ASSERTING AND OVERCOMING PRIVILEGES IN DISCOVERY

By

William S. Mills
Durham, North Carolina

INTRODUCTION

This paper will focus on three primary topics. First, how to compel the production of documents or testimony to which an objection has been made on the grounds of the work product privilege. Second, peer review privilege will be discussed in the context of medical negligence actions. The last section will address how to protect your client's medical and/or psychiatric records from production.

I. HOW TO COMPEL THE PRODUCTION OF DOCUMENTS OR TESTIMONY OVER A CLAIM OF THE WORK PRODUCT PRIVILEGE

A. INTRODUCTION AND OVERVIEW

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." Plaintiff's counsel should be more aggressive in compelling the production of such documents. The guidance provided by the appellate decisions in North Carolina is minimal on when the following types of documents are discoverable:

1. Statements of witnesses prepared by the witness at the request of the Defendant.

2. Statements of witnesses prepared at the request of Defendant's in house counsel or risk management

3. Incident Reports prepared pursuant to Defendant's written or unwritten policy or procedure. (See discussion of Cook v. Wake County Hospital, *infra.*, which held such reports discoverable.)

4. Reports prepared by agents of Defendant reflecting facts discovered during an on site investigation or witness interviews.

If we will all be aggressive in pursuing such documents, the North Carolina law on the topic will evolve. Please involve NCATL in providing assistance to you if you have such an issue that may be headed to the higher courts.

B. HOW TO GET THE ISSUE BEFORE THE COURT

First exhaust your efforts to get as many facts about the document, witness statement, or meeting as possible. You are then in a better position to overcome the assertion of the work product privilege. Gather the facts with interrogatories and depositions. You should read Willis v. Duke Power, 291 N.C. 19, 229 S.E.2d 191 (1976) on the importance of interrogatories in laying your groundwork. Before filing your motion to compel, you should be prepared to describe for the court what the document is that you are seeking. In Willis the Supreme Court held that the trial judge was in error in ordering the production of documents, at least in part because the documents had not yet been properly identified. In that case the court stated:

> 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. It was error, however, for the trial court to order production of any documents before the documents had been (1) further "identified" by defendant, or (2) further "designated" by plaintiff. Whether and to what extent defendant should have been required to identify documents in answer to plaintiff's interrogatories was a threshold question pending before the court ..., but which the court never addressed.

Id., 229 S.E.2d at 199.

Do not simply accept the defendant's conclusory objection that the requested information or documents are covered by the work product privilege. I routinely insert the following paragraph in the introductory portion of my Interrogatories and Request for Production of Documents:

ASSERTION OF PRIVILEGE

> If you contend that information, documents or other materials within the scope of these interrogatories and Request for Documents is privileged, or subject to protection as trial preparation material, and therefore not discoverable, please make such claim expressly and describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

This is consistent with the approach taken in Rule 26(b)(5) which states the following:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the document, communications, or things not produced or disclosed in a manner, that without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

When the conclusory objection is made without any further explanation, promptly write the attorney who has asserted that privilege asking that the attorney prepare a descriptive index of the documents or other matters for which the privilege has been asserted. When you file your Motion to Compel, recite the efforts made to obtain the information that you need, and the court will need, in order to assess the applicability of the privilege. It has been my experience that the court will always compel the party asserting the privilege to at least prepare such an index of documents.

Once you have met the minimal showing that the requested information is within the scope of discovery, the party asserting the privilege bears the burden of proving that the information requested is privileged. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

The Defendant's conclusory assertion that a document is privileged in that 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). The North Carolina Court of Appeals has expressly stated that the objecting party's conclusions as to whether the document was prepared in anticipation of litigation is not relevant to the court's decision and that the party must come forward with evidence establishing the facts upon which the court must 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 must analyze whether the requested discovery was in fact prepared as a result of specific anticipated litigation or whether the Incident Report is prepared in the ordinary course of business.[1] (See discussion of Cook v. Wake County Hospital, 125 N.C.App. 618, 482 S.E.2d 546 (1997), infra.) This point is critical because often the defendant's procedures and their forms are clearly intended to cloak the documents with the work product or attorney client privilege.

