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Discoverability of Healthcare Provider Policies and Incident Reports

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ESSAY

DISCOVERY DIVIDE: VIRGINIA CODE SECTION 8.01-581'S QUALITY ASSURANCE PRIVILEGE AND ITS PROTECTION OF HEALTHCARE PROVIDER POLICIES AND INCIDENT REPORTS

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I. INTRODUCTION

Undoubtedly, the greatest controversy within the medical malpractice litigation community is the limit placed on damage awards. After numerous challenges, the Supreme Court of Virginia ostensibly put the controversy to rest in *Pulliam v. Coastal Emergency Services.*[1] The *Pulliam* court found that Virginia Code section 8.01-581.15,[2] which established the damage cap, was constitutional.[3] Such a litigious community, however, could not be

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1. 257 Va. 1, 509 S.E.2d 307 (1999).
2. VA. CODE ANN. § 8.01-581.15 (Cum. Supp. 2004).
3. *Pulliam*, 257 Va. at 7, 509 S.E.2d at 310.

without controversy for long. Enacted concurrently with the medical malpractice damage cap, Virginia Code section 8.01-581.17[4]—a sister statute—threatens to divide the medical malpractice community anew. At the center of the storm is the applicability of the quality assurance privilege to healthcare provider policies and incident reports.[5]

A gaping chasm has developed between the circuit courts (and occasionally within the same circuit court), centering on a determination of whether the statute protects healthcare providers' policies and incident reports from production in discovery. The controversy's nexus is found in the language of the statute itself, which is seemingly contradictory, creating an environment in which courts facing nearly identical issues reach disparate conclusions.[6]

Of the twenty published opinions of Virginia circuit courts which examine healthcare provider policies, there is an even split among the circuit courts—ten found them privileged and ten found them discoverable.[7] Of the eighteen published opinions which considered incident reports, seven ruled the documents privileged while eleven ruled them discoverable.[8] Despite the discrepancy in treatment by the circuit courts, the Supreme Court of Virginia has offered little interpretative guidance, and the Virginia General Assembly has approved only minimal substantive revision of the statute. As noted in *Saunders v. Gottfried*:[9]

> No appellate decisions address the scope of the privilege created by this section. The circuit courts have split between two distinct lines of interpretation. The first extends the privilege only to communications which contain some deliberative content or opinion. Purely factual reports are not deemed a "communication." The second broader

4. VA. CODE ANN. § 8.01-581.17 (Cum. Supp. 2004).

5. *See* Messerley v. Avante Group, Inc., 42 Va. Cir. 26, 26 (Cir. Ct. 1996) (Rockingham County); *see also* VA. CODE ANN. § 8.01-581.17 (Cum. Supp. 2004).

6. *Compare* Head v. INOVA Health Care Servs., 55 Va. Cir. 43 (Cir. Ct. 2001) (Fairfax County), *with* Saunders v. Gottfried, 61 Va. Cir. 641 (Cir. Ct. 2002) (Chesterfield County).

7. *See infra* note 37.

8. *See infra* note 90. Of the eleven published opinions finding incident reports discoverable, three were handed down by the Honorable John J. McGrath of the Rockingham County Circuit Court. Consolidating these opinions into one creates a seven-to-nine circuit split.

9. 61 Va. Cir. 641 (Cir. Ct. 2002) (Chesterfield County).

> approach extends the privilege to any report generated for an appropriate review committee regardless of its factual content.[10]

This essay will examine the discoverability of policies and incident reports under Virginia Code sections 8.01-581.17(B) and (C), respectively.[11] The logic determining the application of the privilege is discernible.[12] This article will consider policies and incident reports separately.

II. AN OVERVIEW OF VIRGINIA CODE SECTION 8.01-581.17 AND ITS PURPOSE

Virginia Code section 8.01-581.17 was one of several new laws adopted in 1976 comprising the Medical Malpractice Act ("Act").[13] The Act, which included Virginia Code section 8-654.10 (the predecessor to Virginia Code section 8.01-581.17), was created to combat practitioners' increasing difficulty in obtaining affordable medical malpractice insurance.

> Whereas, the difficulty, cost and potential unavailability of such insurance has caused health care providers to cease providing services or to retire prematurely and has become a substantial impairment to health care providers entering into practice in the Commonwealth and reduces or will tend to reduce the number of young people interested in or willing to enter health care careers; and
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> Whereas, these factors constitute a significant problem adversely affecting the public health, safety and welfare which necessitates the imposition of a limitation on the liability of health care providers in tort actions commonly referred to as medical malpractice cases . . . .[14]

Since its enactment, the General Assembly has not revisited the purpose of Virginia Code section 8.01-581.17. The strongest recent indication of the statute's goals was enunciated by the Su-

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10. *Id.* at 641–42.

11. In order to prove most beneficial to Virginia practitioners, only published opinions are considered. There is, however, a wealth of unpublished letter opinions on the topic.

12. On occasion, courts have ruled policies discoverable and incident reports privileged. *See Saunders*, 61 Va. Cir. at 642; Houchens v. Univ. of Va., 23 Va. Cir. 202, 204 (Cir. Ct. 1991) (Charlottesville City); Hedgepeth v. Jesudian, 15 Va. Cir. 352, 355–56 (Cir. Ct. 1989) (Richmond City). Another court found policies to be privileged while finding incident reports were discoverable. *See* Hurdle v. Oceana Urgent Care, 49 Va. Cir. 328, 329 (Cir. Ct. 1999) (Norfolk City).

13. VA. CODE ANN. §§ 8.01-581.1 to -581.20 (Repl. Vol. 2000 & Cum. Supp. 2004).

14. Act of Apr. 9, 1976, ch. 611, 1976 Va. Acts 784.

preme Court of Virginia in *HCA Health Services v. Levin*,[15] when the court stated,

> The obvious legislative intent is to promote open and frank discussion during the peer review process among health care providers in furtherance of the overall goal of improvement of the health care system. If peer review information were not confidential, there would be little incentive to participate in the process.[16]

Minor adjustments were made to the statute in 1995, 1997, and 2001 in order to add entities to those included by reference in Virginia Code section 8.01-581.16.[17] The General Assembly's enlargement of covered entities did not end the disagreement over the statute's application. There existed little confusion over who was covered; the problem lay in what was covered.[18]

Despite a 2002 statutory rearrangement and additions to the increasing list of covered entities, the General Assembly did not make changes addressing the discoverability of healthcare policies and incident reports until 2004.[19] The amendment exempted from the privilege oral communications made to peer review committees, accreditation entities, professional associations of healthcare providers, and licensees of managed care health insurance plans within twenty-four hours of the incident.[20] The

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15. 260 Va. 215, 530 S.E.2d 417 (2000).

16. *Id.* at 221, 530 S.E.2d at 420.

