MEDICAL PEER REVIEW

I. Basics of peer review

Medical peer review is a process whereby doctors evaluate the quality of work done by their colleagues, in order to determine compliance with accepted health care standards. This self-regulatory procedure provides quality assurance for the medical community by fostering standardization of appropriate medical procedures and by policing caregivers who could pose risks to patients. The rationale for the process is efficiency: working doctors are best situated to judge the competence of other working doctors because they regularly see each others’ work and possess the relevant expertise to evaluate it.

A peer review committee typically performs two functions: the initial process of credentialing (reviewing a doctor’s qualifications and recommending whether or not the doctor should be granted privileges at the hospital), and ongoing review of a doctor’s work within the hospital. Peer review is one of three chief means of monitoring the quality of doctors’ work; the other two are state licensing board disciplinary action and tort law medical malpractice. Ideally, effective peer review should decrease the number of medical malpractice events and improve overall health care. Doctors, courts and critics recognize the review process as an efficient means of professional self-regulation. “[P]eer review has become widely accepted as the primary means to weed out low quality physicians and to identify and offer assistance to physicians whose skills need to be enhanced in certain areas.” Susan O. Scheutzow, State Medical Peer Review: High Cost But No Benefit – Is it Time for a Change?, 25 Am. J. L. & Med. 7, 15 (1999).

Statutory and regulatory requirements dictate the use of peer review. Early in the 20th century the American College of Surgeons (“ACS”) established the first peer review program in America. In 1952, the ACS, together with the American Medical Association, the American Hospital Association, and the American College of Physicians, formed the Joint Commission on the Accreditation of Hospitals. Now known as the Joint Commission on Accreditation of Health Care Organizations (“JCAHO”), it requires hospitals and other health care groups to conduct peer review in order to gain accreditation. JCAHO is the country’s main hospital accreditation authority and participation in it is the basis for certain federal funding.

States and the federal government also encourage peer review. All states have statutes mandating minimum monitoring for hospitals seeking state licensure. The federal government additionally requires that new applicants be credentialed and staff members be regularly evaluated for a hospital to be in the Medicare program. Despite mandates and altruistic motivations, doctors often are reluctant to take part in peer review. Jeanne Darricades, Medical Peer Review: How is it Protected by the Health Care Quality Improvement Act of 1986?, 18 J. Contemp. L. 263, 270 (1992). Their reluctance derives from hesitation to criticize their peers, lost pay for time spent in review, fear of losing patient referrals and most significantly, possible legal repercussions.
from adverse decisions, especially discovery and liability aspects of lawsuits. These disincentives chill candor and diminish effective peer review.

II. Laws of peer review protection

To counter doctors’ reluctance to engage in peer review, State legislatures and Congress have enacted laws which protect peer reviewers from liability, and (all but New Jersey) their work product from discovery.

These protections stand in opposition to the basic evidentiary rule of discovery that parties “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Fed. R. Civ. P. 26(b)(1). See also United States v. Nixon, 418 U.S. 683, 710 (1974) (“[E]xceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”)

In the struggle between litigation and peer review, statutory privileges and immunities generally are accorded the preferred status. George E. Newton II, Comment, Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection, 52 Ala. L. Rev. 723, 728 (2001). The Connecticut Supreme Court, facing this collision of policy interests in a malpractice action, stated: “Should a conflict between access to such evidence and peer review confidentiality arise, it was the legislature’s judgment in enacting the peer review privilege that the strong public policy favoring open peer review would outweigh any incidental burden on discovery.” Babcock v. Bridgeport Hosp., 742 A. 2d 322, 344 (Conn. 1999).

Statutory peer review protection comprises three closely related kinds of laws: 1) those granting immunity from lawsuits to persons and institutions; 2) those declaring peer review work products to be privileged and inadmissible in court; and 3) those allowing information related to peer review to remain confidential.

The first type of protection, immunity, exists to diminish an individual doctor’s or an institution’s apprehension of facing damages in cases involving defamation, antitrust or negligent credentialing claims. The majority of states provide peer reviewers immunity from civil liability. The strongest statutes give immunity to all peer review committee members, institutions and persons furnishing information to the committee; weaker statutes give immunity for only a few or specified people. The reason for the immunity is explained in a case brought by a doctor for wrongful suspension of staff privileges:

“Review by one’s peers within a hospital is not only time-consuming, unpaid work, it is also likely to generate bad feelings and result in unpopularity. If lawsuits by unhappy reviewers can easily follow any decision, even a temporary one followed by a due process hearing such as
here, then the peer review demanded by statute will become an empty formality, if undertaken at all.”