Therefore, you must be sure to first serve the interrogatories designed to discover such documents, and then you must insist that the Defendant sufficiently identify them. A responding party may not assert the privilege and refuse to identify. See appendix for sample of interrogatories and Request for Production designed to obtain the necessary information to establish that the documents are discoverable and will enable you to properly designate them in your motion to compel.

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 asked?

Q: Who directed that you give a statement?

Q: Where was the interview given?

[1] North Carolina has recognized the distinction between work product done "in anticipation of litigation" and documents which are maintained "in the ordinary course of business". The North Carolina Supreme Court has held in Willis v. Duke Power Company, 291 N.C. 19, 229 S.E.2d 191 (1976) that work product privilege does not apply to documents maintained in the ordinary course of business. The rationale used by the Court of Appeals in Cook v. Wake Co. in ruling that such an incident report was discoverable.

Q: Who was present?

Q: Was your statement 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?[2]

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

Q: What is the subject of the statement?

If counsel instructs the witness not to answer you should obtain an order directing that such questions be answered. You then specifically request the production of that 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 providers will state that they can't recall much of anything that is not reflected in the medical chart. The importance of this is clear later in the context of making your showing that even if it is work product you should get it.

Having gone through the necessary steps by either deposition or 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, which entitles you to access to the documents.

---

[2]If 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, which provides: "If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have those portions of any writing or of the object which relate to the testimony produced, if practicable, at trial, hearing, or deposition in which the witness is testifying."

C. INCIDENT REPORTS PREPARED BY THE AGENTS OF A DEFENDANT PURSUANT TO ESTABLISHED WRITTEN POLICIES AND PROCEDURES ARE NOT PROTECTED CONFIDENTIAL WORK PRODUCT.

Corporate Defendants, especially hospitals, will typically have written procedures mandating the preparation of reports commonly referred to as "Incident Reports". Defendants often assert that the Incident Reports or similar documents are documents prepared in anticipation of litigation and are therefore protected from discovery by Rule 26(b)(3). The procedures followed at Duke University Medical Center as set forth in their procedure manual, for example, require that an Incident Report be prepared for the following purpose:

> To provide a detailed written report of all facts related to incidents involving patients or visitors, whether injuries are or are not sustained, including medication or treatment errors and adverse drug reactions. The report is a confidential document provided to hospital counsel in anticipation of possible litigation. This report is not punitive but for purpose of risk management to improve patient care, protect the hospital and its staff. (emphasis added)

Typically the "Incident Reports" which are the subject of this motion are clearly documents which fall within the scope of discovery as set forth in Rule 26 in that they are documents prepared by persons with knowledge of the events giving rise to this action. Therefore, such discovery can be avoided only by the Defendant carrying its burden of proving that the document constitutes work product. Remember that it is the Defendant, as the objecting party, who 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).

The North Carolina Court of Appeals has provided us with some clear guidance as to when an "incident report" is subject to discovery. In Cook v. Wake County Hospital System, Inc., 125 N.C.App. 618, 482 S.E.2d 546, *cert granted*, 487 S.E.2d 543, 346 N.C. 277, *joint motion to dismiss appeal allowed*, 347 N.C. 397, 494 S.E.2d 404 (1997), plaintiffs' counsel, Charles L. Becton, Michelle L. Flowers and Maria J. Mangano, demonstrate the importance of making and preserving a record for the subsequent appeal of discovery rulings. The plaintiffs' Motion to Compel the production of an incident report was denied by the trial court (Henry V. Barnette, Jr.) a jury was unable to reach a verdict, and Judge Barnette then granted defendant's Motion for Judgment pursuant to Rule 50.

On appeal, the North Carolina Court of Appeals reversed the entry of Judgment Notwithstanding the Verdict, ordered the defendant to produce the incident report and granted plaintiffs a new trial.

Recognizing the sparsity of law on this issue in North Carolina, the Cook court relied upon Willis v. Duke, *supra.* and a federal case arising out of the Eighth Circuit, Simon v. G.D. Searle and Co., 816 Fed.2d 397 (1987).

The Cook court emphasized that pursuant to the holding in Willis the work product privilege applies only to materials which were "prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." The court also emphasized that Willis recognized that the materials prepared in the ordinary course of business are not protected. Cook held that "even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation." Cook, 125 N.C.App. 618, 624, 482 S.E.2d 546, 551.

