

**OBTAINING INFORMATION AND WORK PRODUCT FROM A HOSPITAL'S
RISK MANAGEMENT OFFICE IN A MEDICAL NEGLIGENCE ACTION**

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INTRODUCTION

This paper addresses how to compel the production of information gathered by a risk management office of a hospital during discovery in a medical negligence action. By providing a step by step explanation of how to compel the production of such information I hope to show you how to create a record that will support an order compelling such discovery on appeal. The case law from a survey of all jurisdiction is also summarized.

The most desired documents in the hands of the Defendant are those documents to which you encounter: "Objection, the requested documents constitute privileged work product prepared in anticipation of litigation and therefore protected from discovery". We are increasingly finding the attorney client privilege being asserted based upon actions of in-house counsel. The risk management office typically works closely with hospital in-house counsel in the investigation of potential claims. They will typically gather information soon after the act of negligence upon which your action is based.

The work-product privilege is founded upon the holding in the landmark case of Hickman v Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) and is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. Most states have adopted the same provision. This rule provides a qualified immunity for all work product and an absolute protection of "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." The work product privilege will not prevent the discovery of information upon a showing of a substantial need of the materials and that it is not available without undue hardship.

Hospital counsel must satisfy three tests to have information gathered by risk management protected by the work product privilege. The material must be: (1) documents and tangible things (2) prepared in anticipation of litigation or for trial; and (3) by or for another party or by or for that party's representatives. Wright & Miller, Federal Practice and Procedure, Section 2024, p. 196-7. A party claiming that material sought is protected as work product is now required to specify the basis for the objection due to recent amendments to that rule.

If you properly prepare for the motion to compel, you may very well succeed in obtaining documents such as:

1. Statements of witnesses prepared by the witness at the request of the defendant hospital's office of risk management.
2. Incident Reports prepared pursuant to a hospital's written or unwritten policy or procedure.
3. Reports prepared by agents of Defendant reflecting facts discovered during an on site investigation or witness interviews.

I. HOW TO GET THE ISSUE BEFORE THE COURT

Before you file your motion to compel the discovery, exhaust your efforts to get as many facts as possible about the document or the witness statement you are seeking. The two primary methods of doing so are through the use of interrogatories and depositions. First, as to the importance of interrogatories in laying your ground work, see Willis v. Duke Power, 291 N.C. 19, 229 S.E.2d 191 (1976). In Willis the North Carolina Supreme Court discusses the proper interplay between interrogatories and requests for documents. You want to be prepared to describe, to the extent possible, for the court what the document is that you are seeking. In Willis the N.C. Supreme Court held that the trial judge erred in ordering the production of documents because the documents had not yet been properly identified.

Rule 34 requires that as a prerequisite of production, documents must be (1) "designated", (2) "within the scope" of Rule 26(b), and (3) in the "possession, custody, or control" of a party from whom they are sought. The party seeking production must show that these prerequisites are satisfied. A proper function of interrogatories is to obtain the information necessary to make such a showing. (emphasis added) Plaintiff's interrogatories properly, therefore, asked the defendant to "identify" certain documents.

Id., 229 S.E.2d at 199. First serve the interrogatories designed to discover the documents. Then you must insist that the Defendant sufficiently identify them. A responding party may not assert the privilege and refuse to identify the subject statements or documents. You may have to first move for an order requiring the Defendant to properly identify the documents claimed to be privileged. You will then be in a better position to compel their production.

Another method of obtaining the same sort of information is to always cover the topic during depositions of fact witnesses with questions and follow up as indicated:

- Q: Have you been interviewed or given a statement about the death of my client's husband?
- Q: When?
- Q: Did you know why you were interviewed?
- Q: Who directed that you give a statement?
- Q: Was it reduced to writing?
- Q: When?
- Q: By whom?
- Q: Do you have possession of that document?
- Q: Do you know who does?
- Q: Did you review it in preparation for this deposition? ¹

¹If you get a "yes" to this question, then you should be able to compel production on the additional grounds of Rule 612 (b) of the Rules of Evidence. Samaritan Health Services, Inc. v. Superior Court, 142 Ariz 435, 690 P.2d 154

Q: Do you know who else has seen the statement?

Q: What is the subject of the statement?

Q: Do you know others with knowledge of this event that have given statements?

Q: Was your recollection of factual details clearer at that point in time than it is now?

If counsel instructs the witness not to answer you should succeed in obtaining an order directing that such questions be answered because you are seeking information necessary to the court's ultimate conclusion of law as to whether or not the matters are privileged. You then specifically request the production of such a statement or document and use the answers in the deposition to support your motion to compel.

