



# Arkansas Association of Defense Counsel

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## Is My Hospital-Client's Incident Report Protected from Disclosure?

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Some questions have undebatable, clear answers: Beans in chili? Of course. Ketchup on a hot dog? Heck no. Toilet paper hung over or under? Obviously, over. Others, like whether hospital incident reports are discoverable, not so much.

In most medical malpractice cases, the initial set of discovery propounded by plaintiff will include a request like this:

### **Request for Production No.**

**1:** Please produce copies of all incident reports involving plaintiff and the admission that is the subject of this lawsuit.

After reviewing the request with your client, you are handed a document (they go by many different names) that appears to be responsive to plaintiff's request. The principal author has described some event involving plaintiff. One section down, a supervisor has acknowledged that the event was looked into. The part that's giving you heartburn is the supervisor's additional comments that go beyond restating facts and venture into the realm of quality assurance and peer review. What do you do?

For those who might not be as familiar with this predicament, generally, documents that are generated during the course of a quality assurance or peer review proceeding are statutorily protected from disclosure.

"The . . . reports of organized committees of hospital medical staffs . . . and any records, *other than those records described in subsection (c) of this section*, compiled or accumulated by the administrative staff of such hospitals in connection with such review or evaluation . . . shall not be subject to discovery. . . ." Ark. Code Ann. § 16-46-105(a)(1)(A) (emphasis added). These privileges do not, however, operate to exclude every record that is considered during peer review: "[I]nformation, documents, or records otherwise available from original sources are not to be construed as immune from discovery . . . merely because they were presented during the proceedings of the committee." Ark. Code Ann. § 20-9-503(b)(1).

Oftentimes, the analysis boils down to whether the report in question consists of information otherwise available from original sources. That said, even if you conclude that the report—or at least part of it—falls under the peer review privilege, you will have to deal with the dreaded subsection (c):

Nothing in this section or 20-9-308 shall be construed to apply to original hospital medical records, incident reports, or other records with respect to the care or treatment of any patient or to affect the discoverability or admissibility of such records.

Ark. Code Ann. § 16-46-105(c).

Is your client's incident report exempted from the statutory privilege by subsection (c)? That question has not yet been answered by the Arkansas Supreme Court. However, in *Locke v. Continental Casualty Company*, 2011 Ark. App. 653, 2011 WL 5253036, a fall case, the Arkansas Court of Appeals came close.

Jonnie Locke went to Jefferson Regional Medical Center ("JRMC") to check on her daughter, who was in the emergency room. As she walked down a hospital sidewalk, she tripped over exposed bolts that once held in place a parking sign. Locke filed suit against JRMC's carrier, alleging that the hospital was negligent in failing to maintain its premises. After filing suit, Locke propounded discovery asking about the "existence of reports and records of the accident." The hospital objected on the grounds that two entries in the hospital's reporting system were statutorily privileged under Ark. Code Ann. § 16-46-105(a)(1)(A). Locke moved to compel production, and the hospital moved for summary judgment. After the circuit court denied the motion to compel and granted summary judgment, Locke appealed.

The Arkansas Court of Appeals reversed and remanded the case, holding that the privilege did not protect the entries at issue because Locke was a visitor at the time of the fall and not a patient. In dictum, the court continued to touch on whether the entries would have been protected from disclosure had Locke been a patient. In so doing, the court first described the contents of the report:

The first entry shows in part that Kim Lassiter, who is an LPN and the reporter of the entry, reported that Locke, "a visitor," tripped over bolts in the emergency-room parking lot and that Locke was seen and treated in the hospital, with x-rays showing a fracture of the fifth metatarsal on the right foot. The second, entry, which does not name a reporter, reports that Locke tripped over bolts on the sidewalk in the emergency-room parking lot; that the fall was witnessed by "Tammy," who worked in the emergency room; and that Locke was coming to visit her daughter who was in the emergency room when she caught her foot on four large bolts on the sidewalk in front of a handicap-parking space in the emergency-room parking lot, causing Locke to fall. The entry also notes that orange barrels had been placed around the bolts by the time Locke exited the hospital.

2011 Ark. App. 653, at 2–3, 2011 WL 5253036, at 1. Ultimately, the court held that the proof of record, namely, the entries themselves, did not support

the notion that they were prepared by or at the direction of a peer review committee. In other words, they did not fall within the privilege. The court, however, implied that there was a section in the entries that could have supported the privilege's application, but they were left wanting for purposes of the analysis:

While the entries note that the entries were "Reviewed by QM," Continental did not present any testimony or other evidence regarding what in fact is "QM."

*Id.* at 3, 2011 WL 5253036, at 2.

With *Locke* in mind, what do you do with the document your client gave you? If the verbiage mimics the entries described by our court of appeals in *Locke*, you're probably going to have to turn it over. If your overzealous supervisor's comments do, in fact, look like quality assurance or peer review language, you probably need to do more homework (i.e., find out if the supervisor was working in his/her capacity as a peer review committee member or as part of the committee's administrative staff). In other words, this isn't a beans in chili issue.

**The thanks of the AADC go out to David C. Jung of Wright, Lindsey & Jennings.**



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