

# Appellate Division Clarifies Burden on Quality Assurance Privilege for Non-Party Statements

By Christopher Simone and Lena Holubnyczj

## Introduction

On December 22, 2021, the Appellate Division, Second Department decided *Siegel v. Snyder* (2021 N.Y. Slip Op. 07264), which impacts discovery of recorded statements made at quality assurance meetings. The appeal focused on the scope of the quality assurance privilege and the corresponding “party-statement exception” to that privilege. The court held that a hospital defendant has the burden of demonstrating that a statement claimed to be privileged made at a quality assurance meeting derived from a person who is not a party to the action.

## The Party-Statement Exception

Public Health Law (“PHL”) § 2805-m(2) and Education Law § 6527(3) shield from disclosure, under CPLR Article 31, the proceedings and records relating to performance of the quality assurance review function as well as any statement of any person attending such a meeting. But both allow for the discovery of “party statements”, which, in this context, are statements made by any person attending the quality assurance meeting who is a defendant in the medical malpractice action about which the subject treatment is discussed. Under this exception, the statement made by the defendant is not privileged and thus must be disclosed upon demand in the underlying action.

## The Siegel Case

Critical to the discovery of recorded statements, Siegel held that it is the hospital’s burden in asserting the privilege to identify “who said what at the meeting.” Therefore, if the minutes of the meeting do not identify the speaker, the hospital is in no position to confirm that the speaker is not a party to the underlying action. Under those circumstances, therefore, the hospital cannot meet its burden in showing that the quality assurance privilege should apply to the statements it aims to withhold.

After Siegel’s death at defendant South Nassau Communities Hospital (“SNCH”) from a head injury, defendants Trauma Medical Director Dr. Kenneth Becker and Assistant Director of the Emergency Department Dr. Mathew Lurin attended a Trauma Peer Review Committee meeting. The minutes of the meeting contained statements attributed to the “committee” along with one statement attributed to the “Trauma Medical Director”, i.e. Dr. Becker.

In response to plaintiff’s demand for quality assurance records, SNCH moved for a protective order asserting privilege under PHL § 2805-m and Education Law § 6527(3). SNCH sought to limit discovery to only those portions of the minutes that constituted statements made by the individually named defendants. SNCH submitted to the court proposed redactions of the meeting minutes and sought a determination that the party-statement exception applied only to a notation that the two defendant physicians were present at the meeting and a single statement made by Dr. Becker. As the other statements in the meeting minutes were attributed to the “committee”, they were not subject to disclosure, SNCH asserted, because they fell outside the party-statement exception.

After an in-camera review, the court denied SNCH’s motion. The court found itself unable to identify who provided specific comments at the meeting when the “statements and/or information contained in the minutes [were] attributed to the committee” and, as a consequence, what statements were indeed privileged. Thus, the court ordered disclosure of the statements attributed to the “committee” as party-statements.

*“To avoid disclosure beyond party statements, all quality assurance meeting minutes should identify, by full name and professional title, each person making a statement at such a meeting.”*

In upholding the disclosure, the Appellate Division reasoned that, by failing to properly identify each speaker, SNCH in turn failed to establish its entitlement to the quality assurance privilege. Put another way, since the speakers were not identified, the hospital necessarily could not show that it was rightfully withholding statements made by nonparties to the underlying action.

## Accounting for Siegel Going Forward

Critically, under Siegel, any recorded statements attributed only to the “committee”, or presumably, to an unidentified speaker, made during a quality assurance meeting would not be entitled to the quality-assurance privilege afforded by Education Law § 6527(3) and PHL § 2805-m(2). Accordingly, to avoid disclosure beyond party statements, all quality assurance meeting minutes should identify, by full name and

professional title, each person making a statement at such a meeting. This will ensure that, upon a motion for a protective order in response to a discovery demand, the hospital can satisfy its burden of establishing that certain statements are subject to the quality assurance privilege. By identifying the speakers in the meeting minutes, the hospital can affirmatively prove to the reviewing court that certain statements were indeed made by nonparties to the underlying medical malpractice action. Upon such a showing, those statements should be deemed privileged and not subject to disclosure because they are not “party statements”.



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