

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Committee Substitute

for

Senate Bill 434

BY SENATORS TRUMP AND BOSO

[Originating in the Committee on the Judiciary;

reported on February 22, 2018]

1 A BILL to amend and reenact §30-3C-1 and §30-3C-3 of the Code of West Virginia, 1931, as
2 amended; and to amend said code by adding thereto a new section, designated §30-3C-
3 5, all relating to discovery in certain proceedings; defining terms; specifying certain
4 documents that are confidential and not subject to discovery; providing that a person who
5 testifies before a review organization or is a member of a review organization shall not be
6 required to testify or asked about his or her testimony; providing that peer review
7 proceedings, communications, and documents of a review organization are confidential
8 and privileged and shall not be subject to discovery; providing that an individual may be
9 given access to documents used as basis for an adverse professional review action,
10 subject to a protective order as may be appropriate; providing that privilege is not deemed
11 to be waived unless the review organization executes a written waiver; and addressing
12 original source materials.

Be it enacted by the Legislature of West Virginia:

ARTICLE 3C. HEALTH CARE PEER REVIEW ORGANIZATION PROTECTION.

§30-3C-1. Definitions.

1 As used in this article:
2 “Document” means any information, data, reports, or records prepared by or on behalf of
3 a health care provider and includes mental impressions, analyses, and/or work product.
4 ~~“Health care professionals” means individuals who are licensed to practice in any health~~
5 ~~care field and individuals, who, because of their education, experience or training participate as~~
6 ~~members of or consultants to a review organization~~
7 “Health care facility” means any clinic, hospital, pharmacy, nursing home, assisted living
8 facility, residential care community, end-stage renal disease facility, home health agency, child
9 welfare agency, group residential facility, behavioral health care facility or comprehensive
10 community mental health center, intellectual/developmental disability center or program, or other
11 ambulatory health care facility, in and licensed, regulated, or certified by the State of West Virginia

12 under state or federal law and any state-operated institution or clinic providing health care and
13 any related entity to the health care facility as that term is defined in §55-7B-1 et seq. of this code.

14 “Health care provider” means a person, partnership, corporation, professional limited
15 liability company, health care facility, entity or institution licensed by, or certified in, this state or
16 another state, to provide health care or professional health care services, including a physician,
17 osteopathic physician, physician assistant, advanced practice registered nurse, health care
18 facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor,
19 physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist,
20 pharmacist, technician, certified nursing assistant, emergency medical service personnel,
21 emergency medical services authority or agency, any person supervised by or acting under the
22 direction of a licensed professional, any person taking actions or providing service or treatment
23 pursuant to or in furtherance of a physician’s plan of care, a health care facility’s plan of care,
24 medical diagnosis or treatment; or an officer, employee or agent of a health care provider acting
25 in the course and scope of the officer’s, employee’s or agent’s employment.

26 “Peer review” means the procedure for evaluation by health care professionals providers
27 of the quality, delivery, and efficiency of services ordered or performed by other health care
28 professionals, including practice analysis, inpatient hospital and extended care facility utilization
29 review, medical audit, ambulatory care review, claims review and patient safety review,
30 preparation for or simulation of audits or surveys of any kind, and all forms of quality
31 assurance/performance improvement whether or not required by any statute, rule, or regulation
32 applicable to a health care facility or health care provider.

33 “Professional society” includes medical, psychological, nursing, dental, optometric,
34 pharmaceutical, chiropractic and podiatric organizations having as members at least a majority of
35 the eligible licentiates in the area or health care facility or agency served by the particular
36 organization

37 “Review organization” means any committee ~~or~~ organization, individual or group of
38 individuals engaging in peer review, including, without limitation, a hospital utilization review
39 committee, a hospital tissue committee, a medical audit committee, a health insurance review
40 committee, a health maintenance organization review committee, hospital, medical, dental and
41 health service corporation review committee, a hospital plan corporation review committee, a
42 professional health service plan review committee or organization, a dental review committee, a
43 physicians’ advisory committee, a podiatry advisory committee, a nursing advisory committee,
44 any committee or organization established pursuant to a medical assistance program, the joint
45 commission on accreditation of health care organizations or similar accrediting body or any entity
46 established by such accrediting body or to fulfill the requirements of such accrediting body, any
47 entity established pursuant to state or federal law for peer review purposes, and any committee
48 established by one or more state or local professional societies or institutes, to gather and review
49 information relating to the care and treatment of patients for the purposes of: (i) Evaluating and
50 improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii)
51 establishing and enforcing guidelines designed to keep within reasonable bounds the cost of
52 health care. It shall also mean any hospital board committee or organization reviewing the
53 professional qualifications or activities of its medical staff or applicants for admission thereto, and
54 any professional standards review organizations established or required under state or federal
55 statutes or regulations.

