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PARTNERING WITH OUTSIDE COUNSEL PROVIDES CERTAIN PROTECTIONS IN INVESTIGATIONS

by: Kimberli Poppe-Smart, JD, RN, BSN, CPHRM, CHC

Something unexpected happened. You might have a nagging feeling that a lawsuit, an administrative action or a regulatory investigation may follow. As a responsible leader, you want to engage all your efforts and be robust in your assessment and analysis of the situation. Time is of the essence so you jump right in and start interviewing witnesses, gathering and preparing documents. You sketch a time line of events. You then draft an e-mail chain to all managers and relevant consultants to off-load what you have learned. You explain the situation and identify those staff members and others that you have interviewed and what they said. You share your analysis and conclusions. Finally, you present your plan of action. Now, it is there in print, in the hands of your key people and quite possibly discoverable in the context of litigation and government investigations.

The list of concerns that keep you awake at night can be long. A sampling of circumstances that trigger your superhuman management powers include: usual incidents, an attorney request for medical records or notice of intent to sue letter, complaints from a referring or treating physician or a quality investigation by an insurer, troubling grievances by staff or patients, allegations of abuse, threats of whistle-blower action, employee claims of harassment threatening family members, business cards of investigators or attorneys placed discretely on your employees' windshields or a drive by from the Department of Justice.

Stop. Breathe. You do not have to travel this path alone. In fact, bringing your counsel on board at the earliest possible moment may provide you the peace of mind you are seeking as you attempt the herculean task of reaching resolution independently. You are not a weak leader by calling for assistance.

Evidentiary privileges are statutory creations born of the legislature and applied by the courts. A recent California Court of Appeal decision highlights the importance of legislature placed on the attorney-client privilege and work product doctrines. The ability to bring an attorney into the fold, to direct the investigation, conduct and document witness interviews, formulate assessments and recommendations is vital to maintaining effective risk management and compliance programs.

A June 8, 2016 decision of the Court of Appeal of California in *City of Petaluma v. Superior Court (Waters)*[1] highlights the benefit of pre-litigation, attorney-led investigations. In *City of Petaluma*, Andrea Waters, the first and only female firefighter and paramedic for the City was hired in 2008. She took a leave of absence from her position in 2014. Thereafter, she filed a complaint with the U.S. Equal Employment Opportunity Commission (EEOC) alleging that she was the victim of sexual harassment and retaliation. According to the *City*, this was their first notice of any concern. She voluntarily resigned her position shortly after the *City* received the EEOC complaint.

The *City*, consistent with their practice and policy, investigated her complaint. They retained outside counsel to conduct an impartial investigation of the claims. By utilizing this outside counsel they sought to protect their investigative report, notes and analysis under attorney-client privilege and work

[1] City of Petaluma v. Superior Court (Waters) (2016) Cal.App.LEXIS 532

product doctrine. The outside attorney provided the *City* with a written report marked as confidential and attorney-client privileged.

During the course of subsequent litigation, Waters sought to get a copy of the report claiming that the investigation was not privileged and even if it was privileged, the *City* had waived any privileges by placing the investigation at issue. The trial court concurred and ordered the report to be disclosed. The *City* appealed the trial court's order.

In its ruling, the Court of Appeal opined that the attorney-client privilege provides a privilege to the client of an attorney, "to refuse to disclose, and to prevent from disclosing, a confidential communication between client and lawyer…"[2] This privilege exists "to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of facts and tactics surrounding legal matters."[3] This absolute privilege precludes the attorney from disclosing confidential communications even if they are highly relevant to a dispute.[4]

Criteria For Assertion of Attorney Client Privilege

There must be an attorney-client relationship. The client must have engaged the attorney, directly, or through an authorized representative, for the purpose of engaging or lawyer or securing legal service or advice.[5] A confidential communication between the client and attorney means "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence" and may include "a legal opinion formed and the advice given by the lawyer in the course of the relationship."[6] Investigation steps taken before an attorney-client relationship has been established do not fall under the attorney-client privilege.

