HEYL ROYSTER VOELKER & ALLEN, P.C. A REGIONAL MIDWEST LAW FIRM

····Medicolegal Monitor

NEWSLETTER THIRD QUARTER 2018

A Word from the Practice Chair

Change is in the Air.

I hope this edition of the *Medicolegal Monitor* finds you enjoying the transition to Fall and the upcoming holiday season. As we experience the change of seasons, and welcome Craig Young as our new managing partner, this seems like an appropriate time to again focus on the ever-changing landscape of medical legal litigation. One of the challenges for healthcare providers is staying abreast of the evolving rules and legal requirements governing the delivery of medical services. Many of our best clients routinely remind us of how challenging it is to practice medicine in today's rapidly evolving business and legal climate.

Our first article, by Matt Thompson and Emily Perkins of our Peoria office, explores a recent opinion from the First District Appellate Court evaluating the use of PSOs by an Illinois hospital and the overall issues associated with use of PSOs by Illinois Hospitals. Like the Medical Studies Act in Illinois, PSOs are a formal statutory creation designed to promote patient safety in a confidential and protected setting.

Our second article, authored by Jenna Scott of our St. Louis office, explores a recent change in Missouri regarding expert standards and contrasts those against the expert standards used in Illinois. Jenna's article is the first in what will be a series of comparison pieces contrasting important legal standards in Illinois and Missouri. Many of our clients have facilities on both sides of the Mississippi River.

As I write this introduction, it is also occurs to me that some things never change. Our Champaign office is currently involved in a challenging and complicated jury trial. As is always true, the amount of planning, preparation and attention to detail before and during trial is all-consuming – for both the client and the lawyer. It is inspiring to reflect on the lengths to which the lawyers in our practice go to ensure that our clients are provided a thorough, well-planned, and compelling defense.

While change is pervasive in today's world, there are some things that remain constant. Heyl Royster will endeavor to keep our clients abreast of significant changes in the law and, when necessary, we will assemble a team of experienced and skilled trial lawyers ready to vigorously defend you and your colleagues at every stage of litigation.

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Hansen Chairs IADC Medical Defense and Health Law Committee

Mark Hansen has been appointed Chair of the Medical Defense and Health Law Committee of the International Association of Defense Counsel (IADC) for a second term. This Committee serves all IADC members who represent physicians, hospitals, and other healthcare providers and entities in medical malpractice actions, healthcare regulatory compliance matters and licensure board appearances. The IADC's core purposes include enhancing the development of skills, promoting professionalism and diversity, and providing an effective forum for the broader civil justice community.

Certain Patient Records Deemed Privileged under Patient Safety Act by First District

By: J. Matthew Thompson, mthompson@heylroyster.com
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The Patient Safety and Quality Improvement Act of 2005 (Patient Safety Act), 42 U.S.C. § 299b-21, establishes a reporting system in an effort to resolve issues relating to patient safety and health care quality. To encourage the reporting and analysis of medical errors, the Patient Safety Act provides a federal privilege and confidentiality protections for patient safety information. Likewise, the Illinois Medical Studies Act (Medical Studies Act), 735 ILCS 5/8-2101, establishes that certain information generated by healthcare committees remains privileged, particularly as it relates to peer review and quality control, in the interest of advancing the quality of healthcare.

Nevertheless, plaintiffs' attorneys often attempt to compel production of these privileged records. In its recent decision in *Daley v. Teruel*, 2018 IL App (1st) 170891, the appellate court outlined the privilege provided by the Patient Safety Act and upheld the hospital's claim of privilege over certain documents.

Facts

The plaintiff, Terri Daley, was the administrator of the estate of the deceased, Rosalie Galmore Jones. *Daley*, 2018 IL App (1st) 170891, ¶ 1. The plaintiff filed a medical malpractice claim against Ingalls Memorial Hospital (Ingalls) and various medical personnel, alleging that their failure to adequately monitor and treat blood glucose levels contributed to the decedent's death. *Id*. ¶ 7.

