amendment right to freedom of speech. Because the court asserted that the government does not have a compelling interest to restrict speech in these ordinances, the potential harm to minors caused by such speech is outweighed by the potential harm from deprivation of the freedom of speech. The Eleventh Circuit has indirectly given therapists permission to conduct speech-based SOCE on minors. This ruling positioned the Eleventh Circuit Court of Appeals in opposition to several sister circuit courts of appeals who have upheld bans against SOCE therapy for minors. This ruling sets the stage for the U.S. Supreme Court to determine the constitutionality of ordinances banning speech-based SOCE therapy for minors.

## Peer-Review Protections within Hospital Credentialing and Privileging

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### Hospital Credentialing Committee Records May Qualify for State and Federal Peer-Review Protections in Medical Negligence Lawsuit

DOI:10.29158/JAAPL.220018-21

**Key words:** credentialing; evidentiary privilege; medical negligence; peer review; privileging

In *Leadbitter v. Keystone Anesthesia Consultants, Ltd.*, 256 A.3d 1164 (Pa. 2021), the Supreme Court of Pennsylvania ruled that portions of a hospital credentialing committee's records may be protected from discovery in a medical negligence lawsuit under both state and federal protections for medical peer review.

### Facts of the Case

After suffering multiple complications from orthopedic surgery in 2015, James Leadbitter and his spouse raised claims of medical negligence against his surgeon. They also claimed that the hospital's credentialing and privileging process for his surgeon was inadequate, and the hospital should have known that the surgeon was not qualified to perform this surgery. The Leadbitters requested the surgeon's complete credentialing and privileging file, and the hospital released records of their credentialing committee's review of the surgeon's objective credentials (such as degrees, licensure, and board certification). The hospital responded that the credentialing committee also considered "peer review" of the physician's past

clinical care when granting hospital privileges and maintained that these portions of their records should be exempt from discovery under the Pennsylvania Peer Review Protection Act (PRPA) of 1974 (63 Pa. Stat. Ann. §§ 425.1-425.4 (1996)). The withheld documents included professional opinions related to the surgeon's competence, interview comments, and performance evaluations submitted by other physicians and compiled by the hospital. The hospital also withheld reports from the National Practitioner Data Bank (NPDB), arguing that these responses were protected from discovery by the federal Health Care Quality Improvement Act (HCQIA) of 1986 (42 U.S.C. §11137(b)(3)).

The HCQIA was intended to improve health care quality by protecting peer review as a means of candid feedback and open investigation within health care systems. To facilitate effective interstate peer review, the HCQIA also established the NPDB as a centralized national reporting system for physician misconduct. Hospitals are required to both report physician misconduct to the NPDB as well as request information from the NPDB during the credentialing and privileging process.

Pennsylvania's PRPA also provides state-level peer review protections. Similar to many other state statues, PRPA provides immunity from both civil and criminal liability for those engaged in peer review and protects confidentiality for peer reviewers who otherwise may face social, financial, or legal repercussions for providing negative evaluations. In 2018, the Supreme Court of Pennsylvania limited the broad protections provided by this statute with its ruling in *Reginelli v. Boggs,* 181 A.3d 293 (Pa. 2018), stating that PRPA's protections were limited to the records of "review committees" and that credentialing review was not entitled to peer review privilege.

The Leadbitters cited *Reginelli* to argue that PRPA's protections did not apply to the records of the hospital's credentialing and privileging committee. They would later argue that overly inclusive protections for peer review within the hiring process could dangerously conceal unethical or unsafe practices. The hospital again refused to provide the requested documents, contending that PRPA would be undermined if peer review material could be denied protections solely because it was collected by a credentialing committee; for example, an applicant's peers may not provide "candid and accurate assessments" of their performance if their evaluations might be discoverable (*Leadbitter*, p 1172). The hospital also cited strict confidentiality standards for NPDB records, which were restricted by the HCQIA to use "solely with respect to activities in the furtherance of the quality of health care" (42 U.S.C. § 11137(b)(3)).

The Superior Court of Pennsylvania ruled in favor of the Leadbitters and directed the hospital to produce the full credentialing file. Though the court acknowledged that the requested documents qualified as peer review, they interpreted *Reginelli* as applying to PRPA's protections for peer-review material according to the type of committee whose records were requested (in this case, a credentialing committee, not a "review committee"). The court also ordered the discovery of the NPDB responses used for credentialing, citing a qualifier to the confidentiality provision of the HCQIA that did not "prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure" (42 U.S.C. §11137(b)(1)).