17. VA. CODE ANN. § 8.01-581.16 (Cum. Supp. 2004). This statute is read in conjunction with Virginia Code section 8.01-581.17 because the groups listed in Virginia Code section 8.01-581.16 are included by reference. Virginia Code section 8.01-581.16 provides civil immunity for members of a

> committee, board, group, commission or other entity [that] has been established pursuant to federal or state law or regulation, or pursuant to Joint Commission on Accreditation of Healthcare Organizations requirements, or established and duly constituted by one or more public or licensed private hospitals, community services boards, or behavioral health authorities, or with a governmental agency.

Id.

18. A few courts have considered whether the parent company of the healthcare provider is afforded vicarious immunity through the quality assurance privilege. These courts have soundly rejected the concept. *See, e.g.*, Eppard v. Kelly, 62 Va. Cir. 57, 63 (Cir. Ct. 2003) (Charlottesville City); Levin v. WJLA-TV, 51 Va. Cir. 57, 61 (Cir. Ct. 1999) (Fairfax County); Messerley v. Avante Group, Inc., 42 Va. Cir. 26, 27 (Cir. Ct. 1996) (Rockingham County).

19. Act of Mar. 31, 2004, ch. 250, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 8.01-581.17 (Cum. Supp. 2004)); *see also* Act of Apr. 6, 2002, ch. 675, 2002 Va. Acts 973 (codified as amended at VA. CODE ANN. § 8.01-581.17 (Cum. Supp. 2002)).

20. Act of Mar. 31, 2004, ch. 250, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 8.01-581.17(B) (Cum. Supp. 2004)).

amendment's scope is very narrow—covering oral communications and lasting one day—therefore, its impact will likely be minimal. The overall lack of modification to the statute makes even the oldest cases examined in this survey relevant to a current understanding of Virginia Code section 8.01-581.17.

In the presence of an ambiguous statute and the absence of binding precedent, differing opinions abound as circuit courts weigh often equally persuasive arguments justifying various positions. As Judge Michael P. McWeeny concluded in *Riordan v. Fairfax Hospital Systems, Inc.*,[21] "[U]ntil the conflict can be resolved by the General Assembly or the Virginia Supreme Court, this Court will view the problem with an eye toward Virginia precedent . . . rather than the trend in other jurisdictions."[22]

III. IMPLEMENTATION OF VIRGINIA CODE SECTION 8.01-581.17

While questions abound regarding when application of the quality assurance privilege is warranted, the mechanics of implementation are not heavily disputed. According to Rule 4:1(b)(1) of the Rules of the Supreme Court of Virginia, the general scope of discovery extends to any matter which is "reasonably calculated to lead to the discovery of admissible evidence."[23] Limiting free-for-all fishing expeditions, the discovery trolling net is subject to certain privileges. For instance, only that which is reasonably calculated to reveal admissible evidence and is "not privileged or otherwise limited by the Court" is discoverable.[24] One such privilege is the quality assurance privilege. Even it is not absolute; Virginia Code section 8.01-581.17 contains an exception which allows for the discovery of documents when the court finds good cause arising from extraordinary circumstances.[25]

The burden of establishing applicability of the privilege is on the party seeking to prevent the discovery of the evidence, not the

21. 28 Va. Cir. 560 (Cir. Ct. 1988) (Fairfax County).

22. *Id.* at 561.

23. VA. SUP. CT. R. 4:1(b)(1) (Repl. Vol. 2004).

24. Peterson v. Fairfax Hosp. Sys., Inc., 21 Va. Cir. 70, 71 (Cir. Ct. 1990) (Fairfax County).

25. VA. CODE ANN. § 8.01-581.17(B)(e) (Cum. Supp. 2004); *see also* discussion *infra* Part VI.

party attempting to procure the documents.[26] "The party asserting the protection of a privilege has the burden of establishing both the existence and applicability of the privilege. Because evidentiary principles operate to exclude relevant evidence and block the fact-finding function, they should be narrowly construed."[27]

Once the court finds grounds to apply the quality assurance privilege, it may be possible to waive the privilege. Although there are no published opinions finding that the privilege was surrendered, the practitioner may find worthwhile fodder in such an assertion. In *Stevens v. Lemmie*,[28] the court found that *if* waiver was possible, the privilege can only be waived as the work product doctrine is waived—by disclosure to an adversary.[29] In *HCA Health Services v. Levin*,[30] the Supreme Court of Virginia found that the statutory privilege does not belong to a plaintiff physician who is the subject of peer review and, therefore, the privilege cannot be waived by him.[31] While the court did not specifically address the merits of the waiver argument, the opinion suggests that the actual holder of the privilege would be allowed to waive the privilege.[32]

IV. DISCOVERABILITY OF HEALTHCARE POLICIES UNDER VIRGINIA CODE SECTION 8.01-581.17(B)

The first category of documents to which the quality assurance privilege is asserted is healthcare policies. Although these written documents are variously termed "procedures," "protocols," and "policy manuals," they collectively represent a consensus among medical personnel and administrators to be treated as guidelines of appropriate conduct for employees and independent contractors.[33] Policies are typically the product of risk management and peer review committees.[34] "It is the searching self-critical analysis

26. Eppard v. Kelly, 62 Va. Cir. 57, 62 (Cir. Ct. 2003) (Charlottesville City).

27. Levin v. WJLA-TV, 51 Va. Cir. 57, 59 (Cir. Ct. 2003); *see also* Wertenbaker v. Winn, 30 Va. Cir. 327, 329 (Cir. Ct. 1993) (Albemarle County).

28. 40 Va. Cir. 499 (Cir. Ct. 1996) (Petersburg City).

29. *Id.* at 512.

30. 260 Va. 215, 530 S.E.2d 417 (2000).

31. *Id.* at 221, 530 S.E.2d at 420.

32. *See id.*

33. Owens v. Children's Hosp., 45 Va. Cir. 97, 99 (Cir. Ct. 1997) (Norfolk City).

34. *Id.*

by which performance is judged by one's colleagues or superiors that characterizes the peer review. The purpose of such review in the medical setting is to improve the efficiency of medical techniques and procedures in the delivery of health care."[35] Virginia Code section 8.01-581.17(B) is often cited as providing the requisite justification for the policies' privilege.[36]

As noted above, circuit courts are equally divided on whether policies are privileged from discovery.[37]

The determination of policies' discoverability inherently requires a balancing of an individual's immediate need for full disclosure with a less palpable continuing desire to improve patient care for the Commonwealth's citizens at large. This balancing act is at the heart of the debate surrounding the quality assurance privilege. Two contemporaneous circuit court decisions demonstrate the logical appeal behind the two positions.[38] In 1997, Judge Jack B. Coulter found the rights of the injured party prevailed in the balancing test, stating,

> In the final analysis a balancing of interests is the critical test. What are the benefits to be achieved in refusing disclosure against the harm to the plaintiff that might thereby result. The records sought

35. Johnson v. Roanoke Mem'l Hosps., 9 Va. Cir. 196, 198 (Cir. Ct. 1987) (Roanoke City).

36. *Owens*, 45 Va. Cir. at 99.