During written discovery, the plaintiff requested Ingalls state whether the incident identified in the complaint was reported to, or investigated by, any hospital or governmental committee, agency, or body. *Id*. ¶ 9. Ingalls objected to the interrogatory, noting in the privilege log that certain documents were privileged under the Patient Safety Act because they were assembled for submission to a certified Patient Safety Organization (PSO) for the purposes of improving patient safety and quality of health care. *Id*. The defendants argued that two incident reviews, two complaints, and a security department incident report were privileged under the Patient Safety Act and the Medical Studies Act. *Id*.

The plaintiff filed a motion to compel production of the documents, and the trial court ordered Ingalls to submit the documents for an *in camera* review. *Id*. ¶ 11. The trial court eventually granted the motion and ordered Ingalls to produce certain portions of the privileged incident reports, noting that certain information was "obtained prior to the peer review" and therefore discoverable. *Id*. ¶ 16. In a motion to reconsider, Ingalls argued that it maintained a patient safety evaluation system for collecting information to report to the PSO and, as noted in a supplemental affidavit, the information contained in the incident review reports was prepared "solely" for submission to the PSO. *Id*. ¶ 17. The trial court disagreed and Ingalls appealed. *Id*. ¶ 18.

First District Analysis

The Court of Appeals, First District, assessed two issues. First, the court was tasked with determining whether the circuit court erred in ordering the disclosure of the documents because they constituted patient safety work product and were therefore privileged under the Patient Safety Act. *Id*. ¶ 22. Second, the court considered whether the Patient Safety Act's privilege protection on such work product preempted the court's production order. *Id*.

The court looked first at the methods in which information can be considered patient safety work product. *Id*. ¶ 37 (citing 42 U.S.C. § 299b-21(7)(A)). Patient safety work product must meet one of the following requirements: (1) it must be assembled or developed by a provider for reporting to a PSO and in fact reported to that PSO; (2) it must be developed by a PSO for the conduct of patient safety activities and could result in improved health care; or (3) it must constitute as the analysis of a patient safety evaluation system. 42 U.S.C. § 299b-21(7)(A). Ingalls argued that

the disputed documents constituted patient safety work product under the first method (known as the reporting pathway method) because the information contained within the documentation was created for the sole purpose of reporting it to the PSO. *Daley*, 2018 IL App (1st) 170891, ¶ 37.

The plaintiff, however, argued that the documents met three of the statutory exceptions to patient safety work product. *Id*. ¶ 49 (citing 42 U.S.C. § 299b-21(7)(B)). Plaintiff first argued the decedent's medical records were not privileged under the "medical records" exception because information contained in a patient's medical record is excluded from the definition of patient safety work product. *Daley*, 2018 IL App (1st) 170891, ¶ 49. The court, however, noted that the medical records exception to patient safety work product is interpreted to mean that the patient's original medical records cannot become part of the patient safety work product merely by reference. *Id*. ¶ 50. The court therefore rejected this argument. *Id*.

The plaintiff also argued that the documents were subject to the second exception to the definition of patient safety work product—that the information contained in the documents was not collected solely for the purpose of reporting to a PSO. *Id*. ¶ 54. The plaintiff cited the circuit court's ruling, which stated that the content of the documents appeared to be "obtained prior to the peer review." *Id*. The court disagreed, noting that Ingalls submitted an affidavit stating that the information contained in the documents was prepared "solely" for submission to a PSO. *Id*. ¶ 55.

Lastly, plaintiff argued that the documents fell under the third exception to the patient safety work product because the information was collected to satisfy a reporting requirement to a state agency, and therefore, it cannot be considered patient safety work product. *Id*. ¶ 56. The plaintiff referenced the Illinois Adverse Health Care Events Reporting Law of 2005, 410 ILCS 522/10-10, 10-15 (2016), which requires Illinois hospitals to report an adverse health care event to the Illinois Department of Public Health within 30 days, as support. *Daley*, 2018 IL App (1) 170891,¶ 56 (citing 42 U.S.C. § 299b-21(7)(B)(iii)(II)). The court rejected the argument, and reasoned that the Illinois Adverse Events Law has not yet been enacted. *Daley*, 2018 IL App (1st) 170891, ¶ 59. Ingalls had no obligation to report any adverse health care events under that law and the exception did not apply. *Id*.

