

HEALTHCARE INVESTIGATIONS: HOW TO PROTECT FROM BACK DOOR DISCOVERY

THE INCIDENT

A guest at your hospital slips and falls walking the hospital hallway. An employee speaks to the guest of the facility who slipped and fell on the premises. Risk Management and Security are called to assist. Pursuant to the hospital policies and procedures statements are taken, an incident report is filed with Risk Management and sent to the Hospital Committee. In addition, Security Services conducted an investigation produces a report for their files which is sent to the Hospital Committee. All the facts gathered are reviewed and transmitted to the hospital's TPA for analysis and resolution. Unfortunately, the case progresses and becomes a lawsuit. Counsel for the hospital is hired and the entire file is transmitted to the attorney where it is incorporated into counsel for the hospital's file. Discovery begins; plaintiff requests the witness statements and reports be produced. Counsel for the hospital asserts the statements are privileged under the Hospital Committee and Peer Review Privilege. A Motion to Compel is filed and the Judge is asked to Order the hospital to produce the requested information. Is there a danger that documents need to be produced? Will the Hospital Committee and Peer Review Privilege protect the statements and documents? Will the Attorney-Client Privilege apply?

In this scenario there is a danger that the court will be convinced to order the production. However, if the hospital establishes investigative procedures that support the attorney-client privilege it can assure that the statements and investigation are never disclosed.

RECORDS KEPT IN THE REGULAR COURSE OF BUSINESS ARE NOT PRIVILEGED

If a record is kept in the regular course of business, then the medical committee privilege and peer review privilege are not applicable. TEX. HEALTH & SAFETY CODE ANN. §161.032(f). This is a statutory exception found at Health and Safety Code §161.032(f). An excellent case illustrating the regular course of business exception is the Second District Court of Appeals decision *In re Osteopathic Medical Center of Texas*, 16 S.W.3d 881 (Tex. App—Ft. Worth, 2000, orig. proceeding), the case was a slip and fall accident at a physical therapy rehabilitation center. The plaintiff requested any and all accident reports in the possession of the center regarding the accident in question and any and all documents or notes in the possession of the center regarding any investigation of the accident in question. *Id.* The center claimed medical peer review committee privilege and filed an affidavit from the chairman of the medical peer review committee to support its assertion of privilege. *Id.*

At the hearing, the trial court ordered the center to produce two documents: 1) Patient Quality Event Tracking Report, 2) Security Services Incident Report. *Id.* A writ of mandamus was filed to the appeal the trial court. *Id.* Both of the documents were pre-printed forms from the center and were completed shortly after the plaintiff's fall. The Patient Quality Event Tracking Report showed the time and location of the fall, the patient's pre-occurrence condition, the nature of the occurrence, the post-occurrence treatment, witnesses to the occurrence and a description of the fall. The pre-printed form stated specifically, "FOR USE BY THE QUALITY ASSURANCE COMMITTEE," and "Do Not Copy," and "Privileged and Confidential," and "Not Part of [the patient's] Medical Record." The Security Services Incident Report was created by someone in the security department and contained a hand-written statement concerning the fall and indicated that security was contacted." *Id.*

The Court held that the Patient Quality Event Tracking Report was protected by the peer review privilege. The factors cited by the court in support of its ruling included the fact that the report was made exclusively for the quality assurance committee and that the report was prepared to provide information to

facilitate the committee's peer review function of evaluating the quality of healthcare and medical services at the center. Id.

On the other hand, the Security Services Incident Report was not privileged. Id. Persuasive to the court was the fact that the document was prepared by the security department as a regular part of its business.³⁷ According to the court, records made or maintained in the regular course of business means "records kept in connection with the treatment of a hospital's individual patients as well as the business and administrative files and papers apart from committee deliberations." Id. **Hence, non-committee records, including security records, administrative records and business records are not protected by the peer review or committee privilege, even if reviewed by or in the possession of a hospital committee.**

The peer review and medical committee privilege do not provide blanket protection for all hospital records. Discovery from alternate sources created in the regular course of business is permitted.

Documents that are gratuitously provided to a committee are not privileged. Id. Documents that have been created without committee impetus and purpose are not protected. Id.

HOW DO YOU PROTECT YOUR INVESTIGATION

Early attorney involvement protects communications from a client to an attorney for the purpose of obtaining legal advice so long as those communications were intended to be confidential. Moore's Federal Practice, Civil § 26.49 (LexisNexis 2009). The Attorney-Client Privilege applies not just to the corporate control group but to all corporate employees. In other words, statements made by lower level employees to the company's general counsel in order for the general counsel to assess potential liability are privileged. *Upjohn v. United States*, 449 US 383, 391-95(1981). There are several ways to achieve this early attorney involvement. In order to resolve the slip and fall scenario with which we began, after the slip and fall incident occurs the hospital must involve an attorney in the investigation of both security and risk. It is important that the attorney be involved in the whole investigation not just part, i.e. risk only. In order to achieve early attorney involvement the hospital may have an attorney on site; involve the general counsel or a hospital attorney in the investigative process of the risk and security report. Another way to address is to hire a TPA that uses claims attorneys. Make sure that your agreement with your TPA involves investigation and incident reporting. This is probably the most cost effective option since the TPA with claims attorneys serves the dual purpose handling claims in addition to offering legal advice. Report the incident immediately to the TPA to begin the claims attorney's involvement in the investigation. Thus, when the incident/claim is reported attorney client privilege applies. The third way to accomplish early attorney involvement is to hire and involve outside counsel in the investigative process as soon as possible. This requires a close working relationship with the hospital and a particular attorney. This upfront expense will save many hours of litigation expense and argument when discovery is conducted. An investigation conducted with this early attorney involvement will prove invaluable in ensuring a proper defense.

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