37. Some circuit courts have held that the policies are privileged from discovery. *See* Head v. INOVA Health Care Servs., 55 Va. Cir. 43, 43 (Cir. Ct. 2001) (Fairfax County); Hurdle v. Oceana Urgent Care, 49 Va. Cir. 328, 328–29 (Cir. Ct. 1999) (Norfolk City); Colston v. Johnston Mem'l Hosp., 49 Va. Cir. 540, 540 (Cir. Ct. 1998) (Washington County); Roller v. Jane, 43 Va. Cir. 321, 322 (Cir. Ct. 1997) (Albemarle County); Mangano v. Kavanaugh, 30 Va. Cir. 66, 68 (Cir. Ct. 1993) (Loudoun County); Dunn v. Smith, 26 Va. Cir. 267, 267 (Cir. Ct. 1992) (Arlington County); Riordan v. Fairfax Hosp. Sys., Inc., 28 Va. Cir. 560, 561 (Cir. Ct. 1988) (Fairfax County); Leslie v. Alexander, 14 Va. Cir. 127, 127 (Cir. Ct. 1988) (Alexandria City); Francis v. McEntee, 10 Va. Cir. 126, 128 (Cir. Ct. 1987) (Henrico County); Taylor v. Richmond Mem'l Hosp., 2 Va. Cir. 224, 225 (Cir. Ct. 1984) (Richmond City). In contrast, other courts have held that the policies are discoverable. *See* Saunders v. Gottfried, 61 Va. Cir. 641, 642 (Cir. Ct. 2002) (Chesterfield County); Day v. Med. Facilities of Am., Inc., 59 Va. Cir. 378, 379 (Cir. Ct. 2002) (Salem City); Bradburn v. Rockingham Mem'l Hosp. of the King's Daughters, Inc., 45 Va. Cir. 356, 363 (Cir. Ct. 1998) (Rockingham County); Owens v. Children's Hosp. of the King's Daughters, Inc., 45 Va. Cir. 97, 100 (Cir. Ct. 1997) (Norfolk City); Messerley v. Avante Group, Inc., 42 Va. Cir. 26, 28 (Cir. Ct. 1996) (Rockingham County); Houchens v. Univ. of Va., 23 Va. Cir. 202, 204 (Cir. Ct. 1991) (Charlottesville City); Curtis v. Fairfax Hosp. Sys., Inc., 21 Va. Cir. 275, 277 (Cir. Ct. 1990) (Fairfax County); Hedgepeth v. Jesudian, 12 Va. Cir. 221, 222 (Cir. Ct. 1988) (Richmond City); Sawyer v. Childress, 12 Va. Cir. 184, 188 (Cir. Ct. 1988) (Norfolk City); Johnson v. Roanoke Mem'l Hosps., 9 Va. Cir. 196, 202 (Cir. Ct. 1987) (Roanoke City).

38. *See Johnson*, 9 Va. Cir. at 196; *Francis*, 10 Va. Cir. at 126.

> are not the pure peer review proceedings that public policy might justify in keeping secret. At issue are mere Job Descriptions and Care Manuals. Disclosing their contents for discovery purposes should not cause much harm to the hospital; it should not, and will not, discourage their continuing and self-serving efforts to improve health care. . . . The present question is will those who stand in the shoes of the alleged victim, seeking recompense for his untimely death, be hindered or helped under the modern liberal scope of pretrial discovery. When the input by one party to an issue in dispute has been silenced by death, natural notions of fair play lean toward opening rather than closing doors that might balance the contest. The potential harm to the plaintiff in refusing the discovery sought outweighs the benefit to the defendant in maintaining their secrecy.[39]

In the same year Judge James E. Kulp's scales tipped toward the rights of the citizens as a whole, noting,

> On the one hand, there is the interest of persons, like plaintiffs, to obtain the fullest disclosure in order to prove their case. On the other hand, there is the interest of the public at large to receive the highest degree of health care possible within the limits of human capabilities. In Virginia, the General Assembly has struck this balance in favor of the public at large. The court has no right or authority to substitute its judgment for that of the legislature.[40]

With their well-reasoned insights early in the debate, *Johnson* and *Francis* greatly influenced later understanding of the nuances of the quality assurance privilege.[41]

A. *Statutory Construction of Virginia Code Section 8.01-581.17(B)*

In addition to determining the balance between full discovery and improved healthcare, the statutory construction of the quality assurance privilege is disputed. Regarding policies, the inquiry centers around the definition of "communications," as found in Virginia Code section 8.01-581.17(B).[42] The problem lies in the statute's declaration that "[t]he proceedings, minutes, records,

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39. *See Johnson*, 9 Va. Cir. at 205–06.

40. *See Francis*, 10 Va. Cir. at 129.

41. Several other courts have expressed their reluctance to rule in this area by judicial fiat. *See* Eppard v. Kelly, 62 Va. Cir. 57 (Cir. Ct. 2003) (Charlottesville City); *Dunn*, 26 Va. Cir. at 267–68.

42. VA. CODE ANN. § 8.01-581.17(B) (Cum. Supp. 2004).

and reports" of certain committees and entities "together with all communications, both oral and written, originating in or provided to such committees or entities are privileged communications . . . ."[43] This statement has been interpreted in two alternative ways: (1) The phrase "proceedings, minutes, records, and reports" acts to define "communications" and therefore the quality assurance privilege extends only to those four items; or (2) The "proceedings, minutes, records, and reports" along with oral and written "communications" provided to the peer review committees are protected. The differing analyses—termed the narrow approach and the broad approach, respectively—were aptly summed up in *Mangano v. Kavanaugh*:[44]

> The differing opinions from the circuit courts regarding § 8.01-581.17 have come in the interpretation of what constitutes "proceedings, minutes, records, and reports" of the covered committees as well as the intent of the legislature in limiting discovery of "all communications, both oral and written, originating in or provided to such committees." Some courts have taken a broad approach to the privilege granted by § 8.01-581.17 and have held that communications such as a hospital's policy and procedure manual are privileged from disclosure, as well as hospital "Incident Reports" regarding a particular patient's claim of injury resulting from medical treatment. On the other hand, some courts have taken a more narrow approach and have held that such communications are not privileged from the discovery process.[45]

The narrow approach, which finds that the policies are discoverable, is often justified by the statutory principle of *ejusdem generis*.[46] This doctrine states that when particular things are listed by name and then followed by a more general word which describes them, the general word is restricted in its meaning to the enumerated, specific words.[47] Take the following example:

> My dog, Cassie, likes to eat bologna, salami, corned beef, and pastrami. Lunch-meats are her favorite treats.

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43. *Id.*

44. 30 Va. Cir. 66 (Cir. Ct. 1993) (Loudoun County).

45. *Id.* at 67.

46. *See, e.g.*, Day v. Med. Facilities of Am., Inc., 59 Va. Cir. 378, 379 (Cir. Ct. 2002) (Salem City); Curtis v. Fairfax Hosp. Sys., Inc., 21 Va. Cir. 275, 278 (Cir. Ct. 1990) (Fairfax County).