§30-3C-3. Confidentiality of ~~review organization’s~~ records.

1 ~~The proceedings and records of a review organization shall be confidential and privileged~~
2 ~~and shall not be subject to subpoena or discovery proceedings or be admitted as evidence in any~~
3 ~~civil action arising out of the matters which are subject to evaluation and review by such~~
4 ~~organization and no person who was in attendance at a meeting of such organization shall be~~
5 ~~permitted or required to testify in any such civil action as to any evidence or other matters~~
6 ~~produced or presented during the proceedings of such organization or as to any findings,~~

7 ~~recommendations, evaluations, opinions or other actions of such organization or any members~~
8 ~~thereof: *Provided*, That information, documents or records otherwise available from original~~
9 ~~sources are not to be construed as immune from discovery or use in any civil action merely~~
10 ~~because they were presented during proceedings of such organization, nor should any person~~
11 ~~who testifies before such organization or who is a member of such organization be prevented~~
12 ~~from testifying as to matters within his knowledge, but the witness shall not be asked about his~~
13 ~~testimony before such an organization or opinions formed by him as a result of said organization~~
14 ~~hearings: *Provided, however*, That an individual may execute a valid waiver authorizing the~~
15 ~~release of the contents of his file pertaining to his own acts or omissions, and such waiver shall~~
16 ~~remove the confidentiality and privilege of said contents otherwise provided by this section:~~
17 ~~Provided further, That upon further review by any other review organization, upon judicial review~~
18 ~~of any finding or determination of a review organization or in any civil action filed by an individual~~
19 ~~whose activities have been reviewed, any testimony, documents, proceedings, records and other~~
20 ~~evidence adduced before any such review organization shall be available to such further review~~
21 ~~organization, the court and the individual whose activities have been reviewed. The court shall~~
22 ~~enter such protective orders as may be appropriate to provide for the confidentiality of the records~~
23 ~~provided the court by a review organization and all papers and records relating to the proceedings~~
24 ~~had before the reviewing court~~

25 (a) Any document prepared by or on behalf of a health care provider for the purpose of
26 improving the quality, delivery, or efficiency of health care or for the purpose of credentialing or
27 reviewing health care providers is confidential and shall not be subject to discovery in a civil action
28 or administrative proceeding. Such documents include, without limitation:

- 29 (1) Incident or event reports, except reports pertaining to the plaintiff of that civil action;
30 (2) Documents related to review organization proceedings for hiring, disciplining,
31 terminating, credentialing, issuing staff privileges, renewing staff privileges, or alleged misconduct
32 of a health care provider;

33 (3) Review organization documents;

34 (4) Quality control and performance improvement documents;

35 (5) Documents satisfying regulatory obligations related to quality assurance and
36 performance improvement; and

37 (6) Reviews, audits, and recommendations of consultants or other persons or entities
38 engaged in the performance of peer review.

39 (b) A person who testifies before a review organization, or who is a member of a review
40 organization shall not be required to testify regarding, or be asked about, his or her testimony
41 before such review organization, deliberations of the review organization, or opinions formed as
42 a result of the review organization's proceedings.

43 (c) All peer review proceedings, communications, and documents of a review organization
44 shall be confidential and privileged and shall not be subject to discovery in any civil action or
45 administrative proceeding: *Provided*, That an individual may be given access to any document
46 that was used as the basis for an adverse professional review action against him or her, subject
47 to such protective order as may be appropriate to maintain the confidentiality of the information
48 contained therein. Privilege is not deemed to be waived unless the review organization executes
49 a written waiver authorizing the release of such peer review proceedings, communications, or
50 documents.

§30-3C-5. Original source; waivers; further proceedings.

1 Information available from original sources are not to be construed as immune from
2 discovery or use in any civil action merely because they were included in any report or analysis
3 related to improving the quality, delivery, or efficiency of health care or for the purpose of
4 credentialing or reviewing health care providers. However, no court may compel production of
5 documents contained in peer review files on the basis that they were not created as part of the
6 peer review process; rather, the document must be produced from the original source.