Finally, in addressing whether the Patient Safety Act preempted the discovery order, the court held that the express preemption clause contained within the Patient Safety Act demonstrated Congress's intent to supersede any court order requiring the production of documents that met the definition of patient safety work product. *Id*. ¶¶ 66-67. Thus, when information is deemed patient safety work product, the Patient Safety Act should be construed as preempting any state action requiring a provider to disclose such work product. *Id*. ¶ 68. The court therefore concluded that the Patient Safety Act preempted the circuit court's production order. *Id*.

The court ultimately concluded that the plaintiff failed to demonstrate that the disputed documents fell under any exception to the definition of patient safety work product. *Id*. ¶ 60. The court held that the incident reviews, complaints, and the incident report constituted patient safety work product under the Patient Safety Act. *Id*. ¶ 48. The documentation consisted of data, reports, and discussions which were included in the definition of patient safety work product. Furthermore, Ingalls established that the documents were prepared solely for submission to the PSO and were intended to improve patient safety and the quality of health care. *Id*. The appellate court overturned the circuit court's order, holding that the reports constituted privileged patient safety work product under the Patient Safety Act because documents were prepared for a PSO, were reported to a PSO, and otherwise met the statutory requirements to qualify as patient safety work product. *Id*. The court emphasized that its ruling was consistent with the intent of the legislature, which was to create a "system of voluntary, confidential, and non-punitive sharing of health care errors to facilitate and promote strategies to improve patient safety and the quality of health care." *Id*. ¶ 31.

Conclusion

The *Daley* decision is an encouraging one for defense counsel because it limits a plaintiff's access to confidential documents and reports generated for a PSO. While the decision is important for limiting the scope of discovery in pending litigation, it is also critical that health care organizations understand the decision and apply it to their participation in a PSO.

J. Matthew Thompson concentrates his practice in the defense of medical malpractice and healthcare litigation. He regularly defends physicians, advanced practice nurses, nurses, hospitals, and clinics in professional liability and institutional negligence claims involving significant injury or death. He has successfully defended multiple medical malpractice actions through jury trial, resulting in verdicts in favor of the firm's clients.

Emily Perkins concentrates her practice in the areas of employment/labor law, governmental law, Section 1983 civil rights litigation, and medical malpractice. She drafts and negotiates a wide variety of contracts ranging from severance agreements to large business contracts, including purchase, consulting, license, and software agreements.

Missouri v. Illinois: Different Standards for Admissibility of Experts and What You Need to Know

By: Jenna Scott, jscott@heylroyster.com

Expert testimony can make or break a medical malpractice case, especially when the science that makes the connection between the plaintiff's condition and the cause needs to be explained to the jury. The law that governs whether or not an expert's testimony can be used at trial varies from state-to-state. By some recent calculations, the majority of states, including Missouri, follow standards articulated by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), whereas approximately 16 percent of the states, including Illinois, follow precedent set in the case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and another 6 percent of states have established their own guidelines. Many would argue that *Daubert* created a more stringent standard. So, how do these differences affect the likelihood of expert testimony being used at trial in Missouri (*Daubert*) and Illinois (*Frye*)?

History of Expert Testimony Standards

In 1923, in the context of an appeal of verdict in a murder case, the D.C. Court of Appeals decided *Frye v. United States* and set forth guidelines to determine the admissibility of scientific expert testimony. The appeal centered around the admissibility of something akin to today's lie detector test. In Frye, the court stated that scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye*, 293 F. at 1014.

In 1993, the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which held that *Frye* had been superseded by the Federal Rules of Evidence. The Court made it clear in *Daubert* that trial courts must act as gatekeepers to ensure the testimony sought to be admitted is not only relevant, but

reliable. Federal Rule of Evidence 702 controls the guidelines pertaining to expert testimony. Many federal circuits have narrowed the gatekeeping function of trial courts under Federal Rule of Evidence 702 to essentially a three-part test: (1) whether the expert is qualified, (2) whether the testimony is relevant, and (3) whether the testimony is reliable. *Johnson v. Mead Johnson & Co., LLC,* 754 F.3d 557, 561 (8th Cir. 2014).