47. *See* East Coast Freight Lines v. City of Richmond, 194 Va. 517, 525, 74 S.E.2d 283, 288 (1953) (explaining the *ejusdem generis* principle of statutory interpretation).

Analyzed under the principle of *ejusdem generis*, the general term "lunch-meat" is restricted to "bologna, salami, corned beef, and pastrami." Thus, Cassie's favorite treats are limited to the four enumerated meat by-products. It is assumed that her canine compulsion does not extend to prosciutto and pimento loaf.

In *Day v. Medical Facilities of America, Inc.*,[48] Judge Robert P. Doherty applied the logic of *ejusdem generis* to explain that

> [a]s the Supreme Court of Virginia states in *Gates & Son Co. v. Richmond*, "[t]he rationale of the principle of ejusdem generis, seems to be, that if the legislature had intended the general words to apply, uninfluenced by the preceding particular words and without restriction, it would in the first instance have employed a compendious word to express its purpose." Similarly, if the legislature had intended that all types of communications were to be protected by the privilege provided by § 8.01-581.17, they could have simply stated that "all communications" were privileged, without specifically listing "proceedings, minutes, records, and reports" as examples of privileged documents.[49]

Courts have also opined that "communications" should be narrowly construed in order to assure that the quality assurance privilege is not boundless. For example, in *Curtis v. Fairfax Hospital Systems, Inc.*,[50] the court noted,

> Although the material technically might fall within the broad language of the statute, such an interpretation would provide a limitless privilege. Any ambiguities in the statute must be strictly construed for, as the U.S. Supreme Court has noted, "exceptions 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."[51]

In comparison, the broad approach emphasizes that the statute should be construed in its entirety and the words of the statute should be given their plain meaning. The court in *Mangano,* after considering both approaches, favored the broad approach over the narrow:

> This Court is of the opinion that § 8.01-581.17 should be read broadly and that protection should be accorded all communications originating from or provided to such medical committees. The Court believes this broad approach is consistent with the objective of the

48. 59 Va. Cir. 378 (Cir. Ct. 2002) (Salem City).

49. *Id.* at 379 (quoting Gates & Son Co. v. Richmond, 103 Va. 702, 705, 49 S.E. 965, 966 (1905)).

50. 21 Va. Cir. 275 (Cir. Ct. 1990) (Fairfax County).

51. *Id.* at 277 (quoting United States v. Nixon, 418 U.S. 683, 709–10 (1974)).

> statute which is to encourage health care providers "to adopt policies and procedures which will provide the public with the highest degree of care recognized by the medical and scientific communities at any given time."[52]

Not only should the word "communications" be read in its plain meaning, the intent of the statute should be taken into account in construing "communications."[53]

In determining that the quality assurance privilege extends to defamation actions, the Supreme Court of Virginia noted the following:

> When statutory language is clear and unambiguous, there is no need for construction by the court; the plain meaning of the enactment will be given it. Courts must give effect to legislative intent, which must be gathered from the words used, unless a literal construction would involve a manifest absurdity.[54]

Although it is in dicta, the court noted that the language of Virginia Code section 8.01-581.17 is unambiguous and, therefore, the intent of the legislation should be given its full effect.[55] This intent, according to the court, was to promote free peer review exchanges with the goal of healthcare improvement.[56] This lends support to a liberal interpretation of Virginia Code section 8.01-581.17(B)'s description of "communications."

B. *Admissibility Inquiry: Internal Company Rules Versus Healthcare Provider Policies*

Rule 4:1 of the Rules of the Supreme Court of Virginia states that the information need only be reasonably calculated to lead to admissible evidence in order to be discoverable.[57] When ruling on whether a policy should be produced in discovery, many circuit courts take the inquiry further and consider admissibility. While this may appear to be the incorrect inquiry, considering admissibility is probative of discoverability: if the policies themselves are barred from admission, then how can they possibly lead to admis-

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52. *Mangano*, 30 Va. Cir. at 68 (quoting Francis v. McEntee, 10 Va. Cir. 126, 128 (Cir. Ct. 1987) (Henrico County)).

53. Stevens v. Lemmie, 40 Va. Cir. 499, 507-08 (Cir. Ct. 1996) (Petersburg City).

54. HCA Health Servs. v. Levin, 260 Va. 215, 220, 530 S.E.2d 417, 420 (2000).

55. *Id.*

56. *Id.* at 221, 590 S.E.2d at 420.

57. VA. SUP. CT. R. 4:1 (Repl. Vol. 2004).

sible evidence? The wide discretion afforded to trial courts in making this determination was recognized in *Dunn v. Smith*,[58] where the court ultimately found the policies at issue in the case privileged.[59]

> Even in dicta, Judge Coulter, in *Johnson*, admitted that measuring the likelihood that discovery may lead to admissible evidence is left to the "wide discretion of the trial court[.]" In *Johnson*, the court in its use of that "wide discretion" found that "full and open discovery" was the "order of the day" and allowed the plaintiff "opportunity to explore the full potential of the documents at issue." However, this court is unpersuaded by Judge Coulter's dicta and finds that in the case at bar under Rule 4:1, discovery of the documents sought is not reasonably calculated to lead to discovery of admissible evidence.[60]

The majority of courts that order production of the policies agree that they are, nonetheless, inadmissible at trial.[61] "The private internal rules of a defendant cannot be admitted by or against the defendant to negate or prove negligence. While the manuals are inadmissible, the manuals are still discoverable because the information contained therein is reasonably calculated to lead to the discovery of admissible evidence."[62] At least one circuit court, in *Curtis v. Fairfax Hospital Systems, Inc.*, however, ruled that healthcare policies reflect industry custom and are, therefore, admissible to show the provider's standard of care.[63]

The inadmissibility of healthcare provider policies is premised upon the holdings of *Pullen & McCoy v. Nickens*[64] and *Virginia Railway & Power Co. v. Godsey*.[65] *Pullen* reaffirms the holding in *Godsey*, where the Supreme Court of Virginia ruled that internal,

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58. 26 Va. Cir. 267 (Cir. Ct. 1992) (Arlington County).

59. *Id.*

60. *Id.* at 268 (quoting Johnson v. Roanoke Mem'l Hosps., 9 Va. Cir. 196, 201 (Cir. Ct. 1987) (Roanoke City)); *see also* Hurdle v. Oceana Urgent Care, 49 Va. Cir. 328 (Cir. Ct. 1999) (Norfolk City).

61. *See* Day v. Med. Facilities of Am., Inc., 59 Va. Cir. 378, 379–80 (Cir. Ct. 2002) (Salem City); Bradburn v. Rockingham Mem'l Hosp., 45 Va. Cir. 356, 363 (Cir. Ct. 1998) (Rockingham County); Owens v. Children's Hosp. of the King's Daughters, Inc., 45 Va. Cir. 97, 101 (Cir. Ct. 1997) (Norfolk City); Messerley v. Avante Group, Inc., 42 Va. Cir. 26, 29 (Cir. Ct. 1996) (Rockingham County).

