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A knight in full plate armor is shown from the waist up, holding a sword aloft with his right hand. The armor is highly detailed, with various plates and rivets. The knight's face is obscured by a helmet. The background is a blurred outdoor setting.

## Cost Effective Medicine vs. Patient-Driven Health Care



# Protecting medical group quality and risk data

By Calvin L. Raup, JD

PHYSICIANS FAMILIAR with the virtually absolute protection of hospital peer review and credentialing data may assume that similar protection is available for quality and risk management data collected in the context of a private office practice. Not so.

This article addresses the importance of developing a means of doing internal case reviews by creating a quality and risk committee that acts within the protections of the Attorney/Client Privilege and the Work Product Doctrine.

A.R.S. § 36-445, The Arizona Peer Review statute, requires hospitals to organize into committees for the purpose of reviewing professional practices within the hospital for the purposes of reducing morbidity and mortality and for the improvement of hospital based patient care. A.R.S. § 36-445.01 provides strict confidentiality for the entire process, even protecting the identities of all participants. This statute also applies to outpatient surgery centers but not to medical groups.

Quality and risk conscious physicians gathering data at the medical group level may be doing so at their peril, for the data that is confidential in the hospital setting is discoverable in the private practice setting. Due to litigation disclosure obligations discussed later in this article, medical groups may be building the case against themselves by gathering this kind of

data. That said, quality and risk information can be gathered, analyzed and subsequently utilized by medical groups to improve patient care and reduce risk without disclosure if a few simple steps are followed—to the letter.

Protection from disclosure of potentially relevant information is possible, but only if confidentiality serves a higher purpose. Anglo-American jurisprudence long has recognized that certain relationships are entitled to confidentiality, to achieve goals more important than “truth seeking” in the context of litigation. Arizona law honors the Attorney/Client relationship above all others. Very limited exceptions to its nearly absolute protection prevent clients from using their attorneys to assist them in the commission of crimes, including perjury. Attorneys may disclose privileged information only in carefully circumscribed areas that seldom arise in the practice of law. Waiver of the privilege can occur, however, if privileged communications are not properly protected.

The corporate entity is considered a “person” for the purpose of the Attorney/Client Privilege. The Arizona Supreme Court, in its 1993 *Samaritan Foundation* opinion, created an unnecessarily complex and unpredictable set of rules to determine the scope of privilege in the corporate entity. The Arizona Legislature promptly responded by amending A.R.S. § 12-2234, the statute that codifies the Attorney/Client Privilege, extending it to any business entity and

to all employees within that entity, no matter how mundane their job descriptions may be. All employees of a business entity are entitled to confidentiality so long as they are seeking legal advice regarding conduct incident to their employment.

The Work Product Doctrine is a judicially created set of rules that protects the thought processes and mental impressions of parties, their attorneys and even their insurers, as they gather information “in anticipation of litigation.” The protection of work product is not absolute. Protection not only is subject to waiver but also may be lost if the information cannot be obtained from other sources. Contemporaneous witness statements are the classic example because there is no way the contemporaneous observations of an eye witness can be reconstructed years after the fact. Memoranda containing both factual observations and mental impressions often are redacted to allow factual information to be discovered while protecting true work product.

Quality and risk data gathered solely within the Work Product Doctrine is subject to disclosure as data that cannot be acquired from other sources. Therefore, effective protection of this data mandates its collection and analysis within the Attorney/Client relationship as well. The purpose of this collection and analysis must be to obtain legal advice regarding the improvement of healthcare delivery and risk reduction. The Attorney/

Client relationship must not be illusory, nor may this relationship be created to “hide bad facts.”

It is important to understand that **facts** themselves are never privileged; **communications** may be. The observations of an eye witness cannot be protected from disclosure. Conversations this witness has with his attorney and the advice obtained may be protected from disclosure by following a few simple but inflexible rules. For example, the presence of a third party during an Attorney/Client meeting prevents the privilege from attaching to the communication. Knowing who can and cannot participate in such a meeting is crucial.

Since 1992, parties to litigation in Arizona and their attorneys have had an affirmative duty to disclose information that is or may be relevant—regardless who this information benefits. Attorneys also have an ethical

duty of “reasonable inquiry and investigation.” These obligations are ethically based for attorneys and there are strict rules imposing sanctions on parties and their attorneys for the failure to disclose damaging information. An exception to the disclosure rule is information protected by a privilege. Thus, quality and risk information properly gathered, analyzed and documented within the Attorney/Client relationship is exempt from mandatory disclosure but must be identified sufficiently that claims of privilege may be tested before a judge.

A medical group contemplating privileged quality and risk analysis should select a law firm qualified to create a quality and risk committee that meets the standards discussed above. The law firm that sets up your pension plan may have an Attorney/Client relationship with your group but it may not have the expertise to analyze

quality and risk data for the purpose of improving the quality of health-care. Choose a firm with experience in protecting peer review data and one with experience in analyzing quality and risk data. Otherwise, the data your group collects may do more harm than good.

Quality and risk data can and should be collected, analyzed and acted upon. This data can be protected from disclosure. By following a few important rules these goals may be met without compromising the group’s liability exposure. **AM**

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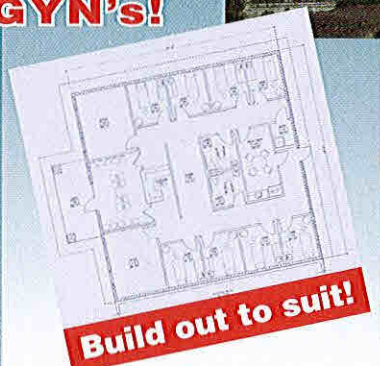
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