Cook emphasized the defendant's own written policies pertaining to incident reports, which are quoted extensively in the opinion. After reviewing those written procedures, the court stated:

> Here defendant's accident reporting policy exists to serve a number of non-litigation business purposes. These business purposes impose a continuing duty on hospital employees to report any extraordinary occurrences within the hospital to risk management. These duties exist whether or not the hospital chooses to consult its attorney in anticipate of litigation. Here, absent any other salient facts, it cannot be fairly said that the employee prepared the accident report because of the prospect of litigation. In short, the accident report would have been compiled, pursuant to the hospital's policy, regardless of whether Cook intimated a desire to sue the hospital or whether litigation was ever anticipated by the hospital. Id., 482 S.E.2d at 551.

The court specifically rejected the defendant's argument that "in the context of today's litigious society...only a person of extraordinary naivete would not expect Dr. Cook, an educated, sophisticated professional, to make a claim against the hospital."

The North Carolina Supreme Court granted defendant's Petition for Discretionary Review on the work product issue but the case was resolved between the parties prior to any decision. Cook is therefore the leading authority for the discovery of incident reports or similar documents in North Carolina.

Despite the fact that we now have the Cook decision, a survey of other jurisdictions and federal cases may be helpful for future efforts to obtain documents that do not fall squarely within the ruling of Cook.

There are two reported decisions from other jurisdictions that are extremely helpful on the point of getting incident reports. 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 prepared in anticipation of litigation 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 both Sims and Kay Labs the work product issue was before the courts in connection with negligence actions filed against hospitals. In Sims the plaintiff had 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 at issue in Sims known generally as the "Incident Report" was prepared on a form bearing the words "Confidential -For Attorney's Use Only". The explanation provided by the defendant hospital and rejected by the Alabama Supreme Court in Sims appears in 511 So.2d at p. 156 and is very similar to the explanation often provided by hospitals in litigation in support of their objection to production. In Sims, the defendant hospital's counsel 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 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. It is my recommendation that you not allow the evidence to be submitted by affidavit unless you are confident that the 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. It is often the case that defendants present no evidence and simply argue to the court on the substantive law. I believe that in the event that happens and the trial judge denies the motion to compel, you should have a meritorious appeal on that denial if you have an adverse verdict at trial. If the appeal is successful, you may obtain a new trial with the benefit of the documents.

In its analysis of the work product question the Sims' court relied primarily on federal decisions interpreting the Federal Rules of Civil Procedure. Since the North Carolina Rules of Civil Procedure as they pertain to this issue are identical to the Federal Rules, you can freely cite the reasoning and rationale of the Federal Courts.

The 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).

Additionally most policies pertaining to Incident Reports will require that they be filed routinely in the ordinary course of business for every injury incident which occurs. Although some may record information about an incident which ultimately leads to litigation, many do not. 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.

In Kay Laboratories v. District Court of Pueblo County, 53 P.2d 721 (1982), the Supreme Court of Colorado, construing Rule 26 of the Colorado Rules of Civil Procedure, which is the same as that of North Carolina, held that a hospital incident report prepared by an employee of a defendant hospital in an action based in negligence, pursuant to standard

procedure 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.

D. ADDITIONAL CONSIDERATION OF THE ATTORNEY CLIENT PRIVILEGE IN THE CONTEXT OF CORPORATE INVESTIGATIONS

You may encounter an objections which asserts the attorney-client privilege in addition to the work product privilege. 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 officers 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 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. You should try to establish that the defendant's motivation for gathering the information 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 the Accreditation of Healthcare Organizations, that the hospital maintain procedures for investigations necessary to assure and improve Quality Assurance and patient care. With a good investigation and research 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.

E. WITNESS STATEMENTS, EVEN IF PREPARED AT THE REQUEST OF DEFENDANT'S OFFICE OF RISK MANAGEMENT, IN-HOUSE COUNSEL OR INSURANCE ADJUSTER ARE NOT PRIVILEGED PURSUANT TO RULE 26(B)(C).