62. *Owens*, 45 Va. Cir. at 101.

63. 21 Va. Cir. 275, 278–79 (Cir. Ct. 1990) (Fairfax County).

64. 226 Va. 342, 351, 310 S.E.2d 452, 457 (1983).

65. 117 Va. 167, 168, 83 S.E. 1072, 1072–73 (1915).

private rules were inadmissible to show the railway company's standard of care.[66] The logic underlying the *Pullen* and *Godsey* decisions is extended to medical negligence cases by analogizing railway company rules to healthcare provider policies. There is a flaw, however, in the comparison. Unlike the typical negligence action examined in *Pullen* and *Godsey*, Virginia Code section 8.01-581.20 requires the standard of care to be shown through expert testimony in medical negligence cases.[67] No such expert testimony is needed for ordinary negligence actions.[68] In *Riordan v. Fairfax Hospital System, Inc.*,[69] the court offers an explanation for the incongruity's ramification:

> Private rules and regulations were held inadmissible to establish the standard of care in *Virginia Railway and Power Co. v. Godsey*. . .and *Pullen & McCoy v. Nickens* . . . . Interestingly, these cases involved the common law duty of reasonable care. It seems that the holding ought to be accorded even greater weight when the legislature has articulated the standard of care which is to govern. The inadmissibility of policy manuals is simply an extension of the time-honored doctrine barring evidence of repair following an accident when offered to prove a prior defect.[70]

The applicability of the *Pullen* and *Godsey* holdings has been questioned; *Curtis v. Fairfax Hospital Systems, Inc.* and *Johnson v. Roanoke Memorial Hospitals* urge that healthcare providers' policies are not private company rules.[71] Instead, these courts argue that policies are widely adopted standards promulgated by the Joint Commission of Accreditation of Health Care Organizations.[72] Because healthcare provider policies are so widely accepted throughout the healthcare industry, these rules should be admitted into evidence to establish the standard of care.[73]

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66. *Id.* For a discussion of whether the plaintiff must be a party to the rules or policies, see *Roller v. Jane*, 43 Va. Cir. 321 (Cir. Ct. 1997) (Albemarle County) and *Leslie v. Alexander*, 14 Va. Cir. 127 (Cir. Ct. 1988) (Alexandria City).

67. This is true unless the alleged medical issue is within the province of the jury, such as in retained sponge cases. *See, e.g.*, Beverly Enterprises v. Nichols, 247 Va. 264, 267, 441 S.E.2d 1, 3 (1994).

68. *See id.*

69. 28 Va. Cir. 560 (Cir. Ct. 1988) (Fairfax County).

70. *Id.* at 560.

71. *Curtis*, 21 Va. Cir. at 279; *Johnson*, 9 Va. Cir. at 199.

72. *See Curtis*, 21 Va. Cir. at 279.

73. *Id.*; *see also Johnson*, 9 Va. Cir. at 199.

In the absence of a clear precedent regarding the admissibility of healthcare provider policies, Judge Rosemarie Annunziata looked to the trend in other states in declaring that

> [t]he Virginia Supreme Court has not yet addressed the admissibility of these materials into evidence and few courts outside Virginia have addressed this issue. However, I note, first, that it appears that a majority of the other jurisdictions which have addressed the issue have determined the materials to at least be subject to discovery, if not admissible. . . .Moreover, there is dictum from the Virginia Supreme Court's decision in *Bly v. Rhoads*, 216 Va. 645[, 222 S.E.2d 783] (1976), which implies that the materials sought may provide some evidence of the standard of care.[74]

Utilizing the same logic, Judge Paul Peatross reached the opposite conclusion in *Roller v. Jane*[75] in ruling that

> [t]he Supreme Court of Virginia has stated that "private rules are inadmissible in evidence either for or against a litigant who is not a party to such rules." This has been the unwavering policy of the Supreme Court of Virginia since 1915. The rationale behind the Commonwealth's rule is not to penalize organizations for having higher standards in their private organization than the law requires. Allowing private rules to be admissible would encourage organizations to adopt the minimal standard acceptable at law in order to avoid potential liability. The Commonwealth has made a decision to favor public good over the potential benefit to litigants and not allow the private rules into evidence. Furthermore, in formulating this policy, the Commonwealth has noted that the majority of jurisdictions allow the introduction of private rules as evidence. Therefore, such a policy mandate reflects an adoption of a strong state policy.[76]

Perhaps the most persuasive argument for not allowing the admission of healthcare provider policies into evidence is the effect it would have on the administration of care. As explained by Judge James P. Kulp, "If health care providers were to believe that their liability is going to be predicated by the standards they impose upon themselves, they will invariably adopt minimal standards. Such a circumstance would disserve the public's interest by lowering the standards of health care available."[77] Judge

74. *Curtis*, 21 Va. Cir. at 278–79.
75. 43 Va. Cir. 321 (Cir. Ct. 1997) (Albemarle County).
76. *Id.* at 322 (quoting *Pullen*, 226 Va. at 351, 310 S.E.2d at 457).
77. Francis v. McEntee, 10 Va. Cir. 126, 130 (Cir. Ct. 1987) (Henrico County).

Kulp also noted that if the policies were admitted into evidence, they would likely confuse the jury.[78]

C. *Depersonalized Character of Policies*

The pervasive reasoning behind protecting the peer review process is to encourage frank criticism of healthcare, thereby fostering improvement. While this is an admirable goal, the question remains whether the objective of improved healthcare can be achieved while simultaneously allowing for sufficient discovery. One possibility is to find that the policies themselves are discoverable but leave the process leading up to their creation privileged. This compromise is premised upon the depersonalized character of the policies.

> It is the meetings, minutes and reports of such no-holds-barred investigations, the true peer review, that these statutes are primarily designed to protect. But the ultimate end results of such critiques, which might find their way into depersonalized manuals of procedure and which have been shorn of individualized criticisms, does not merit the same concern for protection from public scrutiny.[79]

Because the policies are stripped of identifying information which might embarrass the peer review subject and her critics, by this logic, there is no harm in their disclosure.

The counterargument points to the wording of Virginia Code section 8.01-581.17(B). The section's plain language states that all communications which originate in the peer review committee are privileged from discovery.[80] According to the theory, healthcare provider policies are created in these committees and are therefore privileged. Judge Thomas B. Horne opined that "[s]uch manuals, while they may be the end-product of confidential proceedings, are still communications originating from a committee whose function it is to review, evaluate, or make recommendations on health care facilities and services. As such, they should

78. *Id.* at 129.

79. Johnson v. Roanoke Mem'l Hosps., 9 Va. Cir. 196, 199 (Cir. Ct. 1987) (Roanoke City); *see also* Bradburn v. Rockingham Mem'l Hosp., 45 Va. Cir. 356, 363 (Cir. Ct. 1998) (Rockingham County).

