Incident Reports Prepared by Staff for the Risk Management Department of a Hospital Are Often Privileged From Discovery

Flynn v. University Hospital, Inc., 172 Ohio App.3d 775, 2007-Ohio-4468

In Ohio, incident reports prepared by hospital staff are generally privileged and fall outside the scope of discovery. An exception to this general privilege exists, however, where an incident report is not actually used for the purpose in which it is intended. Specifically, simply producing a report does not mean that it meets the statutory definition of an incident report. Rinaldi v. City View Nursing and Rehab. Ctr., Inc., 8th Dist. 85867, 2005-Ohio-6260, ¶20. Moreover, a party asserting the privilege bears the burden of proof that it applies. Cook v. Toledo Hosp., 169 Ohio App.3d 180, 2006-Ohio-5278, ¶28.

Recently, in Flynn v. University Hospital, Inc., (2007), 172 Ohio App.3d, the 1st District Court of Appeals discussed and confirmed the applicability of the privileges surrounding incident reports. In Flynn, the Plaintiffs Sean and Jennifer Flynn filed a malpractice action against Defendant University Hospital alleging that as a result of the Defendant’s negligence, Sean Flynn had been severely burned during surgery. During the course of discovery, the Plaintiffs requested that University Hospital produce an incident report related to Flynn’s surgery. The Trial Court granted the Plaintiffs’ Motion to Compel and ordered University Hospital to produce the report. University Hospital appealed the Trial Court’s decision asserting that the incident report was protected by peer review privilege, risk-management privilege and attorney-client privilege.

The 1st District rejected University Hospital’s argument for peer review privilege under Ohio Revised Code § 2305.253, § 2305.251, and § 2305.252, noting that the incident report in this case was never actually provided to a peer review committee. Moreover, University Hospital failed to show that the report was prepared for, or submitted to, a quality assurance or that a peer review committee even existed.

Ultimately, however, the 1st District reversed the Trial Court’s decision, holding that University Hospital’s incident report was privileged under the attorney-client privilege set forth in Revised Code § 2317.02. The Court held that the attorney-client privilege encompasses communications made to an employer’s counsel by employees. Generally, in the case of a hospital, this will cover incident reports prepared for the risk management department of a hospital. Here the incident report was specifically prepared for the attorneys in the hospital’s risk management department. As such, the 1st District reversed the Trial Court’s decision, and held the Hospital need not produce the report.

The Flynn decision is significant in that it confirms the multiple avenues of protection available to incident reports prepared by employees and staff of a hospital. More importantly, the Flynn decision serves as a reminder that incident reports may not simply be prepared routinely, but must actually be prepared for a specific purpose. In light of the Flynn decision, hospitals should review their incident report procedures and ensure that reports are actually being prepared for use at either a peer review committee, by risk management or by an attorney in preparation for litigation, to ensure that incident reports are properly excluded from discovery.

If you would like a copy of this opinion or if you have any other questions regarding how the Flynn ruling may affect a present or future case, please feel free to contact any of our Medical/Hospital Malpractice Group members.