Different Standards for Self-Critical Analysis Privilege in Illinois: What You Need to Know

Monday, May 11, 2015

In a recent March 19, 2015 decision, the Illinois Supreme Court refused to acknowledge the self-critical analysis privilege. This recent discussion underscores the need to understand the different standards for the privilege in each jurisdiction a company operates under and the importance of the proactive steps to safeguard privilege detailed in our November 13, 2014 post, Protecting Your Safety Investigations and Deliberations from Prying Eyes. Illinois now joins a number of states, such as Indiana and Rhode Island, that have refused to adopt the privilege absent legislative authority.

In Harris v. One Hope United, Inc., 2015 IL 117200, the Illinois Supreme Court was asked to determine whether the self-critical analysis privilege applied to “Priority Review” reports or quality control reports created by an agency within the Illinois Department of Children and Family Services (DCFS), One Hope. In this case – based on the death of an infant whose family was participating in rehabilitation services provided by One Hope – the plaintiff sought the Priority Review reports that evaluated whether One Hope’s services were professionally sound.

One Hope argued that protecting the documents was in line with the intent of the Illinois Child Death Review Team Act and consistent with the purpose behind a similar statutory privilege found in the Illinois Medical Studies Act. In denying expansion of the privilege, the court relied on prior Illinois precedent that discouraged the use of privileges against disclosure because they hindered the “truth seeking function” of litigation and because expansions of such privileges were best left to the legislature. But most importantly, the court conducted a thorough review of the legislative intent behind the two state statutes highlighted by One Hope. In the end, the court held that the legislature’s failure to extend the current privileges to these types of circumstances along with the intent of these Acts showed that the legislature did not intend to expand any self-critical analysis privilege. The court further noted that when one looks at other privileges, such as the deliberative process privilege, that had been adopted by the court, these privileges had overwhelming federal support as well as a clear intent expressed in state statutes and regulations. In contrast, the court found that the self-critical analysis privilege continues to be inconsistently adopted in various federal jurisdictions and lacks the requisite state regulatory and statutory support.

© 2019 Foley & Lardner LLP