Note that the immunity is not absolute. “The majority of states have qualified the immunity, imposing as statutory hurdles the threshold requirement that the peer review actions be taken without malice, in good faith or reasonably, in order to invoke the immunity….” Smith v. Our Lady of the Lake Hosp., Inc., 639 So. 2d 730, 742 (La. 1994).

The second type of protection is the work product privilege which prevents information associated with the peer review process from discovery. Its premise is the belief that doctors are loath to candidly discuss a colleague’s shortcomings if their statements later could be discovered in judicial proceedings. The Alabama Supreme Court recently explained this rationale: “[T]he purpose of a peer review statute is to encourage full candor in peer review proceedings and that … policy is advanced only if all documents considered by the committee or board during the peer review or credentialing process are protected.” Ex parte Krothapalli, 762 So. 2d 836, 839 (Ala. 2000).


Like the immunity statutes, the discovery privileges are not absolute. Many of the laws state explicitly that documents are not privileged just because they are part of a review process. If a document is otherwise discoverable it does not acquire protection because a review committee has utilized it. “The legislative history surrounding the statute further indicates that the privilege applies to the peer review committee’s self-generated analysis, but not to the underlying facts that provide the basis for that analysis when such facts have been collected by an independent source.” Babcock v. Bridgeport Hosp., 742 A. 2d 322, 343 (Conn. 1999). A plaintiff who can get information from its original source is not kept from doing so because a review committee has used the information. “[A] fact witness may be required to testify as to what he or she saw or heard during a surgery, but could not be required to testify as to what was told to the peer review committee.” Monroe Reg’l Med. Ctr., Inc. v. Rountree, 721 So. 2d 1220, 1223 (Fla. Dist. Ct. App. 1998). The malice exception, which applies to statutes which grant immunity from liability, usually does not apply to the discovery privilege.
The third protection, the confidentiality requirement, creates an affirmative duty incumbent on committee members to keep information involving peer review to themselves. Miscellaneous exceptions to peer review protection may occur regarding: 1) the fact that peer review took place, 2) whether licensing boards have access to peer review records, 3) waiver through release of peer review business to entities in an integrated health care delivery system (for example, a part of a centralized credentialing program), 4) applicability to criminal proceedings, and 5) court review and use of a balancing test. Elise Dunitz Brennan, Esq., Chair, Credentialing and Peer Review Substantive Law Committee American Health Lawyers Association, Introduction, 12-15, 50-State Survey on Peer Review Privilege, Spring, 1998. Note that Congress extends its own kind of protection (immunity) to medical review participants and to their work product through the Health Care Quality Improvement Act of 1986 (“HCQIA”). The Act attempted to address national components of the health care quality assurance problem. Charity Scott, Medical Peer Review, Antitrust, and the Effect of Statutory Reform, 50 Md. L. Rev. 316, 325 (1991). Local committees evaluating incompetent doctors and rescinding staff privileges are exempted from reporting their conclusions because of state confidentiality statutes. A doctor whose privileges were revoked at one hospital could relocate without having the previous incompetence discovered. Hospitals at times were willing to accept these doctors’ voluntary resignations in exchange for silence about the events which led to the resignation. Ironically and unfortunately, the system initiated to promote quality care was sabotaging it by making possible the migration of bad doctors.

To counter this problem HCQIA set up a national reporting system for medical review decisions. When a review board’s decision negatively affects a doctor’s privileges for more than 30 days, the review board must notify the National Practitioner Data Bank (“NPDB”). 42 U.S.C. Sects. 11131-34 (1994). The NPDB also must be notified of all medical malpractice claim settlements. The reporting requirements are mandatory, but Congress included conditional immunity and privilege provisions which apply when four standards are met: 1) Review must be conducted in the reasonable belief that it furthers quality health care; 2) Action commences only after a reasonable effort to get the facts; 3) Review must provide adequate notice and hearing procedures to the doctor; and 4) Review must be made in the reasonable belief that the facts warranted it. 42 U.S.C. Sect. 11112(a)(1)-(4). In contrast to many state statutes, HCQIA does not afford the protection of a confidentiality requirement for the review committees’ records and proceedings.

