

Privilege

OVERVIEW OF ISSUE

In the aftermath of a critical incident or service of a Statement of Claim, staff are often anxious about providing information for fear of adverse consequences. Some of these fears can be alleviated by properly invoking privilege over communications about the incident at issue. Understanding the different types of privilege available, their purposes and their scope can help maximize the protection that can be afforded.

KEY POINTS

- There are four types of privilege: lawyer-client; litigation; quality assurance (common law); and legislative.
- Healthcare organizations and practitioners can support claims of privilege in a number of ways.

THINGS TO CONSIDER

Types of Privilege & Their Scope

- “Privilege” is a legal term used to denote the protection afforded to some information which, although relevant, is shielded from disclosure in a legal proceeding. The four types of legal privilege and their relationship to management of incidents are outlined below (Ontario Hospital Association, 2004; Nova Scotia District Health Authorities and IWK Working Group, 2006; Morris & Clarke, 2011):
 1. **Lawyer-Client** – For reviews undertaken at the direction of a lawyer; strong protection, but intended to be used in limited circumstances (e.g. not as a matter of course for critical incident/quality improvement reviews).
 2. **Litigation** – For reviews undertaken in contemplation of or for the predominant purpose of litigation; not as broadly protected as lawyer-client privilege and limited utility for most critical incident reviews (too soon to determine the likelihood of litigation) but could be very helpful in management and investigation of multi-patient events.
 3. **Quality Assurance (Common Law)** – For quality reviews that meet the four “Wigmore” criteria (i.e. confidentiality is promised to review participants, confidentiality is required to ensure participation, participation is important to improving care, and the benefits of improving care outweigh the benefits of disclosure). This does not provide automatic or blanket protection and must be argued on a case by case basis if challenged.
 4. **Legislative** – Privilege conferred by a piece of legislation (e.g. the Quality of Care Information Protection Act in Ontario). Reflecting the public policy objective of encouraging healthcare providers to participate in reviews, legislation has been enacted in most provinces and territories to facilitate an environment of open sharing of opinions (Canadian Medical Protective Association, 2010). This provides strong protection if specific requirements are met (e.g. review takes place under the direction of an established quality assurance/improvement/ of care committee). Some legislative provisions can pose challenges, however, particularly related to sharing incident analysis findings with patients, families, and stakeholders outside the organization (Laupacis & Morin, 2014).
- It should be noted while privilege covers the subjective interpretations of staff on what should have happened, could have happened or what they wished had happened, it does not extend to the facts of the case which should always be disclosed and documented in the health record.
- Parallel reviews may take place for different

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purposes (e.g. critical incident analysis and medical-legal investigation); different types of privilege may be invoked depending on the type of review.

- The following are not covered by privilege:
 - The facts of an incident;
 - All content in the health record;
 - Incident reports, unless they were written under the auspices of a quality of care committee.

Tips to Support Claims of Privilege

- Initially, obtain preliminary facts and discuss how staff are feeling and coping. Detailed discussions about the incident including (potentially erroneous) assumptions about cause should be avoided outside of a formal, confidential analysis process or at the direction of assigned defense counsel if appropriate.
- Emphasize the importance of confidentiality at the outset of quality review meetings to all participants.

- Clearly document the purpose for which documents were created and when, as well as who created them.
- A document does not become privileged simply because it is marked “Privileged”. Rather, documents for which privilege can be legitimately claimed should be appropriately marked to reduce the risk that they will be shared in a way that compromises the claim for privilege.
- Control disclosure of privileged materials such as minutes from a meeting. Designate one scribe and discourage independent note taking. This will minimize the risk of inadvertent disclosure and the risk of a document being so widely shared that a claim for privilege is undermined.
- Avoid having documents or meetings with multiple purposes, some of which may be privileged and some are not (this might mean there is repetition in work that is done).



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