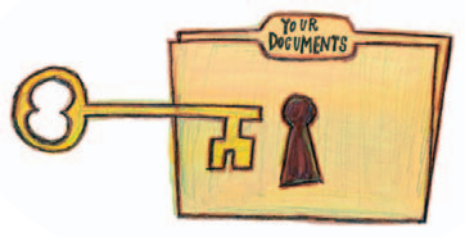

The Jury's Right to Know?

Protecting Self-Critical Information

by Kathryn M. Vanden Berk

SITUATION: A 15-year-old was badly injured in a traffic accident while returning to your agency's program center after a medical office visit. The van she was riding in was sideswiped by an uninsured driver who failed to stop at a stop sign. Your driver wrote up an incident report as he was required to do by licensing requirements, your insurer, and your accrediting body.

At its next quarterly meeting, your Risk Management Committee thoroughly evaluated the incident and came to the conclusion that, despite the other driver's obvious negligence, a number of violations had occurred within your organization. The committee's report looked at hiring and staffing patterns, training procedures and records, and even internal review processes. There were some lively discussions that named names and sharply criticized some of your people. The report included it all, and after review, its recommendations were implemented. Your driver was sent to retraining. You changed your driver testing program. You beefed up recruitment efforts to fill open positions. In other words, you did what you were supposed to do, and life went on.

Now, it is years later and the young lady involved in the accident is an adult. She has filed a lawsuit against your facility and your driver, alleging that he was negligent and that you are responsible as his employer for her injuries. The plaintiff has subpoenaed all agency documents that relate to the accident. The case records and the incident report have been prepared for transmittal. However, your attorneys want to claim privilege as to the Risk Management Committee's report. They argue it is a "self-critical analysis" and it should be protected on public policy grounds.

Public policy? The public is interested in compensating injuries, but it is *more* interested in correcting the wrongs that could cause similar injuries in the future. Therefore, public policy says that documents that are generated out of certain self-critical exercises will be protected in order to foster the kind of openness that will lead to frank discussions and corrective measures.

On your part, you certainly hope that the privilege will be granted, because you know that the plaintiff's counsel could have a field day with the list of possible errors involved.

If you assert a privilege, you must have a very good reason for asking the court to respect it, for our judicial system believes that "the public … has a right to every man's evidence."

I am very interested in the question of whether or not (and to what extent) internally generated "self-critical" agency reports are discoverable and I suspect you are as well. When you investigate an incident that has resulted in an injury of some sort to a client, you automatically create an "audit trail" as to what went wrong. The report becomes a blueprint for a plaintiff's attorney to follow at some future time in asserting a claim against your facility.

A couple of years ago, I was asked during a COA training event if I knew of any legal ways to keep this sensitive information out of the hands of attorneys. I'm not a litigator, so I had to answer truthfully that I was not aware of any principles that would protect these sorts of reports. Since then, I have kept my eyes open for information that might be responsive to this important issue, and I have kept a folder open for articles that pertain to it.

First, I'd like to tell you a little about how documents are disclosed in the course of litigation. When a lawsuit is filed, the plaintiff typically serves the defendant with a Request for Production of Documents. The request is broadly stated, as the plaintiff will want to get anything even remotely concerned with the underlying incident. Many documents are clearly relevant, and your attorney will produce them as a matter of course. There are some, though, that may be so potentially harmful to your case that the attorney will seek a protective order to prevent them from being given to the other side. Among these might be reports that look beyond the incident to its root causes and go deep into operational detail. If you assert a privilege, you must have a very good reason for asking the court to respect it, for our judicial system believes that "the public … has a right to every man's evidence."

There are three common law exceptions that have been used to protect self-critical records from discovery requests. The first is called *post-accident remedial measures;* the second is *self-critical analysis;* and the third is the more commonly known *attorney-client privilege.*

Post-accident remedial measures

An example: A plumber gets his jacket caught in a pipe threading machine and loses his arm because there is no way to stop it. He claims in a lawsuit against the machine's manufacturer that it was negligently designed. The manufacturer changes the machine's design following this accident so that it now has a safety button that could have prevented the plumber's injury. Courts will not allow that piece of evidence to be presented to a jury.[1]

Why? Courts have decided that it is against the public interest to place a company in legal jeopardy if it improves its product after an accident occurs. A jury hearing about a post-accident change in design would almost certainly see this as proof that the machine had been negligently designed in the first place. This would put the manufacturer in a quandary. Should it correct the problem and take the risk of a huge jury award, or should it sit on the problem and risk another accident?