The Peer Review Improvement Act of 1982, 42 U.S.C. 1320(c) et seq., exists to promote quality health care for Medicare patients. The Act requires the U. S. Department of Health and Human Services to contract with private organizations to evaluate the work of doctors who minister to Medicare patients. Then a federally created review group amasses documents about the doctors in question. The statute prevents disclosure of the information, but is narrowly drawn and interpreted to apply only to federally defined peer review groups. Zulima V. Farber, David M. Wissert and Jessica L. Herbster, Caught Between a Rock and a Hard Place – Improving Health Care vs. Increased Liability Exposure, N.J.L.J., Dec. 17, 2001.
Peer review protections, as stated earlier, do not prevent a plaintiff from bringing a cause of action with reasonable access to evidence: peer review statutes protect the work product of the review, not the substantive evidence, which plaintiffs may get from an original source. Two categories of plaintiffs in cases involving peer review exist: the doctor-plaintiff and the patient-plaintiff. The doctor-plaintiff seeks recovery against a medical peer review individual, committee or hospital, regarding due process, antitrust, defamation or tortuous interference with a business relationship. Pauline Martin Rosen, Medical Staff Peer Review: Qualifying the Qualified Privilege Provision, 27 Loy. L.A.L. Rev. 357, 367 (1993). The majority of jurisdictions do not protect peer review documents when a doctor seeks them to contest the denial of staff privileges. Elise Dunitz Brennan, supra, at 9-10. The Illinois statute, for example, states: “Any hospital proceeding to decide upon a physician’s staff privileges, or in any judicial review thereof, the claim of confidentiality shall not be invoked to deny such physician access to or use of data upon which such decision is based.” Ill. Comp. Stat. 735 Sect. 5-8-2101 (West 1993). A patient-plaintiff usually brings an action against a doctor for malpractice or against a hospital, charging corporate liability.

III. Self-critical Analysis Privilege in New Jersey

The following cases trace the evolution, application, and repudiation of the self-critical analysis privilege in New Jersey.


Four consolidated cases presented “the issue of an asserted qualified privilege for a corporate internal evaluative report. The basic issue is whether self-evaluation of corporate actions should be encouraged and protected from discovery in litigated matters, as a matter of public policy. The issue is novel in this jurisdiction in that it has not been the subject of a reported decision in New Jersey. However, several federal courts have recognized this nascent privilege.” Wylie, supra, at 334-5.

Plaintiff George Wylie, an employee of defendant Public Service Electric and Gas Company (PSE&G) was injured in an automobile accident. During depositions, defendant City of Elizabeth learned of several PSE&G documents and sought production of one titled “Elizabeth Electric Transmission & Distribution Committee Investigation – Automobile Accident” (the “Committee Investigation Report”). PSE&G refused to produce the Committee Investigation Report and asserted three privileges all of which defendant City of Elizabeth resisted. The parties agreed to have the court examine, in camera, the document and rule on the validity of the asserted privileges. The contested Committee Investigation Report had been prepared at the conclusion of an internal PSE&G investigation of the accident. The purpose of the investigation was to decide if PSE&G should change its procedures to prevent employee injuries in the future. The investigation was not conducted in anticipation of litigation nor related to an investigation done by PSE&G’s Claims or Legal Departments.
The court found “formidable and persuasive” PSE&G’s assertion that a public policy promoting self-critical analysis bestowed a qualified privilege upon the Committee Investigation Report. “The doctrine of ‘privileges’ is dynamic in nature not static. A privilege develops when the ‘public need for disclosure’ is outweighed by the ‘public need for confidentiality’ of information.” Wylie, supra at 337.

The court noted that “Several federal courts have acknowledged the existence of a qualified privilege of self-examination or self-critical analysis. [Citations omitted] The privilege prevents disclosure of confidential critical, evaluative and/or deliberative material whenever the public interest in confidentiality outweighs an individual’s need for full discovery. [Citations omitted] Factual information, however, should not be protected by the qualified privilege.” Wylie, supra, at 337-8. “District courts have reached inconsistent results in applying the federal common law as it relates to self-evaluative materials. In Leon v. County of San Diego, 202 F.R.D. 631 (S.D. Cal. 2001), the court held that there is no self-critical analysis privilege under federal common law. Further, in Weekoty v. U.S., 30 F. Supp. 2d 1343 (D.N.M. 1998), the court recognized the privilege of self-critical analysis in the medical peer review context, shielding such records from disclosure.” Zulima V. Farber, supra, at 4.