### Ruling and Reasoning

The Supreme Court of Pennsylvania ruled that a credentialing committee performing a peer review function does qualify as a "review committee" whose peer review records are protected from discovery in a malpractice suit by PRPA. The superior court's order to produce the documents was vacated and remanded to the common pleas court to review the contested documents *in camera* and determine whether they met PRPA's definition of protected peer review materials.

The court acknowledged that the process of granting medical privileges to a physician includes "assessment of the applicant's experience, capabilities, and competence," which inherently involves peer review (*Leadbitter*, p 1175). This peer review information is protected by PRPA regardless of the committee's title or whether the same committee also performs other nonpeer review functions such as physician "credentialing," defined as review of "objective criteria for employment" such as board certifications and licensure that do not contain peer review.

The court also found that the superior court erred in ordering discovery of the NPDB responses. The HCQIA's confidentiality limitations and deference to state law were interpreted to apply only to reports of misconduct sent to the NPDB, while information provided by the NPDB in response to a hospital's query remains protected under federal law regardless of any state law to the contrary.

A concurring opinion by Justice Wecht highlighted his disagreement with *Reginelli's* distinction between "review organizations" and "peer review committees" in determining whether information qualified for peer review protections. He warned of ongoing potential for "confusion and discomfort" in applying PRPA within credentialing and privileging processes.

### Discussion

Over the second half of the 20th century, health care professionals and legislators have increasingly focused on peer review as the primary means of evaluating the quality of medical care. In addition to the federal HCQIA, all 50 states and the District of Columbia have enacted legislation regarding peer review, most of which includes some combination of confidentiality and immunity from litigation. These statutes have protected peer review within multiple levels of the health care system, as peer review extends beyond its traditional role in retrospective review of medical error into health care cost-monitoring programs, accreditation reviews, and the privileging and credentialing of staff physicians.

Arguments raised in *Leadbitter* highlight the complexities of peer review protections within the credentialing and privileging process. Medical malpractice cases routinely involve a claim of corporate negligence against the hospital, which has a duty to ensure its physicians are competent by means of careful credentialing and privileging. While both the plaintiff and the hospital had a significant interest in employing quality physicians and protecting patient safety, the arguments in this case reflect an ongoing debate regarding whether protecting or limiting confidentiality within the credentialing and privileging process best achieves this goal.

An *amicus curiae* brief submitted by the American Medical Association (AMA) in *Leadbitter* defends peer review protections as essential safeguards for meaningful assessments of a physician's abilities and performance in the privileging process (Brief for AMA and the Pennsylvania Medical Society as Amici Curiae Supporting St. Clair Hospital, *Leadbitter v. Keystone,* 256 A.3d 1164 (Pa. 2021)). The brief argues that a decision to deny peer review protections in this case could prevent a physician's peers from providing candid performance evaluations to their employers, if their feedback could later be discoverable.

But, as alleged by the plaintiffs in this case, peer review protections may also obscure unsafe or unethical hiring practices. If confidentiality protections are necessary to ensure peer evaluations are honest and accurate, it is not clear how a hospital may be held accountable for responding appropriately to concerns raised within a confidential process. Even if privileged peer review evaluations do have the advantages described by legislators and health care organizations, harm may still arise when review committees do not then utilize confidential peer review data effectively or in good faith.

Within an American tort system otherwise premised on the equal accessibility of information, privileging peer review may infringe on the rights of both patients and physicians. Critics argue that peer review protections prioritize protecting hospitals over the rights of patients to obtain records of potential negligence within the credentialing process. Physicians may also be harmed by peer-review protections, such as in past cases of sham peer review of a competitor for economic gain (see, for example, *Patrick v. Burget*, 486 U.S. 94 (1988)) as well as racism and other civil rights violations within peer review (such as in *Adkins v. Christie,* 488 F.3d 1324 (11th Cir. 2007)). The best interests of the practicing physician may lie somewhere between the opposing advocacy opinions represented in this case.

As Justice Wecht described in his concurring opinion, prioritizing patient safety and health care quality requires a "nuanced balancing of competing interests—here, between protecting the courts' desire to decide cases based with the benefit of all relevant evidence and ensuring that highly-trained health care professionals with specialized skills candidly police the effectiveness and integrity of their peers" *(Leadbitter*, p 1189). An *in camera* review of contested peer review documents, similar to that ordered in *Leadbitter*, may help to achieve this nuanced balancing.

## Substance Use Disorders and Child Maltreatment

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