Missouri and *Daubert*

On August 28, 2017, Missouri Revised Statute § 490.065 became effective, which adopted Federal Rule of Evidence 702. The Missouri statute adopts an approach to the admissibility of expert opinions that is consistent with *Daubert* and federal standards.

In *Gardner v. Wright*, No. ED106935, 2018 Mo. App. LEXIS 943 (E.D. Mo. Aug. 21, 2018), the Eastern District of Missouri Court of Appeals issued an opinion in the first Missouri case since the new law came into effect. The court held that admissibility of expert testimony under § 490.065.2 requires it to be relevant and reliable, as well as proffered by a qualified expert, following the same three-part test set forth by several federal circuits. The Eastern District said that no single factor is necessarily dispositive of the reliability of a particular expert's testimony and that the trial court may consider *Daubert* factors or other factors, depending on the nature of the testimony at issue.

In *Gardner*, the court stated the adoption of Mo. Rev. Stat. § 490.065.2 makes clear that *Frye* standards should no longer be applied in Missouri. The court held the enactment of this section does not necessarily completely transform how Missouri courts treat non-scientific expert testimony in criminal cases. *Gardner*, 2018 Mo. App. LEXIS 943, at *20. Rather, the relevance analysis remains unchanged, because under § 490.065.2 relevance depends on whether the testimony contains specialized knowledge that will assist the trier of fact to understand the evidence. *Id.* For example, in child sex cases, even though an expert cannot comment on the veracity of a witness, the expert's generalized testimony on this topic can assist the jury in making that credibility assessment of a child alleging sexual abuse. *Id.* at **21-22. The Eastern District's opinion focused its analysis on whether or not the expert's testimony is "specialized knowledge" that will "assist the trier of fact to understand the evidence." *Id.* at *23. Particularly, the court noted that even though holdings pertaining to matters outside a juror's range of knowledge predated the statute, such holdings remain precedential because the conclusions therein were drawn under a standard of relevance that is essentially no different than the one in the new statute. *Id.* Moreover, the Eastern District held, "[t]here is nothing to suggest that by adopting the federal rules of evidence, the legislature intended to undermine what the above case law has firmly established." *Id.*

Illinois and *Frye*

Unlike Missouri, Illinois state courts still follow the standards that were set forth in *Frye* when determining the admissibility of scientific evidence. *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 77 (2002). Again, the *Frye* standard simply states that scientific evidence is admissible at trial if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye,* 293 F. at 1014. When a scientific principle, technique or test is being offered by an expert to support his or her conclusion, such opinion may not be admissible if it is "new" or "novel" and not generally accepted. *Donaldson,* 199 Ill. 2d at 79. A scientific theory is "new or novel if it is original or striking or does not resemble something formerly known or used." *Id.*

At the practice level, in both *Frye* and *Daubert*, a motion can be brought by the party contesting the admissibility of the expert's testimony before or during trial. During a *Frye* hearing, the proponent of the evidence bears the burden of showing general acceptance and the movant then has the opportunity to respond. In 2004, the Illinois Supreme Court adopted a *de novo* standard of review when conducting a *Frye* hearing. *In re Simons,* 213 Ill. 2d 523, 530-31 (2004). With this *de novo* standard, the reviewing court has

the ability to consider sources outside the record, including legal and scientific articles, along with court opinions from other jurisdictions. *Simons*, 213 Ill. 2d at 531. The *de novo* standard is different than the standard of review for other foundational and relevancy determinations, which are still subject to an abuse of discretion standard. *Id*. at 532.

Over time, the Missouri courts will continue to refine application of the new rule in the context of professional liability cases. We don't expect to see substantial changes in the use of medical professionals as experts, but in areas of dubious expert opinion, the *Daubert* standard gives Missouri courts greater latitude to exercise their gatekeeper role.