The court concluded that “confidentiality and the ‘public need for confidentiality’ are the sine qua non of effective internal self-critical analysis since such confidentiality will encourage open and frank criticism. … Accordingly, public policy demands that the ‘evaluative’ portions of the Committee Investigation Report be protected by the privilege of self-critical analysis. Nevertheless, factual information contained within the report must be disclosed.” Wylie, supra, at 339-340.


“This case concerns the standard that shall govern the disclosure, for use in civil proceedings, of confidential investigative records relating to a licensing board’s inquiry into a professional’s acts.” McClain, supra, at 351. The case arose from a claim of medical malpractice alleged to have happened to Elnora L. Faniel and to have caused her death while she was a patient in defendant College Hospital. Plaintiff McClain brought the action for wrongful death and sought documents resulting from the State Board of Medical Examiners (Board)’s investigation of Faniel’s and other patients’ deaths. Following an in camera inspection, the trial court ruled that the Board’s documents should be released to plaintiff. The Appellate Division affirmed in an unreported opinion.

The Supreme Court stated that “Recently courts have recognized a qualified privilege of self-examination or self-critical analysis as furthering the public interest,” citing Wylie v. Mills, 195 N.J. Super. 332, 337 (Law Div. 1984). The Court continued, “Although we deal here not with peer review but with a licensing board’s investigation, the concerns are similar. … An applicant seeking the opinions, conclusions, sources of information and investigative techniques of the agency should demonstrate a need more
compelling than the agency’s recognized interest in confidentiality.” The Court held “that the standard is a showing of particularized need that outweighs the public interest in confidentiality of the investigative proceedings, taking into account (1) the extent to which the information may be available from other sources, (2) the degree of harm that the litigant will suffer from its unavailability, and (3) the possible prejudice to the agency’s investigation. We find that, with one exception, the record before us requires a remand to evaluate the character of the materials in order to apply the standard we adopt.” McClain, supra, at 351, 359.


This case called upon the Court “to balance the citizen’s right of access to official information with the government’s need for confidentiality in the conduct of law enforcement investigations.” Loigman, supra, at 101. The plaintiff sought a copy of the Attorney General’s audit of the Monmouth County Prosecutor’s confidential account. The Attorney General refused to turn over the audit on the ground that it was a confidential internal investigation, privileged from disclosure. The complicated procedural history, unrelated to the self-critical privilege analysis is omitted here.

The Court discussed McClain v. College Hosp., 99 N.J. 346 (1985) in which it:

“recently reviewed the citizen’s common-law right to gain access to public records. … We described the balancing process that courts must make as being ‘concretely focused upon the relative interests of the parties in relation to these specific materials.’ …We also described the process as flexible and adaptable to different circumstances and ‘sensitive to the fact that the requirements of confidentiality are greater in some situations than in others. … As the considerations justifying confidentiality become less relevant, a party asserting a need for the materials will have a lesser burden in showing justification. If the reasons for maintaining confidentiality do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a compelling need.’” [Page citations omitted]

Loigman, supra, at 103.

In evaluating the need for confidentiality of the records, the Loigman court stated that “A final source of guidance is the nascent privilege of self-examination or self-critical analysis. … The growing acceptance of this privilege among courts is a recognition that the public interest is furthered by the promotion of internal efforts to analyze problems and correct deficiencies. The Court cited Wylie v. Mills, 195 N.J. Super. 332, 337-38 (Law Div. 1984) (privilege prevents disclosure of confidential self-evaluative materials when public interest in promoting such materials outweighs individual’s need for disclosure).” Loigman, supra, at 107.

In this medical malpractice action, plaintiff sought a hospital’s Peer Review Committee file to substantiate her allegation that the defendant physicians failed to follow accepted medical standards during her surgery. The court stated that “Neither the New Jersey statutes nor the N.J.A.C. creates a Peer Review Privilege as to the discoverability of the Peer Review Committee file. There is a statutory [N.J.S.A. 2A:84A-22.8] privilege created for a hospital’s Utilization Review Committee. [A specific committee required in order to qualify under the Social Security Act] That statutory privilege was not extended to include the Peer Review Committee.” Next the court quoted N.J.S. 2A:84-22.10 which protects a hospital peer review committee members from liability in damages for their actions taken within the scope of committee functions. “The Legislature, therefore, has sought to provide a protection or immunity to such members of Peer Review committees for the actions, recommendations, or statements that they make in the process. The Legislature has not, however, provided for a privilege regarding the information contained within the Peer Review process. The question remains whether there is a common law privilege applicable to the case at bar.”

