The ‘Split Personality’ of Patient Care Standards

Although hospitals strive to improve patient care and safety, such facilities are torn between the following two competing principles: (1) responsibly adhering to the “self-critical analysis” and reporting requirements enforced by the state and accreditation bodies such as the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), and (2) employing a “self-preservation analysis” that may promote the underreporting of adverse events to shield the facility from legal vulnerabilities such as the discoverability of reported events. Accordingly, hospitals must navigate through many uncertainties that require health care administrators and clinicians to balance these competing patient safety and legal interests.

Both JCAHO and the recently enacted New Jersey Patient Safety Act provide reporting standards. Although JCAHO and the act share many similar features (e.g., both were promulgated to encourage hospitals to implement a patient safety plan to improve the health and safety of patients), the inherent differences reflect a tension that make legal representation and risk management of a hospital more difficult.

This tension is exacerbated by the fact that New Jersey is the only state without a statute that delineates the discoverability of internal self-critical hospital documentation. This article illustrates the difficulty hospitals may have navigating this two-layered regulatory system and suggests that to encourage appropriate reporting and implementation of internal reviews, a confidentiality statute is necessary to protect against the discoverability of reported events.

In 1996, JCAHO promulgated guidelines to facilitate hospitals in monitoring, analyzing and improving their medical services. JCAHO created self-critical analysis procedures for hospitals to follow through a process called “Sentinel Event” reporting. Sentinel Events are unexpected occurrences involving death or serious physical — including loss of limb or function — or psychological injury, or the risk thereof. Additionally, health care organizations must perform a root cause analysis that involves a thorough systems evaluation to determine what, if any, systemic changes can be made to prevent future occurrences. Although not mandated for accreditation, JCAHO strongly urges reporting of Sentinel Events. Hospitals, general counsels, and even JCAHO are concerned that reviewing courts may view the reporting of Sentinel Events as a waiver of any alleged confidentiality privilege. Although JCAHO has lobbied for legislation granting absolute privilege for hospitals, neither Congress nor the state has codified such confidentiality.

Juxtaposed to JCAHO’s standards, the newly passed act requires hospitals to report “Serious Preventable Events” to the New Jersey Department of Health and Senior Services. The act provides discoverability protection to hospitals’ “Self-Critical Analysis” and the reporting of adverse events; however, this is not an absolute privilege. The New Jersey Legislature clarified that the discoverability of materials related to the act should be consistent with the holding in Christy v. Salem, 366 N.J. Super. 535 (App. Div. 2004). Accordingly, the discoverability of internal information is still governed by the state’s common law standard, discussed below.

In McClain v. College Hospital, 99...
N.J. 346 (1985), Justice Daniel O’Hern articulated the applicable standard in assessing the discoverability of hospitals’ confidential investigative records. Essentially, the court created a test which balances the following factors: (1) the extent to which the information may be available from other sources; (2) the degree of harm that the litigant will suffer from its availability; and (3) the possible prejudice to the agency’s investigation.

The “McClain Standard” was subsequently applied in *Bundy v. Sinopoli*, 243 N.J. Super. 563 (Law Div. 1990), and *Estate of Hussain v. Gardner*, 264 N.J. Super. 208 (Law Div. 1993) — two cases in which the courts found in favor of imposing judicial restraint on the discovery of confidential investigative records. In *Hussain*, Judge John Harper opined about the danger in establishing a precedent for the discoverability of such records because it could stifle the open critical analysis necessary to stimulate improvements in medical care. This conclusion, however, was later renounced.

In *Reyes v. Meadowlands Hosp. Med. Ctr.* , 335 N.J. Super. 226 (Hudson Co. Law Div. 2001), Judge Julie Fuentes found that confidential material reported to JCAHO was discoverable because (a) JCAHO reporting created no expectation of confidentiality, (b) the administrative code provision (N.J.A.C. 8:43G-27.5) mandating hospitals to conduct peer review programs contained no absolute confidentiality provision, and (c) the assumption followed by the *Hussain* court (i.e., discoverability would silence reliable self-critical analyses and adversely affect improvement in medical care) was flawed.