If witness statements were obtained by the defendant, or defendant's in house counsel, you will meet a work product objection. When you move to compel production, emphasize that a witness statement, 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).

In Phillips v. Dallas Carriers, 133 F.R.D. 475 (M.D.N.C. 1990), The United States District Court for the Middle District of North Carolina held that the Defendant driver's statement given to the defendant's insurer on the day of the accident was not protected by the attorney client privilege and that the plaintiff was entitled to production even if it was covered by the work product privilege. The court in Phillips did not actually reach the issue of whether or not the statement was in fact work product but rather resolved the issue by stating that even if you assume it is, the plaintiff is entitled to it because of need. In Phillips the plaintiff motorist had no memory of the collision and the defendant was asserting the claim of contributory negligence.

Our Fourth Circuit Court of Appeals Court in McDougall v. Dunn, 468 F.2d 468 (4th Cir. 1972) considered whether statements taken by an insurance adjustor qualified as work product. The Court noted that the statements were made before the plaintiff had employed counsel and before any notice of claim had been given. The Court indicated that the statements were secured by the claim adjuster in the regular course of his duties as an employee of the insurance company and presumably were incorporated in the files of the company. The Court at 468 F. 2d at 473 quoted Thomas Organ Co. v. Jadranska Slobodna Plovidba (D.C.Ill.1972) 54 F.R.D. 367, 372, wherein it was stated:

> This trend which was followed in the framing of Rule 26(b)(3) compels the Court to conclude that any report or statement made by or to a party's agent (other than to an attorney acting in the role of counselor), which has not been requested by nor prepared for an attorney nor which otherwise reflects the employment of an attorney's legal expertise must be conclusively presumed to have been made in the ordinary course of business and thus not within the purview of the limited privilege of new Rule 26(b) (3) and (b)(4)." (emphasis added)

In National Union Fire Insurance Company v.. Murray Sheet Metal Company, Incorporated, 967 F. 2d 980 (4th Cir 1992) the Fourth Circuit likewise considered the contention of the Defendant that it did not need to produce in house reports because they had been prepared in anticipation of litigation. The Court stated at page 984:

> We take notice of the fact that members of society tend to document transactions and occurrences to avoid the foibles of memory and to perpetuate evidence for the resolution of future disputes. And because litigation is an ever-present possibility in American life, it is more often the case than not that

> events are documented with the general possibility of litigation in mind. Yet, "[t]he mere fact that litigation does eventually ensue does not, by itself, cloak materials" with work product immunity. (citations omitted and emphasis added)

The Court noted that the underlying reason for the document is more controlling than what the parties call it, stating at 984:

> Thus, we have held that materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes are not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3). (citation omitted) Following any industrial accident, it can be expected that designated personnel will conduct investigations, not only out of a concern for future litigation, but also to prevent reoccurrences, to improve safety and efficiency in the facility, and to respond to regulatory obligations. Determining the driving force behind the preparation of each requested document is therefore required in resolving a work product immunity question. (emphasis added)

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 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 United States Court of Appeals for the Fifth Circuit held that the plaintiffs were entitled to obtain the production of statements obtained from members of a train crew within a few days after the train accident giving rise to the litigation. In a lengthy and well reasoned opinion, the court in Lanham stressed that the plaintiffs would be substantially disadvantaged at trial if the plaintiffs did not have access to the witness statements taken at a time of close proximity to 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. In fact, you should always secure opposing counsel's commitment to bring the disputed documents to the hearing so that the judge may review them In Camera. You can certainly subpoena them. The trial judge will most likely want to review the actual documents themselves and can redact those portions not discoverable. There may be unintended benefits also, I once had a judge, after reviewing the documents but before making his decision, talk to counsel about status of settlement and made the comment that "it seems like in a case like this where liability is not really being contested there ought to be a settlement". Well, that was the first I'd heard about liability not being contested so obviously the documents were probably going to help me.

The case of Scourtes v. Albrecht, 15 F.R.D. 55 (U.S.D.C., Northern District Ohio, 1953) is instructive. In Scourtes the court held that:

> The written statement of a witness, whether prepared by him and later delivered to the attorney, or drafted by the attorney and adopted by the witness, is not

> properly considered the "work product" of an attorney. It records the mental impressions and observations of the witness himself and not those of the attorney.