Declaring that “Public policy dictates that the Court must in certain areas recognize the privilege of self-critical analysis,” the court discussed Wylie v. Mills, 195 N.J. Super. 332 (Law Div. 1984). Next the court stated “The concept of self-critical analysis as applied to the health care area was recognized by the New Jersey Supreme Court in McClain v. College Hospital, 99 N.J. 346 (1985) and examined that case at length.

Granting that the Peer Review process is not solely motivated by altruism, the court concluded however, that “the purpose of the process is self-evaluation and health care improvement. This Court must, therefore, characterize the Peer Review process as a self-critical process. … The opinions, criticisms, and evaluations contained within the Peer Review file come within the self-evaluation privilege and are absolutely protected.” The court ordered defense counsel to submit the entire file to the Court for in camera inspection, following specified highlighting and separating of portions of the file. Bundy, supra, at 570-572.


In this medical malpractice action, plaintiff sought discovery of defendant-physician’s statements to the hospital’s peer review committee (“Quality Assessment Committee”). The court stated that it “must examine whether this information falls within the self-evaluation privilege as discussed in Wylie v. Mills, 195 N.J. Super. 332 (Law Div. 1984).” The court next considered “The standard used for disclosure of confidential investigative records relating to a licensing board’s inquiry into a professional’s acts in the health care field [as] set forth in McClain v. College Hosp., 99 N.J. 3465 (1985).” The court concluded its analysis by examining “The standard set forth in McClain v. College Hosp., supra [as] applied to a hospital’s Peer Review Committee file in Bundy v. Sinopoli, 243 N.J. Super. 563 (Law Div. 1990).” … This court now adopts the holding set forth in Bundy and after applying the McClain
balancing test to the documents submitted following the court’s in camera review, holds that plaintiffs have not made a strong showing of particularized need that outweighs the public interest in the confidentiality of the Quality Assessment Committee.” Estate of Hussain, supra, at 210-212.


A female employee of the New Jersey Turnpike Authority sued her employer and two supervisors for sexual harassment under the Law Against Discrimination (“LAD”). The general question for the Court was “the nature and extent of the pretrial discovery that an employee claiming to have been sexually harassed is entitled to obtain for the purpose of establishing the employer’s liability…. The more specific issues … relate to whether various documents and records … may be made available through discovery and the extent to which concerns based on confidentiality and privilege may preclude or limit the discovery of such materials.” Payton, supra, at 532.

Plaintiff Payton sought discovery of specified materials relating to the investigation of her case and to defendant’s commissioners’ executive session meeting. The Law Division, without looking at any of the documents in camera, granted defendant’s motion for a protective order in its entirety. The court relied on the LAD’s public policy of confidentiality, and to a lesser extent, on the attorney-client privilege “and the so-called privilege of self-critical analysis.” Payton, supra, at 534. The Appellate Division instructed the trial court to inspect the documents in camera and to redact appropriately to accommodate confidentiality and privilege concerns.

After concluding that the materials sought by plaintiff were relevant to a claim under the LAD and “hence generally discoverable,” the Court began a lengthy analysis of privilege.

“Although relevance creates a presumption of discoverability, that presumption can be overcome by demonstrating the applicability of an evidentiary privilege. R. 4:10-2(a). A privilege reflects a societal judgment that the need for confidentiality outweighs the need for disclosure. … Wylie v. Mills, 195 N.J. Super. 332, 337 (Law Div. 1984). Despite the existence of privileges, however, our desire to attain truth through the adversarial process has led to a disfavoring of such a categorical approach to concerns about confidentiality, [citations omitted] in favor of case-by-case balancing. See Loigman v. Kimmelman, 102 N.J. 98, 103-104 (1986).

…[W]e are confronted with two competing public interests, as opposed to a private interest in disclosure that is outweighed by a strong public interest in confidentiality. …[W]e must determine which method of achieving the unanimously supported goal [an end to sexual harassment] will best achieve that goal.
We conclude that the appropriate balance is not to create a blanket privilege arising from legitimate general concerns for confidentiality, but rather to recognize a conditional privilege that applies selectively depending on the nature of the materials involved.

... We therefore conclude that, regarding confidentiality, the balance weighs in favor of disclosure with appropriate procedures to insure justified confidentiality in light of plaintiff’s paramount interest in obtaining relevant materials.”  Payton, supra, at 539, 541-42, 544.