In *Christy*, the court agreed in part with Judge Fuentes regarding discoverability. As such, the court ruled that the plaintiff’s compelling need for discovery only included purely factual material contained in an internal peer report and specific deliberative information. However, the court declined to find the opinions, analyses and findings of fact discoverable. The court held that future analyses should balance the competing interests of privacy and disclosure on a case-by-case basis and believed that peer review committees would not leave out purely factual material just because it is discoverable; however, committees may be discouraged in making findings of fact and honest critical opinions if such information can readily be obtained by a plaintiff.

Currently, hospitals are placed in a precarious position given the uncertainty of the laws in New Jersey regarding the discoverability of peer review and reporting materials. Hospitals are further confused by the divergence in standards set forth by JCAHO and the act. Hospitals have to comply with the act and report serious preventable events. The act specifically states that any discoverability of such reporting will be analyzed in accordance with the holding in *Christy*.

The extent that any reporting to JCAHO is discoverable, however, is still uncertain and will be treated on a case-by-case approach. As reported above in the holdings of *Reyes* and *Christy*, the courts are split and unsure as to whether discoverability acts to suppress internal reviews and reliable reporting. With this critical issue left open to debate, courts will continue to address each claim on a case-by-case basis, the Legislature will continue to ignore the issue, and hospitals will be left in legal limbo.

There are statistics that suggest that hospitals underreport medical mishaps. JCAHO reports that the number of total “reviewed” Sentinel Events occurring in New Jersey hospitals from January 1995 through December 2003 equaled 71, while “self-reported” Sentinel Events only equaled 47 for the same period. Thus, there is on average 5.2 “self-reported” Sentinel Events per year. In contrast, the National Center for State Courts reports that medical malpractice filings in New Jersey equaled 1,656 in 2002, a number slightly reduced when compared to 1,776 in 1998.

In addition, the American College of Emergency Physicians reports that medical liability insurance exponentially increases each year as a partial result from medical malpractice cases. We have taken into account that some filings could be frivolous and/or based on private practice accidents, and that the medical malpractice insurance crisis has resulted from multiple factors, including economic fluctuations in the market. However, the significant discrepancies in raw numbers and the fact that medical malpractice claims are based on theories of negligence — which would be the common basis for formally reporting mishaps — are too difficult to ignore.

Additionally, a recent trend among health care organizations is to hire attorneys as their risk managers. Thus, in addition to making the argument that internal peer reviews and reported events should be confidential for the public good, attorney-client and work-product privilege arguments are set forth to bolster a hospital’s position. Given the relevant statistical information and the legal trends among hospitals, the lack of confidentiality puts many hospitals in a position where their first priority may become one of self-preservation and survival.

Although the United States has one of the best health care standards in the world, many patients continue to suffer from medical mistakes, which contribute to high insurance rates and overburdened courts. All parties in these types of actions resort to some form of interest balancing. Courts balance an individual’s right to discoverable documents against a hospital’s right to the confidentiality of internal review and reporting materials. Hospitals balance between adhering to internal review and reporting requirements and protecting against legal liability. While these issues are important, a patient who enters a hospital typically balances the unparalleled issues of life and death. JCAHO created the reporting of Sentinel Events and root cause analyses to improve health care standards. Yet, JCAHO does not technically deny accreditation based on the lack of reporting because of the discoverability issue. The system is not effectively working when an organization such as JCAHO cannot enforce a process that exemplifies the very definition of its purpose.

Recently, the Law Revision Commission reached a tentative consensus that a confidentiality statute is warranted (178 N.J.L.J. 224). If such a
statute is implemented, it must resolve the discoverability issues associated with the standards set forth by JCAHO and the act. Currently, a hospital’s report to the department in accordance with the act may be at least partially discoverable. If JCAHO accredited, the hospital also has to consider reporting to JCAHO. Yet, the reported information to JCAHO may be more discoverable than information necessitated under the act.

To encourage the health care system in general to make systemic changes to improve patient care and safety, the Legislature must protect hospitals’ ability to enable frank and honest candor in internal review processes and reporting. For hospitals to accurately assess themselves and make appropriate modifications to improve patient safety, a confidentiality statute is necessary. Until there is such a statute, general counsels and risk managers should be well aware of the tensions between the standards set forth by the act and JCAHO.