Id at p. 58.[3]

Statements obtained from 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.

See also Janicker v. George Washington University, 94 F.R.D. 648 (U.S.D.C., District of Columbia, 1982). The Janicker court stressed that there must be some objective facts establishing 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.

Other jurisdictions have also considered the question of whether pre-litigation reports prepared by the defendant pursuant to a routine practice constitute privileged work product and decided that issue in favor of discovery and against a finding of privilege. 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.

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

---

[3] 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.

> 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."

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. In the absence of specific, pending litigation, materials prepared during investigation of such accidents do not merit immunity.

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

The North Carolina Rules of Civil Procedure allow for 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 to the material even if the privilege applies, the appeal of the privilege issue becomes much less important. You argue that you should nonetheless be allowed to obtain the statements on the grounds of substantial need and the inability to obtain the same information through other procedures.

Generally the only means available to plaintiffs at the time of the hearing is to take the witnesses' depositions. This is generally 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 [and]

> 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.

G. CONCLUSION

Start preparing for the inevitable hearing on the work product materials early through 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.

Make sure that the trial judge clearly understands that it is the party asserting the privilege that must carry the burden of proof on that issue.

Have the subject documents present 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 present in the various cases from other jurisdiction and you should try to emphasize facts in your favor on each of the factors. The trial judge should be more inclined to grant the request when some of the following circumstances apply:

1. That the report or statement is made by a person with actual knowledge of the event.

2. That the report or statement was made at or near the time of the event in litigation.

3. That it was prepared as part of a normal routine or pursuant to some other duty.

4. Does the document 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. Is it going to be difficult to obtain the information at this point in time from some other source

6. Was defendant on actual or implied notice of a claim at the time the document was prepared.

7. Does the document contain the mental impressions of its author or does it simply cover factual events.

II. PEER REVIEW PRIVILEGE

North Carolina protects information generated by a medical review community conducting proceedings which are typically referred to as "peer review." North Carolina General Statute §131E-95(b) provides that statutory protection. Additionally, N.G.C.S. §90-21.22 entitled "Peer Review Agreements" authorizes the North Carolina Medical Board to adopt rules allowing for agreements between the North Carolina Medical Board and the North Carolina

Medical Society. The purpose of these agreements are to establish procedures for the investigation, review, and evaluation of records, reports, complaints, litigation and other information about the practices and practice patterns of physicians licensed by the Board. Pursuant to §90-21.22(b) such agreements shall provide assurances of confidentiality for "non-public information" and of the review process. Section 90-21.22 also protects information received by and generated by programs for impaired physicians.

Shelton v. Morehead Memorial Hospital, 318 N.C. 76, 347 S.E.2d 824 (1986) was the first and only North Carolina Supreme Court decision addressing the scope of the protections afforded by §131E-95. In Shelton plaintiffs had filed suit alleging negligence on the part of individual surgeons and corporate negligence because of the Board of Trustees and the Executive Committee of its medical staff's negligence in allowing the physicians to continue to practice at the hospital after the defendant hospital knew, or should have known, that the physicians were not fit to practice medicine. The plaintiffs attempted to learn, by way of interrogatories, the identity of all records relating to personnel decisions, disciplinary investigations, peer evaluations, credentials and competence reviews and patient complaints against the individual physicians. Plaintiffs subsequently sought the identity of the custodian of any such records and the production of those records.

The plaintiffs issued a notice for the deposition of the former chief executive officer of the hospital directing him to produce those same documents at his deposition. The defendants moved to quash the subpoena and for a Protective Order preventing the requested discovery, relying upon N.C.G.S. §131E-95.

The North Carolina Supreme Court ruled that the protection afforded by §131E-95 was limited as applied to the requested information. The summary of its holding can be stated as follows:

1. Records of the hospital's medical review committee relating to the investigation of alleged medical negligence were protected.
2. Information and documents known to the former chief executive officer were protected only to the extent that such knowledge or documents came from the medical review committee. Information which the chief executive officer gained from other sources was not protected and therefore subject to discovery.

3. Records of the hospital's Board of Trustees were not protected since the Board of Trustees was not a medical review committee. The court acknowledged however, that if the Board of Trustees was in possession of documents that were otherwise privileged by the statute, the mere possession by the Board of Trustees did not defeat that protection.