80. VA. CODE ANN. § 8.01-581.17(B) (Cum. Supp. 2004).

be given the protection accorded other confidential communications."[81]

Along a similar vein, it has been argued that because policies are widely disseminated within healthcare facilities they are *ipso facto* excluded from the quality assurance privilege.[82] Although Judge T. J. Markow allowed the discovery of the policies, he rejected this argument in declaring that

> [t]he court does not agree that "guidelines, rules, regulations, protocols or recommended procedures for the Department of Anesthesiology . . ." are proceedings, minutes, records and reports which are intended to be protected from discovery based on its assumption that these materials are the formalized rules disseminated to and expected to be followed by all persons covered by the rules, etc., and, therefore, were never intended to attain a character of confidentiality. These materials do not qualify as privileged or otherwise protected from discovery. Such materials may not be relevant or lead to the discovery of admissible evidence, but there is no way to determine that at this stage; therefore, discovery will be permitted.[83]

Other arguments have advanced ways in which to undermine the quality assurance privilege. In *Day v. Medical Facilities of America, Inc.*, the court found that the Virginia Administrative Code allows nursing home residents and their families to review the same policies sought and therefore there is no chilling effect on improving nursing care.[84] Similarly, in *Houchens v. University of Virginia*, the court allowed policies to be discovered because they were probative as to the control element of sovereign immunity.[85]

V. DISCOVERABILITY OF INCIDENT REPORTS UNDER VIRGINIA CODE SECTION 8.01-581.17(C)

The second type of document for which the quality assurance privilege is asserted is the incident report.[86] Judge Coulter explained,

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81. Mangano v. Kavanaugh, 30 Va. Cir. 66, 69 (Cir. Ct. 1993) (Loudon County).

82. *See* Hedgepeth v. Jesudian, 12 Va. Cir. 221, 222 (Cir. Ct. 1988) (Richmond City).

83. *Id.*

84. Day v. Med. Facilities of Am., Inc., 59 Va. Cir. 378, 379 (Cir. Ct. 2002) (Salem City) (citing 12 VA. ADMIN. CODE § 5-371-140 (2004)).

85. Houchens v. Univ. of Va., 23 Va. Cir. 202, 205 (Cir. Ct. 1991) (Charlottesville City).

86. There are a few cases in which it is argued that the quality assurance privilege

> In reality, when an untoward event has occurred to a patient in a hospital causing injury, hospital officials, keenly conscious of the litigious nature of the American character, will undertake an investigation to accumulate *facts* so as to be fully informed if claim is ultimately made. But such information is also sought in pursuit of the hospital's noble objectives of remedying procedures or policies that bring about accidents. The investigation is part of the hospital's program of quality control.[87]

The debate surrounding incident reports is more straightforward than that regarding healthcare provider policies. The question is whether or not an incident report is a medical record kept in the ordinary course of a provider's business, for then it would be exempted from the privilege under Virginia Code section 8.01-581.17(C).[88] Thus, if an incident report is not a medical record, it is protected. If it is a medical record, then it is discoverable.[89]

Similar to decisions regarding healthcare policies, circuit courts are divided on whether incident reports are privileged from discovery. Although there is a split among the circuits, more courts have found incident reports to be protected.[90]

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applies to documents other than policies and incident reports. *See, e.g.*, Clements v. MCV Associated Physicians, 61 Va. Cir. 673 (Cir. Ct. 2002) (Richmond City) (finding that credentialing and the departmental file of a physician are privileged); White v. Cassady, 29 Va. Cir. 45 (Cir. Ct. 1992) (Fairfax County) (holding that the report of a review committee is privileged in a defamation action).

87. Benedict v. Cmty. Hosp., 10 Va. Cir. 430, 437–38 (Cir. Ct. 1988) (Medical Malpractice Review Panel).

88. *See* VA. CODE ANN. § 8.01-581.17(C) (Cum. Supp. 2004).

89. *See id.*

90. Some circuit court decisions have held incident reports privileged. *See* Saunders v. Gottfried, 61 Va. Cir. 641, 641–42 (Cir. Ct. 2002) (Chesterfield County); Stevens v. Lemmie, 40 Va. Cir. 499, 514 (Cir. Ct. 1996) (Petersburg City); Mangano v. Kavanaugh, 30 Va. Cir. 66, 70 (Cir. Ct. 1993) (Loudoun County); Houchens v. Univ. of Va., 23 Va. Cir. 202, 203 (Cir. Ct. 1991) (Charlottesville City); Hedgepeth v. Jesudian, 12 Va. Cir. 221, 221–22 (Cir. Ct. 1988) (Richmond City); Riordan v. Fairfax Hosp. Sys., Inc., 28 Va. Cir. 560, 561 (Cir. Ct. 1988) (Fairfax County). Other decisions, however, have found these reports discoverable. *See* Eppard v. Kelly, 62 Va. Cir. 57, 63–64 (Cir. Ct. 2003) (Charlottesville City); Hurdle v. Oceana Urgent Care, 49 Va. Cir. 328, 329 (Cir. Ct. 1999) (Norfolk City); McMillan v. Renal Treatment Ctr., 45 Va. Cir. 395, 397 (Cir. Ct. 1998) (Norfolk City); McGuin v. Mount Vernon Nursing Ctr. Assocs., 45 Va. Cir. 386, 386 (Cir. Ct. 1998) (Fairfax County); Bradburn v. Rockingham Mem'l Hosp., 45 Va. Cir. 356, 360 (Cir. Ct. 1998) (Rockingham County); Huffman v. Beverly Ca. Corp., 42 Va. Cir. 205, 216 (Cir. Ct. 1997) (Rockingham County); Messerley v. Avante Group, Inc., 42 Va. Cir. 26, 26–27 (Cir. Ct. 1996) (Rockingham County); Howell v. McDaniel, 52 Va. Cir. 526, 526–27 (Cir. Ct. 1994) (Richmond City); Peterson v. Fairfax Hosp. Sys., Inc., 21 Va. Cir. 70, 72 (Cir. Ct. 1990) (Fairfax County); Benedict v. Cmty. Hosp., 10 Va. Cir. 430, 434–35 (Cir. Ct. 1988) (Medical Malpractice Review Panel); Atkinson v. Thomas, 9 Va. Cir. 21, 22–23 (Cir. Ct. 1986) (Virginia Beach City).

Many of the cases considering the discovery of incident reports demonstrate the two-step analysis applied when determining if an incident report is privileged. This analysis begins by examining the document within the confines of Virginia Code section 8.01-581.17(B) or Virginia Code section 8.01-581(C).[91] If the incident report is a "communication" originating in or provided to one of the specified entities, then it is protected.[92] On the other hand, if the incident report is a "medical record" kept in the ordinary course of a healthcare provider's business, then it is discoverable.[93] The following is an examination of the factors which assist circuit courts in making this decision.