During the course of a deposition of a witness that has given an earlier statement in a work-product context, be sure to ask questions testing their ability to recall and have them agree that their recall was better immediately after the incident. This is usually not hard to do. Quite often in a medical case the witnesses will state that they can't recall much of anything that is not reflected in the medical chart. This information will be essential in meeting your required showing of need if the work product privilege applies.

Having gone through the necessary steps by deposition, interrogatories and Request for Documents in order to determine the specifics of the document, you are ready to file your motion to compel and argue the law.

II. ARE INCIDENT REPORTS PREPARED BY AGENTS OF A DEFENDANT HOSPITAL PROTECTED FROM DISCOVERY CONFIDENTIAL WORK PRODUCT OR ATTORNEY CLIENT PRIVILEGE?

(1984) held that any privilege which may have existed is waived if the witness is shown the statement before the deposition to refresh recollection.

Hospitals will typically have written procedures mandating the preparation of "Incident Reports". Defendants always assert that the Incident Reports are documents prepared in anticipation of litigation and are therefore protected from discovery. You should obtain these regulations. Often the court's ruling depends upon the purpose for which the document was generated. For instance, in Enke v. Anderson, 733 S.W.2d 462 (Mo. App. 1987), the Missouri Court of Appeals ruled that plaintiff was not entitled to the incident report because the hospital directed its employees to prepare the report for the purpose of transmitting notice of the incident to the hospital's insurance carrier. Whereas in St. Louis Little Rock Hospital v. Gaertner, 682 S.W.2d 146 (Mo. App. 1984), the same court ordered the production of an incident report because it was prepared for the purpose of preventing future loss and therefore not privileged.²

A. THE HOSPITAL AS THE OBJECTING PARTY HAS THE BURDEN OF PROOF TO ESTABLISH THE PRIVILEGE

As a threshold issue, you need to show the court that the requested information is within the scope of discovery. "Incident Reports" are documents which fall within the scope of discovery because they are documents prepared by persons with knowledge of the events giving rise to this action. Therefore, the defendant can avoid production only by meeting its burden of establishing privilege. The party resisting the discovery bears the burden of proving the elements of the work product immunity exception of Rule 26(b)(3). Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947); Mlynarski v. Rush Presbyterian St. Luke's Medical Center, 213 Ill.App.3d 427, 572 N.E.2d 1025, 157 Ill.Dec. 561 (1991).

² Missouri seems to have created a privilege which is not widely recognized in that they protect information provided by the insured to the insurer as a variant of the attorney client privilege. As cited hereinafter, other jurisdictions have required the disclosure of information developed by the insurance adjuster. A federal decision arising out of North Carolina specifically held that statements by the insured to the insurance adjuster were not protected by the attorney client privilege. Phillips v. Dallas Carriers, 133 F.R.D. 475 (M.D.N.C. 1990)

B. THE DEFENDANT'S LABEL OF "CONFIDENTIAL WORK PRODUCT" OR "ATTORNEY-CLIENT PRIVILEGE" IS IMMATERIAL.

The Defendant's conclusory assertion that a document is privileged because it was prepared in anticipation of litigation has no bearing on the ultimate ruling by the Court. "[S]uch a speculation as to possible litigation is not enough to cloak those reports with the protection given an attorney's work product." Binks Manufacturing Company v. National Presto Industries, Inc., 709 F.2d 1109 (7th Cir. 1983). North Carolina cases have also held that the objecting party's conclusions as to whether the document was prepared in anticipation of litigation is not relevant. The party claiming privilege must come forward with evidence upon which the court must then make its conclusion on the issue of privilege. Industrotech v. Duke, 67 N.C. App 741, 314 S.E. 2d 272, at 275 (1984); Midgett v. Crystal Dawn Corp. 58 N.C. App 734, 294 S.E. 2d 386 (1982). The trial judge before whom you appear must analyze whether the Incident Report or other document was in fact prepared as a result of specific anticipated litigation or whether the Incident Report is prepared in the ordinary course of business, or some other non-privileged reason.

This point is critical because the Defendant's procedures and the forms themselves are clearly intended to cloak the documents with the work product or attorney client privilege. In Samaritan Foundation v. Goodfarb, 176 Ariz. 497, 862 P.2d 870, 26 A.L.R.5th 893 (1993), the Arizona Supreme Court ruled that even though hospital's risk management office obtained employees' signatures on documents reciting that hospital counsel would be representing the employee in connection with any action filed, the subsequent statements were not protected by the attorney client privilege.