When assessing whether to pursue the production of documents or other information to which defendants lodge a peer review objection, be mindful of the following principles set forth in Shelton.

1. Is the source of the information a "medical review committee"? N.C.G.S. §131E-76(5) defines "medical review committee" in pertinent part as, "A committee...of a medical staff of a licensed hospital...which is formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentials." You will be entitled to discover facts sufficient for you, and ultimately the court, to determine whether the body from whom the information is sought is indeed a medical review committee.

2. The codification of §131E-95 abrogates any preexisting common law peer review privilege.

3. The plaintiff is entitled to discover, by way of interrogatories, the identity of existing documents to which the privilege is being asserted and the identity of the custodian of those documents. The statutory protection afforded by §131E-95 is not compromised by the disclosure of that information.

4. The statute specifically provides that any information, documents or records which are otherwise available are not immune from discovery or use at trial merely because they may have been presented during proceedings before a medical review committee.

Our appellate courts recently addressed a trial court's ability to protect the confidentiality of peer review documents in Virmani v. Presbyterian Health Services Corp., 127 N.C.App. 629, 493 S.E.2d 310, *temporary stay allowed*, 347 N.C. 585, 496 S.E.2d 394, *motion to dismiss appeal denied,* 348 N.C. 78, 505 S.E.2d 863, *affirmed in part, reversed in part*, 350 N.C. 449, 515 S.E.2d 675, *rehearing denied*, 351 N.C. 123, *certiorari denied*, 120 S.Ct. 1452 (1999). In Virmani a physician sued the hospital contesting the suspension of his medical privileges. In that proceeding, the defendant hospital moved to seal confidential medical peer review committee records and to close court proceedings in which those records were discussed. The trial court granted the motions sealing the peer review records and closing the court proceedings. The *Charlotte Observer* moved to intervene to contest the confidentiality. The Supreme Court held that:

1. The denial of the newspaper's Motion to Intervene was proper.
2. When the physician attached documents that were otherwise subject to a claim of protection, as exhibits to his Complaint, they became public records and no longer entitled to protection.

3. Peer review materials submitted by the defendant hospital directly to the presiding judge did not lose their confidentiality and protection provided by §131E-95.

4. The newspaper had no common law right of access to the contested materials and proceedings, and

5. Closure of the proceedings and sealing of documents did not violate the open courts provisions of the state Constitution or First Amendment.

I commend the lengthy Supreme Court opinion to you for an elaboration of those issues.

In Sharp v. Worland, 137, N.C.App. 82, 527 S.E.2d 75 (2000) the court addressed the degree of protection which is afforded to a treatment program designed for impaired physicians pursuant to N.C.G.S. §90-21.22.[4] In Sharp the plaintiff filed suit based upon the alleged negligence of an anesthesiologist and corporate negligence for allowing the anesthesiologist to maintain staff privileges at the hospital after it knew, or should have known, that he was not

[4]The case was initially dismissed by the North Carolina Court of Appeals, 132 N.C.App. 223, 511 S.E.2d 35 on the grounds that the appeal was interlocutory. The Supreme Court reversed that ruling finding that the discovery order affected a substantial right and remanded the case to the Court of Appeals.

practicing medicine in accordance with the applicable standard of care. The plaintiff sought documents containing information regarding the physician's participation in Physicians Health Program (PHP), a treatment program operated by the North Carolina Medical Society to provide treatment to impaired physicians. The defendant hospital moved for a Protective Order on the ground that the documents sought were protected from discovery by the privilege set forth in N.C.G.S. §90-21.22. The trial court denied the Motion for Protective Order and directed the hospital to produce all such documents concerning the physician's participation in PHP.

The North Carolina Court of Appeals reversed the denial of the Motion for Protective Order and held that the information regarding an individual's participation in a program for impaired physicians is immune from discovery. The Sharpe court distinguished Shelton's application of the immunity privilege set forth in §131E-95 by stating that, "G.S. §90-21.22 does not contain 'an otherwise available' proviso, providing instead an unqualified privilege to information 'acquired, created, or used in good faith by the Academy or a Society pursuant to G.S. §90-21.22.'" 527 S.E.2d at 78. The ruling was based in large part upon the strong public policy behind encouraging impaired physicians to seek help without subjecting their efforts to discovery.