A. *Comparison of Incident Reports to Medical Records*

Virginia Code section 8.01-581.17(C) is often used to deny incident reports the protection of the quality assurance privilege.[94] The subsection is designed to assure that the statute does not become a roadblock to the discovery of patient records. "Medical records" are undoubtedly those items in the patient's chart—history and physical, nursing notes, consultations, progress reports, etc.—to which the patients have unfettered access. While there is invariably some notation made in the chart, the incident report itself is not kept there. In a typical scenario, if Elderly Ella rolls off her bed while sleeping, the nursing note may read:

> Patient found on the floor by aide at 22:00, complaining of pain in her right hip. Assisted back to bed. Assured that safety rails are in place. Tylenol 500 mg given for pain. Attending physician notified.

After Elderly Ella's x-rays the next morning reveal a fractured hip, Risk Management dispatches an investigator to document the event and determine its cause.[95] At a minimum, the factual scenario is recorded along with the names of those having knowledge of Elderly Ella's fall. Quality Assurance recommendations may be included.

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91. VA. CODE ANN. § 8.01-581.17(B)–(C) (Cum. Supp. 2004).

92. *Id.* § 8.01-581.17(B) (Cum. Supp. 2004).

93. *Id.* § 8.01-581.17(C) (Cum. Supp. 2004).

94. *Id.*

95. In the absence of certainty regarding incident reports' privilege, one practice is for the hospital to retain counsel and have him direct the investigation. This provides the added protections of the work-product doctrine and attorney-client privilege.

Although it may surface in peer review meetings, the incident report is kept by Risk Management. It is this separate process and placement which places the incident report in limbo between a medical record, quality assurance device, and risk management document.

Judge Jack B. Coulter helped to clarify the incident report's role when he encountered the following argument: because the goal of healthcare providers is to improve or maintain health, a document which details a deviation therefrom cannot, by its very nature, be a record kept in the ordinary course of business.[96] In response he wrote,

> What are, or should be, records kept in the ordinary course of treating a patient or operating a hospital with respect to patients, that is the ultimate question. The ordinary course of a hospital's function surely includes the prevention of accidents or mishaps to those who have been entrusted to its care. Charting the ordinary course of a patient's treatment would or should require description of events out of the ordinary that relate to a patient's health and well-being. As a health care provider, protection from further illness or injury is an inescapable component of treating a patient.[97]

Another justification for withholding the quality assurance privilege from incident reports is the character of the document. In *Huffman v. Beverly California Corp.*,[98] Judge John J. McGrath, Jr. ruled that incident reports are not only discoverable, they are admissible.[99] He reasoned that they did not rise to the level of quality assurance documents because they are more akin to medical records, which are specifically exempted from Virginia Code section 8.01-581.17.[100] In *Bradburn v. Rockingham Memorial Hospital*,[101] Judge McGrath elaborated upon this comparison, noting,

> In the *Huffman* and *Messerley* opinions, this Court indicated that records such as these, which are standard incident reports that are filed for any accident occurring at a medical facility, are not shielded from discovery by the provisions of § 8.01-581.17 because they do not

96. Benedict v. Cmty. Hosp., 10 Va. Cir. 430, 435–36 (Cir. Ct. 1988) (Medical Malpractice Review Panel).

97. *Id.* at 436.

98. 42 Va. Cir. 205 (Cir. Ct. 1997) (Rockingham County).

99. *Id.* at 216–17.

100. *Id.* at 216.

101. 45 Va. Cir. 356 (Cir. Ct. 1998) (Rockingham County).

> rise to the level as contemplated by the statute of being quality assurance deliberative documents. They are simply recitations of the accident that occurred, the witnesses who were present, and other objective facts that can be ascertained from the eyewitnesses to the incident. As such, they are much more akin to the ordinary hospital records, which are exempted from the reach of this privilege pursuant to the last sentence of § 8.01-581.17.[102]

B. *Comparison of Incident Reports to Communications*

The excerpt from *Bradburn* demonstrates that Judge McGrath paralleled incident reports and medical records because he did not believe that the former should be categorized as a "communication" under Virginia Code section 8.01-581.17(B).[103] Several other circuit courts have addressed the relationship between incident reports and protected communications. As compared to courts which apply the ordinary medical record paradigm, these courts tend to rule that the document is protected from discovery.[104] The court in *Mangano v. Kavanaugh* illustrates this point, noting,

> The courts which have held that these reports are discoverable have rationalized that they fall within the exception of § 8.01-581.17, that is, they are "records kept with respect to any patient in the ordinary course of business of operating a hospital . . . ." However, this Court believes that such communications are clearly part of the confidential process envisioned by § 8.01-581.17 and must be protected from disclosure. Indeed, a hospital's review and evaluation of a malpractice claim is exactly the type of communication most deserving of frank and open discussion without fear of public disclosure.[105]

This concept was also explored by the court in *Stevens v. Lemmie*.[106] Therein, the court addressed the inherent confusion posed by the seemingly contradictory Virginia Code provisions in the following manner:

> The provisions of §§ 8.01-581.16 and 8.01-581.17 cause difficulty in interpretation. On the one hand the protection afforded "all communications" appears to create a universe of coverage without limita-

102. *Id.* at 360.
103. *Id.*
104. *See, e.g.*, Mangano v. Kavanaugh, 30 Va. Cir. 66 (Cir. Ct. 1993) (Loudoun County).
105. *Id.* at 69–70 (citing VA. CODE ANN. § 8.01-581.17(C) (Cum. Supp. 2004)).
106. 40 Va. Cir. 499 (Cir. Ct. 1996) (Petersburg City).

> tion. On the other hand the provision that the statute shall not preclude discovery of evidence "relating to hospitalization or treatment of any patient in the ordinary course of hospitalization of such patient" appears to reclaim much of what was protected by the former declaration. For example, procedures manuals and hospital protocols "relate to" the hospitalization of patients.
>
> Applying the interpretive doctrine of *ejusdem generis*, the term "communications" must be limited in its application to the particulars that proceed it, namely, the "proceedings, minutes, records, and reports of any medical staff committee, utilization review committee, or other committee as specified in § 8.01-581.16."[107]

Interestingly, in applying this logic, the court reached the conclusion that the incident reports under consideration were protected from discovery. The court opined that the statute's intent to improve healthcare through open quality assurance meetings is best accomplished by protecting the reports.[108] The court in *Colston v. Johnston Memorial Hospital*[109] hypothesized that Virginia Code section 8.01-581.17(C) is merely a reassertion of the existing law which assures patients access to their medical records.[110] Although the *Colston* court was speaking of healthcare provider policies, the court in *Johnson v. Roanoke Memorial Hospitals*[111] expresses counterarguments equally applicable to incident reports, noting,

> Technically and semantically, these documents at issue may come within the broad penumbra of "proceedings, minutes, records and reports of any medical staff committee, utilization review committee or other committee." Almost anything could come within such broad and limitless sweep. But the real vitals of the statute's intent is not at risk in the case at bar.
>
> Beyond this analysis, however, the final phrase of § 8.01-581.17 cannot be ignored and must be met head on. As read by this court, these words practically eliminate any privilege that the preceding language might grant.
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> . . .