The Court then addressed the “so-called privilege of self-critical analysis” saying that both the trial court which relied on it in part in granting the protective order, and the Appellate Division which rejected its applicability,

“assumed the existence of this broad privilege in New Jersey despite the fact that this Court never actually adopted it, only having referred to it without expressing an opinion as to its validity.  Loigman v. Kimmelman, 102 N.J. 98, 107 (1986); McClain v. College Hosp., 99 N.J. 346, 359 (1985).

The privilege of self-critical analysis exempts from disclosure deliberative and evaluative components of an organization’s confidential materials. ...

Several lower courts in this State have adopted the privilege and granted seemingly absolute protection to evaluative and deliberative portions of organizations’ files.  ... Bundy v. Sinopoli, 243 N.J. Super. 563 (Law Div. 1990); Wylie, supra, 195 N.J. Super. 332.  Others have accommodated the confidentiality concerns arising from potential disclosure of deliberative and evaluative processes by employing a balancing test instead of a more rigid privilege.  ... Hussain v. Gardner, 264 N.J. Super. 208, 210-12.

We decline to adopt the privilege of self-critical analysis as a full privilege, either qualified or absolute, and disavow the statements in those lower court decisions that have accorded materials covered by the supposed privilege near-absolute protection from disclosure. Instead, we perceive concerns arising from the disclosure of evaluative and deliberative materials to be amply accommodated by the ‘exquisite weighing process,’ [citations omitted] that our courts regularly undertake when determining whether to order disclosure of sensitive documents in a variety of contexts.  ... In fact, we view concerns about revelation of self-criticism to be a subset of the more generalized confidentiality concerns that we already have addressed and that we have refused to protect with an absolute or qualified privilege.

Self-critical analysis, ... is not qualitatively different from other confidential information, and thus does not require the protection of a broad privilege as opposed to a balancing of interests.  ... Given the presumption against the creation of new privileges and the potential
breadth of privileging self-critical analysis, we do not join those courts that have adopted the privilege.

Payton, supra, at 544-5446.


The Court had to determine the nature and extent of pretrial discovery allowed to creditors of an insolvent insurer. The Commissioner of Insurance acting as liquidator characterized the requested documents as deliberative in nature and claimed that confidentiality and privilege should limit discovery. “The deliberative process privilege is a doctrine that permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” In re Liq., supra, at 83. Hospital peer review committees are not governmental decision-issuing bodies, but the Court’s opinion revisits earlier cases which dealt with self-critical analysis and is included for that reason.

The Commissioner of Insurance claimed that McClain v. College Hosp., 99 N.J. 353 (1985) declared the existence of the deliberative process privilege in New Jersey. The Court agreed that McClain identified considerations of the deliberative process privilege as found in federal statutory and case law, but reiterated that McClain also cautioned against “wooden” application of that concept of confidentiality. Merely calling a document deliberative is not dispositive.

The Court stated: “We are satisfied that the intent of McClain was to establish a qualified privilege for governmental deliberative process materials because the government, like its citizens,” must have accessible but protected means of communicating. In re Liq., supra, at 88. The Court declined to invoke the deliberative process privilege and referred to earlier reasoning: “As we have held, when new privileges are recognized, it is only in a setting in which purely private interest in disclosure is outweighed by a strong purely public interest in confidentiality. Payton v. New Jersey Turnpike Authority. 148 N.J. 524, 541 (1997).” In re Liq., supra, at 91.


Plaintiff Frank Reyes claimed medical malpractice and wrongful death, alleging that defendant Meadowlands Hospital did not follow accepted standards of care in failing to correctly diagnose and treat decedent Debbie Reyes. Meadowlands Hospital moved for a protective order to prevent discovery of certain information it gathered through a process it called “self-critical analysis.”

The court first stated that “The term ‘privilege’ refers to those statutorily recognized in N.J.R.E. 501 through 517. … In Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997), the Supreme Court specifically declined to recognize or otherwise create a privilege of self-critical analysis.” Reyes, supra, at 231. Next, the

“It is noteworthy that the McClain court was confronted with balancing an assertion of confidentiality made by a licensing board whose statutory function includes investigations of events affecting the delivery of medical services to the public, against a claim of access to public records made by a citizen/litigant. … By contrast, the issue presented by this motion, although couched in language promoting the advancement of medical knowledge and the improvement of medical services, also serves the litigation interests of the defendants by depriving plaintiff from reviewing what would otherwise be clearly discoverable materials.”