III. ASSERTING THE PLAINTIFF'S PHYSICIAN-PATIENT PRIVILEGE

A. GENERAL OVERVIEW

North Carolina has a statutory privilege for communications between a physician and patient: [5]

> No person, duly authorized to practice physic or surgery,...shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician...Confidential information obtained in medical records shall be furnished only on authorization of the patient...Any resident or presiding judge in the district, either at trial or prior thereto...may, subject to G.S. 8-53.6, compel disclosure, if in his opinion disclosure is necessary to the proper administration of justice.

N.C.G.S. §8-53 (1983).

In general, the physician-patient privilege is applicable and exists at the time of the communication, and the information obtained must have been necessary for the treatment of the patient. State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979). It applies not only to oral communications, but also to knowledge obtained through the physician's observations and examinations. McGinnis v. McGinnis, 66 N.C. App. 676, 677, 311 S.E.2d 669, 670 (1984). It includes all records "pertaining to communications" during the course of treatment. Simms v. Charlotte Liberty Mutual Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962). The privilege is for the benefit of the patient alone, and only the patient may waive it.

[5] The same privilege applies for psychologists and counsellors. NCGS §§8-53.3, 8-53.5, 8-53.7 and 8-53.8.

The privilege is a qualified, not absolute one, in that the Judge has discretion to compel disclosure "if in his opinion the same is necessary to proper administration of justice." N.C.G.S. §8-53.3. In short, the physician cannot divulge the patient's communications unless the patient either waived the physician-patient privilege, or the court orders disclosure. McGinnis, 66 N.C. App. at 677, 311 S.E.2d at 670.

B. EXPRESS OR IMPLIED WAIVER OF THE PRIVILEGE.

The physician-patient privilege is for the benefit of the patient alone, and only the patient may waive it. McGinnis, 66 N.C. App. at 677, 311 S.E.2d at 670 (citing Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960). A waiver can be express or by implication. An express waiver exists when the patient consents that the physician be examined as a witness concerning the communication. The privilege may also be expressly waived by contract in writing. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841, 842 (1968).

The Neese court also enumerated the circumstances under which the privilege may be waived by implication. This occurs "where the patient calls the physician as a witness and examines him as to patient's physical condition, where patient fails to object when the opposing party causes the physician to testify, or where the patient testifies to the communication between himself and the physician." Id.

The North Carolina Supreme Court, however, has afforded broad discretion in this area to judges in two respects. First, the judge has wide latitude in determining whether the privilege was waived impliedly by the plaintiff's conduct. Second, he has even broader discretionary power in balancing the plaintiff's conduct against the defendant's need for the information. Even if the plaintiff's conduct appears to impliedly waive the privilege, a finding that there is indeed no waiver may be entered "to ensure justice." Crist v. Moffatt, M.D., 326 N.C. 326, 389 S.E.2d 41 (1990).

For example, in Crist, during discovery, the plaintiff provided medical records to opposing counsel, testified at her deposition concerning her treatment by other doctors, and identified two doctors as witnesses. The defendant's attorney, having a good faith belief that the plaintiff had waived the physician-patient privilege, contacted the plaintiff's physician ex parte. The trial court concluded that the plaintiff's conduct did not impliedly waive the psychologist-patient privilege. Id. at 329, 389 S.E.2d at 43. The Court concluded that even if the plaintiff had impliedly waived the privilege, the trial court "did not abuse its broad discretionary power to ensure justice in entering the order." Id. at 331-32, 389 S.E.2d at 44.

The Crist court, relying on decisions in numerous other jurisdictions, based its holding on the purpose of the statute and its underlying public policy:

> "The purpose[] of North Carolina's statutory physician-patient privilege [is]...to encourage the patient to fully disclose pertinent information to a physician so that proper treatment may be prescribed...Patients expect that physicians will comply with the Hippocratic oath [not to divulge confidential information absent legal compulsion]. . [T]he public has a right to have this expectation realized."