Attorney Work Product Doctrine

The attorney work product doctrine[7] is designed to allow attorneys to investigate the favorable and unfavorable aspects of cases and to prevent attorneys from taking undue advantage of the attorney's effort.[8] This doctrine creates a qualified privilege against the discovery of general work product and an absolute privilege against disclosure of the attorney's writing that include impressions, conclusions, opinions, or legal theories.[9] Recorded witness interviews conducted by attorneys or their employed investigators are afforded qualified work product protection.[10] Witness statements may be afforded absolute protection if disclosure would reveal "attorney's impressions, conclusions, opinion, or legal research or theories."[11] A court must determine that denial of discovery would unfairly prejudice the party seeking discovery or result in injustice in order for the work product to be discoverable.[12]

Waiver of Attorney-Client Privilege and Work Product Doctrine

When privileged communications or work product are shared outside the attorney-client relationship, the privilege may be waived if the disclosure is inconsistent with the goals of maintaining the

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2 Evidence Code §954

3 *Costco Wholesale Corp. v Superior Court* (2009) 47 Cal.4th 725,732

4 Ibid

5 Evidence Code §951

6 Evidence Code §952

7 Code of Civil Procedure §2018.010

8 Code of Civil Procedure §2018.020

9 *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 50 Cal.App.4th 110, 120

10 *Coito v. Superior Court* (2012) 54 Cal. 4th 480

11 Id.

12 Code of Civil Procedure §2018.030

communications or work product under the seals of confidentiality. Strict confidentiality is a critical element to preserving these protections.

When to Initiate that Attorney-Client Relationship

Issues arise day in and day out and you handle them. On occasion a situation takes you by surprise and your instincts tell you "this might be big." There is no fixed rule as to when to engage outside counsel to manage an investigation. You might have access to in-house counsel if you are part of a larger, more complex organization. Following is a list of triggers that may inspire thought and conversation on when to bring in counsel. This is not definitive but merely illustrates some questions to consider whether your organization has experienced the type of event that warrants at least a consultation with your counsel to determine whether an attorney-directed investigation is prudent.

- There was an unanticipated serious injury or death.
- An eloped patient/ resident has not been located.
- Call, letter or request for records from an attorney.
- Request for records from family member listing "legal" as the reason for the request.
- A governmental agency has requested multiple billing and/or patient or staff records outside of a standard audit or survey.
- An employee has threatened to or made a report to the EEOC or labor board.
- An employee has complained internally about sexual harassment and fear of retaliation.
- A governmental agency has escalated their investigation.
- The incident is likely to attract media attention.
- A staff member threatens a whistle-blower action.
- Documents or records are missing.
- Staff report an attorney or investigator contacted them.

About the Author:

Kimberli Poppe-Smart

A Shareholder at Wroten & Associates, Kimberli M. Poppe-Smart has united her 30-year nursing career with over a decade of legal experience into a healthcare risk management and compliance specialist. Ms. Poppe-Smart served as an appointed leader in Alaska State government. Her role as the Deputy Commissioner for Health and Social Services overseeing Medicaid, Senior and Disability Services, Behavioral Health Services, long term care and psychiatric facilities, survey, certification and a myriad of additional state-administered program add a depth of knowledge and experience rarely seen in the litigation arena.

Ms. Poppe-Smart is a Wroten & Associates litigation team member as well as an expert in identifying and managing risks and implementing enterprise risk management plans and strategies. She has spoken nationally on healthcare topics including quality assurance, risk management and compliance. Her most recent presentation was titled Proactive Measures to Mitigate Risks From Surveys Gone Bad…and Other Tips. Ms. Poppe-Smart has written a number of articles as well, her most recent titled “The Ins and Outs of Resident Transfer & Discharge”.

Ms. Poppe-Smart earned a diploma in registered nursing in 1983, a Bachelor of Science in Nursing in 1992 and graduated cum laude from Thomas Jefferson School of Law in San Diego, California in 2002. She is a member of the Health Care Compliance Association (HCCA) and is a professional Certified in Healthcare Compliance and a Certified Professional in Healthcare Risk Management (CPHRM).