C. SUMMARY OF DECISIONAL LAW FROM VARIOUS JURISDICTIONS

A number of decisions have addressed the issue of whether information developed by risk management is discoverable in a medical negligence action. The cases of Sims v. Knollwood Park Hospital, 511 So. 2d. 154 (Ala. S.Ct., 1987) and Kay Labs v. District Court, 653 P.2d 721 (Colorado S.Ct., 1982) both held that hospital incident reports prepared by hospital employees pursuant to instructions from attorneys did not constitute work product and were therefore subject to discovery. Both holdings are supported by sound reasoning and can be used effectively to help persuade the trial judge to order the production of the incident reports.

In Sims, the plaintiff sought production of all written reports concerning the injuries suffered by the plaintiff. The defendant objected to the production of its incident report on the grounds of work product. The trial court in Sims denied the plaintiff's discovery of the incident report. The report was prepared by defendant hospital's employee pursuant to instructions from the hospital's risk management and legal departments. The document was prepared on a form bearing the words "Confidential - For Attorney's Use Only". The hospital's justification, which was rejected by the Alabama Supreme Court in Sims, is very similar to the justification typically provided by hospitals in support of their objection to production. The defendant hospital stressed that the incident report was, as noted above, for the attorney's use only, and that it is prepared "when an incident occurs at the hospital which might result in some legal action and it is submitted to the risk manager for review and then turned over to the legal department". The Alabama Supreme Court ruled that the reports were not privileged.

The issue in Sims was whether the Incident Report was in fact "prepared in anticipation of litigation"? That question is always one which must be answered by the Court based upon

the facts presented during an evidentiary hearing. Try to resist the Defendant's use of affidavits and force the presentation of witnesses; unless you are confident that the offered affidavits do not satisfy the objecting party's burden. The evidence should more typically be presented from depositions or by the presentation of witnesses at the hearing regarding the circumstances of the preparation of the document.

The case of Kay Laboratories v. District Court of Pueblo County, 53 P.2d 721 (1982) is also instructive. In that case, the Supreme Court of Colorado held that a hospital incident report prepared by an employee of the hospital within eight hours after the incident occurred, was not protected from discovery on the grounds of work product. In Kay Labs, the incident report was prepared on a pre-printed incident report form provided by the defendant hospital's insurance adjuster. The Kay Labs' court stressed that the report was obviously prepared in the normal course of business regardless of whether the incident would realistically lead to litigation.³

Many courts have considered the question of whether pre-litigation reports prepared by the defendant pursuant to a routine practice constitute privileged work product and have decided that issue in favor of discovery and against a finding of privilege. Even if litigation is clearly a prospect, there is no work product immunity for a document prepared in the regular course of business. See 8 C. Wright & A. Miller; Federal Practice and Procedure §2024, at 198-99 (1970).

Other cases which have ordered the production of information generated by the hospital's risk management offices include:

Uhr v. Lutheran General Hosp., 226 Ill.App.3d 236, 589 N.E.2d 723, 168 Ill.Dec. 323 (1992). Risk management personnel's notes summarizing interviews with 10 people involved in the care of the plaintiff's decedent while at the hospital discoverable since the notes were simply summaries of witness statements and not the mental impressions of risk management.

Ekstrom v. Temple, 197 Ill.App. 3d 120, 142 Ill. Dec. 910, 553 N.E.2d 424 (1990). Documents related to an investigation of the subject surgery and the sterility of the surgical environment made by hospital authorities were not privileged.

Sakosko v. Memorial Hosp., 167 Ill.App.3d 842, 522 N.E.2d 273, 118 Ill.Dec. 818 (1988). Letters from risk management consultant to risk manager were not privileged since the letters discussed factual issues pertinent to the plaintiff's medical condition and prognosis and were not addressed to counsel nor did they reflect mental impressions. Other documents at issue in Sakosko were found to be privileged because they were prepared pursuant to the Medical Studies Act which specifically mandated confidentiality and non disclosure during discovery.