Id. at 333-334, 389 S.E.2d 45-46. The public policy is so strong that "defense counsel may not interview plaintiff's non-party treating physicians privately without plaintiff's express consent." Id. at 336, 389 S.E.2d at 47.

Similarly, the earlier decision of Neese emphasizes the court's dedication to preserving the purpose of the statute. In that case, the patient used an affidavit from her physician for the

purpose of obtaining a temporary restraining order pending a hearing on the merits. The Neese court held that the use of the physician's affidavit did not impliedly waive the physician-patient privilege. Id. at 843 (in accord, Gustafson v. Gustafson, 272 N.C. 452, 158 S.E.2d 619 (1968).

In the case of Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987), the North Carolina Supreme Court addressed the scope of the physician-patient privilege. The precise question addressed was whether a plaintiff who has waived his physician-patient privilege as to non-party treating physicians may preclude these physicians from testifying as experts for the defendant. The court found that once the privilege is waived by the patient, the possessor of the privilege, the patient may not later assert it to prevent his physicians from testifying for his opponents.

At trial, the plaintiff, who had been treated by almost ten physicians, testified concerning her visits with them. During the defendants' case, five of the treating physicians testified. Plaintiff failed to object to their testimony until the defendants sought to elicit from the physicians their expert opinions.

The plaintiff argued that she had waived the physician-patient privilege as to "information" obtained by the physicians in the course of their treatment, but not as to "opinion testimony." The court refused to find any distinction.

In finding that the plaintiff had waived the physician-patient privilege, the court reiterated prior North Carolina law that a waiver may be express or implied, citing the case of Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960). Waiver is to be determined by the facts and circumstances of each particular case. By testifying to the consultations she had received, the plaintiff impliedly waived the privilege as to the expert opinions held by the physicians.

The court found two grounds for the holding. One, as a matter of statutory interpretation, there is no basis for a distinction between opinion and information in G.S. 8-53. Secondly, the court specifically found that a "divisible waiver" could lead to "possible misuse by plaintiffs in personal injury actions." 361 S.E.2d at 743. The court feared that a plaintiff might attempt to prevent the physicians from stating an opinion which would aid the trier of fact.

A concurring opinion by Justices Mitchell and Meyer urged a new rule which would hold that "the bringing of an action in which an essential part of the issue is the existence of physical ailment should be a waiver of the privilege for all communications concerning that ailment." 361 S.E.2d at 744. This would create the "patient-litigant" exception to the privilege, now recognized in 26 states as a "tort reform" measure.

In Adams v. Lovette, 106 N.C.App. 23, 411 S.E.2d 620 (1992) the defendant implied waived his physician-patient privilege by objecting only on relevance grounds in response to the plaintiff's discovery request for medical records under North Carolina Rule of Civil Procedure 34. The failure to make a specific objection on the basis of the privilege was a waiver.

These arguments have been successfully used to prevent the necessity of disclosing psychological or psychiatric records during the course of a personal injury action. (An example of motion resisting the production of such documents is attached hereto as an exhibit.) These same arguments can be made to protect against the production of totally unrelated medical records which have no bearing on any issue at trial by reason of the length of time which has passed since the medical treatment and the subject lawsuit or because of the very nature of the treatment received.

When resisting the production of documents, be prepared to produce the documents for an *in camera* review by the court.

Do not automatically assume that your client-plaintiff in a personal injury action has automatically waived all physician-patient privilege. The law in North Carolina is extremely protective of a person's medical records and have set forth only a limited number of ways in which those documents are subject to discovery.

C. COMPELLED DISCLOSURE IN THIS CASE IS NOT "NECESSARY TO THE PROPER ADMINISTRATION OF JUSTICE" PURSUANT TO N.C.G.S. § 8-53.3

The trial judge may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to the proper administration of justice. Again, based on public policy, there must be a strong indication that the interest of justice requires that the physician-patient privilege be withheld. McGinnis, 66 N.C. App. at 678, 311 S.E.2d at 671. Argue that there is simply no interest in the case at hand which overrides the patient's right to a "trusting relationship between [psychologist, psychiatrist, etc.]...and patient which is founded on a sense of complete confidentiality." Id.

Examples of a Brief in Opposition to the production of psychiatric records and an Order that was entered in the case are included in the Appendix.