*Reyes*, supra, at 232.


The court denied defendants’ application for a protective order, stating: “To the extent that *Bundy v. Sinopoli*, supra, and *Estate of Hussain v. Gardner*, supra, are inconsistent with the legal conclusions reached herein, this court declines to follow their holdings. This court further finds the holding in *McClain v. College Hospital*, supra, to be distinguishable to the facts and legal issues raised in this case. This court holds that the Sentinel Event Policy invoked by defendant Meadowlands Hospital does not create a self-critical analysis privilege…. *Reyes*, supra, at 236.


Plaintiff Gilbert Christy, injured in a motor vehicle accident and first treated by defendant physicians at defendant Fuld Medical Center, brought a medical malpractice suit against them. Because of missing X-rays and alleged factual discrepancies in defendant physicians’ deposition testimony, plaintiff Christy sought defendant Fuld’s “confidential” peer review committee report. The Law Division ordered production without giving its reasoning. The Appellate court reviewed, in camera, the entire peer review report and described it as follows: the first paragraph is completely factual material, probably taken from the hospital report; the remaining two paragraphs include factual findings and opinions which are deliberative; the sentence comprising the entire fourth line of the last paragraph contains information which could lead to discovery of pertinent information.
Plaintiff Christy relied heavily on Payton V. New Jersey Turnpike Authority, 148 N.J. 524 (1997) to support his position that hospitals should not be allowed to maintain confidential peer review evaluations. The court revisited that case, stating that “the Payton Court fashioned a ‘conditional privilege’ rather than a ‘blanket privilege,’ which on application, permits the trial court to supervise discovery and protect confidentiality by procedures, short of suppression, which ‘may include redaction, issuance of confidentiality or gag orders, and sealing of portions of the record,’ when a competing public interest favors disclosure. Payton, supra, at 542.” Christy, supra, at 540.

The court also reiterated Payton’s discussion of self-critical analysis in a situation of competing public interests: “We decline to adopt the privilege of self-critical analysis as a full privilege, either qualified or absolute….. Instead, we perceive concerns arising from the disclosure of evaluative and deliberative materials to be amply accommodated by the ‘exquisite weighing process’ that our courts regularly undertake when determining whether to order disclosure of sensitive documents in a variety of contexts. Payton, supra, at 545.” The court noted that “here, unlike Payton, we are required to balance the private interest of a patient against the public interest of a hospital.” In this situation, the plaintiff’s desire for disclosure lacks sufficient important public policy to outweigh confidentiality concerns. However, patients certainly have a right to learn what treatments they received while hospitalized and to locate critical information unexplainably missing from an adversary’s possession. Christy, supra, at 540-41.

In resisting production of the peer review report, defendant Fuld relied partially on McClain v. College Hospital, 99 N.J. 346 (1985). McClain, in remanding State Board of Medical Examiners’ documents “expected that the trial court would determine whether any of the contents … were ‘strictly factual,’ in which event it should ‘conclude that such information’ would be reasonably available to the plaintiff, excising matters of opinion or conjecture on the part of the agency members.” McClain, supra, at 363.” Christy, supra, at 542.

The court rejected defendant Fuld’s argument that factual materials should be confidential as contrary to the reasoning of both McClain and Payton, mentioning that “the availability of relevant facts from multiple sources has never in and of itself prevented discovery. Oftentimes the comparison of different sources reveals inconsistencies that aid in the search for truth. This is especially true here, where plaintiff asserts discrepancies in the factual deposition testimony of various doctors.” Christy, supra, at 542.

The court reasoned that “both Payton and McClain focus on the public interest concerns associated with self-critical analysis arising from the disclosure of ‘evaluative and deliberative materials’ as opposed to disclosure of purely factual material. … [F]actual material must be relied upon in self-critical analysis to support deliberative factual findings, conclusions, and opinions. …The purely factual material in the first paragraph of Fuld’s report is discoverable.” The court also held that the sentence which might lead to discovery of materials critical to plaintiff’s case, should be disclosed despite its deliberative nature. The court refused to allow disclosure of the balance of the
report which it described as “opinions, analysis, and findings of fact, stating that it qualified as “evaluative and deliberative materials consisting of 1) opinions obtainable from medical experts and 2) factual findings solely within the jury’s province. Christy, supra, at 543-545.