Jenna Scott focuses her practice on defending clients in civil litigation, including in the areas of personal injury claims (premises, auto, and other casualty), product liability, professional liability, and trucking. While in law school, Jenna held multiple leadership positions including, Public Interest Law Group (Two-time Auction Co-Chair), Student Bar Association (Chief of Staff), and Business Law Association (Treasurer), Student Mentor, and Admissions Student Ambassador.

New Managing Partner

Craig S. Young

On October 1, Craig S. Young became the firm's Managing Partner. He succeeded Timothy L. Bertschy, who had served as the firm's Managing Partner since 2014.

Young has represented clients in many areas of the firm's practice, and is primarily known as a nationally recognized Workers' Compensation defense lawyer. He is a member of the firm's Board of Directors and he formerly served as chair of the firm's Workers' Compensation Practice. Young has a strong reputation for advising employers on the overall management of their work environment.

Young started at Heyl Royster as a summer clerk in 1983 while enrolled in the University of Illinois College of Law, where he obtained his J.D. degree in 1985. He is a former president of the Peoria County Bar Association (PCBA), and a recipient of the PCBA's 2008 *Distinguished Community Service Award*. He has served as president of the Heart of Illinois United Way. He is past Advisory Board Chair of the Peoria Tri-County Salvation Army, and the recipient of its 2012 *William Booth Award for Community Service*. He is a member of the Illinois State Bar Association, American Bar Association, Abraham Lincoln Court, and Defense Research Institute (Past Chair, National Workers' Compensation Committee).

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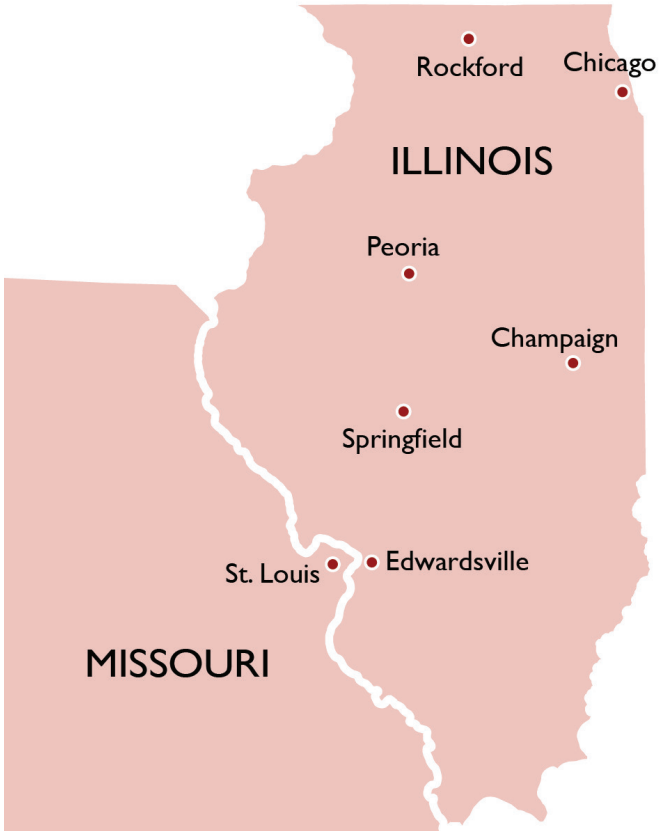

Heyl Royster is a regional Midwest law firm with more than 120 lawyers and seven offices located in Illinois (Peoria, Champaign, Chicago, Edwardsville, Rockford, and Springfield) and Missouri (St. Louis). The firm provides legal services for businesses and corporations, professionals, healthcare organizations, governmental entities, universities, insurance carriers, and other major institutions. Heyl Royster lawyers have successfully defended clients in all of the federal courts and in each of the 102 counties in the State of Illinois, as well as in courtrooms in Indiana, Iowa, Missouri and Wisconsin. Our attorneys also counsel clients on all aspects of business life. Through our lawyers' participation in bar and industry activities, we identify and help develop trends in the law which we believe will be of benefit to our clients.

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