In Mlynarski v. Rush Presbyterian-St. Luke's Medical Center, 213 Ill.App.3d 427, 572 N.E.2d 1025, 157 Ill.Dec. 561 (1991), the court held that a memorandum prepared by the risk management coordinator was protected by both the work product privilege and attorney client privilege. However, it is noteworthy for plaintiffs because the court stressed that it felt

³ Compare this with the result of Enke v. Anderson, Supra., where the production was denied because the information was specifically generated for the benefit of notifying the insurance company. Enke and Kay Labs represent clear conflict in the way some jurisdictions have resolved this issue.

compelled to rule as it did because the defendant's affidavit was unchallenged by plaintiff. The opinion makes it clear that a different result may have been reached had more factual development occurred. In ruling that the privilege would be sustained, the court also stressed that in the event that an attempt was made to use information from the document to impeach a witness, the document would have to be provided to opposing counsel.

Support for the production of information developed by risk management investigations is also found in cases outside of the context of medical negligence cases. In Airocar, Inc. v. Goldman, 474 So.2d 269 (Fla. App. 4 Dist. 1985) the court held that reports prepared by the defendant bus company's drivers pursuant to company procedures in connection with any "incident" was not protected by the work product privilege.

Incident reports are usually prepared by someone with personal knowledge of the event. Therefore, statements reflected in those Incident Reports are nothing more than statements of witnesses entered at a time in close proximity to the incident. A written statement of a witness, whether prepared by him and later delivered to an attorney, or drafted by an attorney and then adopted by the witness, is not properly considered to be the "work product" of an attorney. Scourtes v. Albrecht Grocery Company, 15 F.R.D. 55 (N.D. Ohio 1953).⁴

Most hospital procedures will address what is to be done with the completed incident report. Although some incident reports are about incidents which ultimately lead to litigation, many are not. This fact bolsters the argument that the preparation of incident reports is a routine business practice and not prepared in anticipation of litigation. The mere possibility that litigation may arise, or the mere fact that litigation does in fact occur, does not protect materials prepared by an attorney with the protection of a work product privilege. Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977), cited in Binks, Supra, 702 F.2d 1119. Therefore it should certainly not protect materials prepared by witnesses.

Where statements made, or reports filed, are such as would be made by corporate employees in the usual and regular course of normal business procedure, despite the fact that the corporation is on notice that a claim is likely, and despite the fact that the statement or the document was made at the direction of the corporation's counsel, the statement or report is not protected by the work product privilege. Virginia Electric & Power Company v. Sun Shipbuilding & D. D. Company, 68 F.R.D. 397 (D.C.Va.1975)

In Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, the court ordered production of a report prepared by an engineer on the grounds that

"...the report is actually a notebook that contains objective and material information consisting of mathematical computations, formulae, tables, drawings, photographs, industry specification data, and handwritten notes. It does not reflect or disclose the theories, mental impressions or litigation plans of B-E's attorneys. Nor is it the product of the attorney's mental processes. Sailors never communicated with the legal department prior to preparing this material, nor was he advised by his superior, who had requested Sailor's help, as to what the theories or plans of the attorneys were relative to this litigation. He was simply asked to analyze pieces of the machinery and render an opinion as to what had occurred."

⁴ In the Scourtes case the court nevertheless denied the plaintiff's motion to produce the documents but solely on the grounds that the plaintiff had failed to show "good cause". The Scourtes decision was rendered at a time that good cause was required as a pre-condition to obtaining an order to produce documents. Good cause is of course no longer required.

In Miles v. Bell Helicopter Co., 385 F. Supp. 1029, 1033 (N.D. Ga. 1974), the court held that accident reports prepared immediately after a helicopter crash "merely on the contingency that litigation might well arise from the helicopter crash" were not work product within the meaning of Rule 26(b)(3) and granted plaintiff's motion to compel production of documents.

Courts have held that witness statements obtained by the defendant's insurance company claims agents are subject to discovery by plaintiffs. In Southern Railway Company v. Lanham, 403 F.2d 119, 33 A.L.R.3d 427 (5th Cir. 1968) reh den 408 F.2d 348 (1969) the U.S. Court of Appeals for the Fifth Circuit ordered the production of statements taken from the train crew a few days after the train accident giving rise to the litigation. In a lengthy and well reasoned opinion, the Lanham court stressed that the plaintiffs would be substantially disadvantaged at trial if they did not have access to the witness statements taken near the time of the events giving rise to the lawsuit. Witness statements obtained shortly after the incident are certainly more likely to be accurate than the information which could now be obtained by way of deposition.

The Lanham court did not compel the production of the investigative reports which contained the mental impressions and valuations of the claim agents. If redaction is necessary in order to protect the mental impressions of in-house counsel, that can be accomplished by the Court after an in camera review of the subject statements.