Because our society wants to encourage safety improvements, we have developed what is called the *post-accident remedial measures* exception to document production. We want manufacturers to be committed to safety, and we put a higher value on corrective measures that will benefit the public at large than we do on compensating a single individual.[2]

Self-critical analysis

The *self-critical analysis* exception was first used about 30 years ago when a federal court held that the minutes and reports of a hospital's peer-review committee were not discoverable in a medical malpractice case.[3] The court reasoned that physicians might be unwilling to candidly critique the actions of their colleagues if the critiques were subject to discovery and used as evidence in subsequent malpractice actions. In other words, it placed a higher interest in maintaining the viability of the hospital peer-review system than in the plaintiff's need for the information contained in a specific report.

Since that time, many states have passed laws protecting hospitals from discovery of a wide variety of internal records: accreditation reports, utilization review, peer reviews, or other regular care review processes. The policy favoring disclosure of "every man's evidence" has been vigorously asserted, however. Very often, courts will order peer-review records to be admitted into evidence *to the extent* that they help clarify the facts of the situation. They will be protected only as to the subjective impressions and opinions of committee participants.[4]

If you are accredited by the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO), you probably know that the organization has been working to develop review processes that will leave no written documentation that can be discovered in a lawsuit, or written documentation that will be protectable one way or another. Early last year (January 2004), JCAHO launched

the "Shared Visions-New Pathways" accreditation process that seeks to overcome discovery problems arising out of its traditional documentation-driven survey approach.[5]

Remember, these exceptions are entirely dependent upon legislation and case law developed within each state. Your state might be more willing to protect self-critical documents than the state next door. You will not know how they apply to you until a situation arises that brings them into action.

Attorney-client work privilege

If you seek the advice of counsel as you investigate a specific incident, you may be able to assert attorney-client work product privilege against disclosure. This privilege requires showing that it applies, however.[6] This includes the requirement that the document being protected was prepared in response to a litigation risk, and was not part of your day-to-day routine records review. Materials put together in the ordinary course of business or prepared to satisfy a public obligation (licensing, for example) are typically deemed to be unrelated to litigation and therefore not protected by the privilege.

If you do work with legal counsel on specific incidents that carry legal risk, be sure to carefully document that the review is being done for that purpose, and be sure that both you and your attorneys clearly mark all records as "attorney-client work product," "confidential," or "privileged."

While the involvement of counsel may be costly and therefore not appropriate for day-to-day incident reporting and evaluation, there are times when an attorney's assistance can be invaluable. In addition to offering advice and counsel, your attorney's involvement will at least create a presumption that the matters being discussed are privileged and therefore protectable.

A last word on privileges

It is important that you know about these protections, and I hope you find that someday this knowledge will come in handy. Again, the privileges I have outlined cannot be relied upon to absolutely keep important evidence out of a jury's reach. A court that is curious may well find ways around your arguments, and there is nothing that you can do if your privilege request is denied.

Your absolute best defense is good, consistent, up-to-date everyday practices—good hiring, orientation, and training practices, and good response to every accident and incident. If you ever have to defend yourself from an incident that caused injury, your documented record of attention to your business—the business of child welfare—will show the fact finder that this incident, whether it was due to negligence or not, is out of character with your day-to-day insistence on best practices. ▲

Endnotes

1 This actually happened to a close relative of mine. A plumber by profession, he lost his arm up to the elbow when a pipe threading machine caught his jacket and his left hand was fed into the machine. When he sued the manufacturer, information about the machine's new safety enhancements was excluded from evidence and the jury never knew about them.

2 Every state has its own case law on the issue of post-accident remedial measures. If you are interested in the law of your state, you should consult legal counsel.

3 *Bredice v. Doctors Hospital, Inc.* 50 FRD (DDC 1970), affirmed without opinion, 479 F2d 920 (DC Cir. 1973).

4 See, for example, *Webb v. Westinghouse Elec. Corp.*, 81 FRD 431, 434 (ED Pa 1978).

5 The new accreditation process allows an organization to choose from a full Periodic Performance Review (PPR), or one of three options, two of which eliminate most of the paperwork that might contain damaging admissions of non-standard care.

6 The party asserting a work product privilege must prove: 1) that the materials or communications are of a nature that qualifies for protection; 2) that they were prepared or obtained in anticipation of litigation; and 3) that they were prepared by or for that party or that party's attorney or another qualifying representative. *US v. Hickman*, 329 U.S. 495 (1947).

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