Statements obtained from the witnesses by employees of Defendant in the ordinary course of the business are discoverable:

If in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigative report is producible in civil pre-trial discovery. As stated in Soeder v. General Dynamics Corporation, 90 F.R.D. 253 (D.Nev. 1980) the distinction between whether defendant's "in-house" report was prepared in the ordinary course of business or was "work product" in anticipation of litigation is an important one. The fact that a defendant anticipates the contingency of litigation resulting from an accident or event does not automatically qualify an "in-house" report as work product.

Janicker v. George Washington University, 94 F.R.D. 648 (U.S.D.C., District of Columbia, 1982).

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Janicker court held that objective facts must establish an "identifiable resolve to litigate" before the investigative efforts begin in order for the work product doctrine to apply. In applying that analysis the Janicker court ordered the production of the defendant's in-house investigative report. The court went on to hold that the investigative file accomplished by the insurance company and the attorney representing the defendant after suit was filed were not discoverable.

III. INCIDENT REPORTS AND WITNESS STATEMENTS MAY STILL BE DISCOVERED
EVEN IF THEY ARE DETERMINED TO BE PRIVILEGED WORK PRODUCT.

Courts will order the production of documents covered by the work product privilege upon a showing that the plaintiff has a substantial need for the material and is unable without due hardship to obtain the substantial equivalent to the materials by other means. See generally, The Attorney-Client Privilege and the Work-Product Doctrine, 2nd Edition, American Bar Association, Pages 130-139.

Do not approach the hearing just on the issue of privilege. Be prepared to argue grounds for obtaining the documents even if privileged. The importance of that victory will become apparent on appeal because if the trial judge rules that the plaintiff is entitled even if the privilege applies, the appeal of the privilege issue becomes much less important. Ask the judge to make rulings regarding whether or not you have made the necessary showing for overcoming the privilege, assuming the higher court disagrees on the issue of the privilege.

Generally the only means available to plaintiffs for obtaining the type of information recorded in incident reports or witness statements is to take the witnesses' depositions. These depositions will be a few years after the event, depending on when your client came to you and how quickly you filed. Obviously a witnesses' ability to recall specific factual details has diminished over time and cases have held that this factor alone should justify the production of the witness statements. McDougall v. Dunn, 468 F.2d 468, 474 (4th Circuit 1972); Southern Railway Company v. Lanham, *supra*. In Lanham the court ordered the notes of interviews with the train crew produced, in part, because the depositions of the witnesses, taken well after the accident had occurred, would be less reliable than their immediate impression of the facts contained in the prior statements.

The courts have been unequivocal in ordering the production of witness statements where witnesses do not recollect events or time has elapsed since the incident occurred. In United States v. Murphy Cook and Company, 52 F.R.D. 363 (E.D. Pa, 1971), the court stated succinctly:

There is no doubt that production of a statement should be ordered if a witness has a faulty memory and can no longer relate details of the event. ... The mere lapse of time is in itself enough to justify production of material otherwise protected as work product... The notion that memory fades with the passage of time needs no demonstration.

IV. ADDITIONAL CONSIDERATION OF THE ATTORNEY CLIENT PRIVILEGE IN THE CONTEXT OF RISK MANAGEMENT INVESTIGATIONS

If the court finds the existence of the attorney client privilege, as opposed to the work product privilege, the information is absolutely protected and showing need will not overcome the privilege. You will often face a defendant's assertion that risk management's interview of witnesses at the direction of counsel is absolutely protected by Upjohn Company v. United States, 449 U.S. 383, 66 L. Ed.2d 584, 101 S.C. 677 (1981). However, the Upjohn decision is strictly limited to the facts of that case, a point which is emphasized in the opinion. In Upjohn the court stressed that the corporate superiors had specifically directed that the in-house counsel conduct an investigation as to certain payments to foreign governments in order to ascertain whether any illegal conduct had occurred. Based on that directive, the in-house counsel of Upjohn, with the assistance of privately retained counsel, prepared questionnaires that were then disseminated to targeted individuals with specific instructions that the attorneys were investigating the payments and that the investigation was "highly confidential". Id. 449 U.S. at 387. Generally you will find that in-house counsel and the office of risk management initiated the investigations, not corporate superiors.

In Upjohn, there was a very specific notice of a legal claim and the information sought was to enable Upjohn's counsel to render legal advice. Typically the incident reports and interviews are conducted by a risk manager as a matter of routine business policy. In your

cases you should try to establish a motivation for the gathering of the information which is not related to enabling counsel to render legal advice. Often you can find such a purpose in the hospital's risk management regulations or a statute. To be privileged, among other things, the primary purpose of the attorney-client communication must be the seeking or giving of legal advice or service. N. C. Electric Membership Corp. v. Carolina Power and Light Co., 110 F.R.D. 511, 513 (M.D.N.C. 1986). The privilege applies only to communications "on the faith of", "and in consequence of" the attorney-client relation. Hughes v. Boone, 102 N.C. 117, 141 (1889).

The attorney client privilege will be strictly construed. Fisher v. U.S., 425 U.S. 391 (1976) (the privilege applies only to disclosures, necessary to obtain legal advice, which might not have been made absent the privilege). Courts have held that "in order for the privilege to apply, the attorney receiving the communication must be acting as an attorney and not simply as a business advisor. (citations omitted). In fact, for the privilege to apply, the client's confidential communication 'must be for the primary purpose of soliciting legal, rather than business, advice.'" Henson v. Wyeth Laboratories, Inc., 118 F.R.D. 584, 587 (W.D. Va. 1987).

In addition to the hospital's own policy and procedure's manual, look to the state's statutes as a potential source of a reason for conducting the interviews or investigation. For instance, North Carolina General Statutes 131E-96 requires:

(a) Each hospital shall develop and maintain a risk management program which is designed to identify, analyze, evaluate, and manage risks of injury to patients, visitors, employees, and property through loss reduction and prevention techniques and quality assurance activities, as prescribed in rules promulgated by the Commission.

If the hospital is accredited, then it is subject to the requirement imposed by the Joint Commission on Accreditation of Hospitals (JCAH, now known as the Joint Commission on the Accreditation of Healthcare Organizations), that the hospital maintain procedures for investigations necessary to assure and improve Quality Assurance and patient care. (see, for example, pp 149-152 of the Accreditation Manual for Hospitals, 1985, JCAH). If you look, you will probably find other reasons why the hospitals conduct such interviews and obtains such statements in the ordinary course of business, and not simply for the purpose of rendering legal advice.

Samaritan Foundation v. Goodfarb, 176 Ariz. 497, 862 P.2d 870, 26 A.L.R.5th 893 (1993) is a very noteworthy decision regarding the treatment of attorney client privilege in the contest of a corporate hospital defendant. The court in Goodfarb discusses the policy behind the attorney client privilege and the Upjohn decision at length. You should read this case if attorney client privilege is asserted by a hospital in connection with statements obtained by risk management. The Arizona Supreme Court addressed the issue of when the attorney client privilege was available to a corporate hospital in a medical negligence case. That Court held that the interviews conducted by a paralegal at the direction of corporate counsel of witnesses in the operating room at the time of the negligence were not protected by the attorney client privilege and affirmed the order directing the production of those statements. The Supreme Court rejected the Arizona Court of Appeal's creation of a "qualified attorney client privilege" which could be overcome by a showing of need. Instead, the Court ruled that if the employee witness was being interviewed about conduct of the employee for which the corporation may be vicariously liable, then the statements were absolutely privileged as attorney-client communications. However, if the employee was simply a witness to the actions of others, the privilege does not apply.

V. CONCLUSION

Start preparing for the inevitable hearing on the work product materials early. Seek the information you will need to resist the claim of privileges in your depositions, interrogatories and request for documents.

Force the Defendants to provide sufficient information about the document so that you can determine if it is in fact work product. Don't simply take their assertion that it is.

Have the subject documents present by agreement or by subpoena at the hearing so that the judge can make an in camera review.

Resist the stipulation of facts and force the Defendants to meet their burden with evidence.

A number of factors seem to be of concern to a court when faced with the issue of privilege. It is apparent that findings of fact by the trial court are very critical in your effort to obtain an Order that will be affirmed on appeal. The trial judge should be more inclined to grant the request when some of the following circumstances apply:

1. The report or statement is made by a person with actual knowledge of the event.
2. The report or statement was made at or near the time of the event in litigation.
3. It was prepared as part of a normal routine or pursuant to some other statutory duty. (as long as the statute that imposes the duty does not also protect it from discovery)
4. The documents serve purposes other than simply helping to prepare for litigation. For example, is it mandated as part of an accredited hospital's duty to require investigations as part of its quality control program?
5. It will be difficult to obtain the information at this point in time from some other source.
6. Defendant had no notice of a claim at the time the document was prepared.
7. The documents do not contain the mental impressions of its author and simply cover factual events.
8. The statement is from a witness to the event who is not the agent of the hospital whose actions may cause negligence to be imputed to the hospital.
9. Hospital counsel did not direct and control the investigation.