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107. *Id.* at 508 (quoting VA. CODE ANN. § 8.01-581.17 (Cum. Supp. 2004)). Virginia Code sections 8.01-581.16 and 8.01-581.17 are often lumped together in such inquiries; however, the former only elucidates the latter insofar as concerns the construction of the covered entities.

108. *Id.*

109. 49 Va. Cir. 540 (Cir. Ct. 1998) (Washington County).

110. *Id.* at 541.

111. 9 Va. Cir. 196 (Cir. Ct. 1987) (Roanoke City).

> The defendant advances the classical argument that each and every part of a statute should be given meaning and effect, and that to construe the last phrase of the statute as taking away the privilege granted in the first would render the statute meaningless. Such, it is urged, is contrary to the basic rules of statutory construction, and so it is. But then what meaning should be given to the last phrase? Is it to be ignored? In what way or degree has its scope been limited?[112]

It is worthwhile noting that one circuit court has created a disincentive to commingle risk management with quality assurance, finding that, in the absence of strict barriers between the two, incident reports are not shielded from discovery.[113]

VI. EXTRAORDINARY CIRCUMSTANCES EXCEPTION TO VIRGINIA CODE SECTION 8.01-581.17

Virginia Code section 8.01-581.17 contains a fail-safe provision applicable to the discoverability of both incident reports and healthcare provider policies.[114] Communications which would otherwise be protected by the privilege are discoverable if, after a hearing, the court finds good cause arising from extraordinary circumstances for the disclosure.[115] In other words, even if a document is theoretically protected, there is an exemption acting to temper potentially iniquitous applications. The fact that there is an included mechanism to soften the statute's blow to unfettered discovery undermines Judge Coulter's reasoning in *Benedict v. Community Hospital*,[116] which found,

> [t]he injured patient . . . is at such an unfair advantage: one single individual, sick and weakly, pitted against a colossal corporate giant with staff and resources unlimited and personnel schooled in the techniques of avoiding or minimizing losses for claimed negligence. Already incapacitated and perhaps further damaged by the incident and at the complete mercy of the personnel from whom she seeks re-

112. *Id.* at 199–200 (quoting VA. CODE ANN. § 8.01-581.17 (Cum. Supp. 2004)); *see also* Hurdle v. Oceana Urgent Care, 49 Va. Cir. 328, 329 (Cir. Ct. 1999) (Norfolk City).

113. Eppard v. Kelly, 62 Va. Cir. 57, 60 (Cir. Ct. 2003) (Charlottesville City).

114. VA. CODE ANN. § 8.01-581.17(B) (Cum. Supp. 2004).

115. *Id.* Courts have occasionally failed to apply this standard and instead have opted for a lower bar. *See, e.g.*, Levin v. WJLA-TV, 51 Va. Cir. 57 (Cir. Ct. 1999) (Fairfax County); HCA Health Servs. v. Levin, 260 Va. 215, 530 S.E.2d 417 (2000).

116. 10 Va. Cir. 430 (Cir. Ct. 1988) (Medical Malpractice Review Panel).

> covery and relief, she is hardly in position to undertake critical investigation of what happened.[117]

Perhaps the purpose of the extraordinary circumstances clause is to rectify such inequities.

Unfortunately, beyond the bare words of the statute, neither the General Assembly nor the Supreme Court of Virginia has aided circuit courts in construing the meaning of "extraordinary circumstances." One of the earlier opinions interpreting "extraordinary circumstances" found that a plaintiff's unconscious state when he was burned by heat lamps was insufficient to deny the protection of the privilege.[118] In *Houchens v. University of Virginia*, Judge Jay Swett noted,

> There is little authority as to what constitutes "extraordinary circumstances" sufficient to justify an exception to the statutory privilege that attaches to statements prepared for medical staff committees or utilization review committees. However, something more must be shown than the fact that plaintiff was unconscious at the time the treatment was rendered. The word "extraordinary" must be given its plain meaning. This case would be different perhaps if those who were witnesses to the event were no longer available and their only version of the events were contained in statements presented to a medical staff committee. Those circumstances are much closer to what the court believes was the intent of the legislature in allowing such statements to be produced only under "extraordinary circumstances."[119]

At first blush, a medically induced unconscious state appears to be an excellent reason to require the production of an incident report, which would contain detailed events impossible for the plaintiff to recall. Such a ruling, however, would render the quality assurance privilege nearly meaningless. The untoward events forming the basis of medical malpractice actions often occur while the plaintiff is in an altered mental state, be it due to shock, pain, medication, sedation, etc.

The *Houchens* opinion notes that the opposite conclusion may have been reached if no other sources of information existed.[120] This sentiment was reiterated in *York v. Fairfax Hospital System,*

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117. *Id.* at 438.

118. Houchens v. Univ. of Va., 23 Va. Cir. 202 (Cir. Ct. 1991) (Charlottesville City).

119. *Id.* at 204 (quoting VA. CODE ANN. § 8.01-581.17 (Cum. Supp. 2004)).

120. *Id.*

Inc.,[121] where the court found that extraordinary circumstances did not exist where the names of other witnesses to the event were produced.[122] On the other hand, the court in *Peterson v. Fairfax Hospital Systems, Inc.*[123] found that difficulty in pursuing a theory of liability constituted extraordinary circumstances.[124] This case involved an intruder who allegedly administered insulin to a baby in the neonatal unit.[125]

> Although plaintiffs have deposed Hospital personnel, prior discovery before the panel failed to produce any significant information concerning the alleged criminal interloper. In order to pursue this line of inquiry, the plaintiff must have the guidance that the material requested would provide, and there appears to be no other available source. Upon the oral arguments and briefs of counsel, the Court finds the requisite showing for response under Rule 4:1(b)(3) has been made despite the attorney work-product doctrine.[126]

The Supreme Court of Virginia signaled disapproval of such an interpretation of "extraordinary circumstances" when it stated that the mere need to defend a suit does not meet the criterion.[127]

Because it is often drafted shortly after the event in question, the incident report is one of the best sources of information describing the facts of the accident. While courts recognize the unique nature of the incident report, they are nonetheless divided as to whether this alone justifies removing the quality assurance privilege. In denying the privilege to an incident report which contains no policy recommendations, the court in *Hurdle v. Oceana Urgent Care*[128] stated,

> In a case such as this, I cannot think of a document more likely to lead to the discovery of admissible evidence. It will likely have been produced by a person with the background and training to know what questions to ask and what information to collect. The person preparing the report is also likely to have access to those people most

121. 28 Va. Cir. 211, 212 (Cir. Ct. 1992) (Fairfax County).
122. *Id.*
123. 21 Va. Cir. 70 (Cir. Ct. 1990) (Fairfax County).
124. *Id.* at 72.
125. *Id.* at 70–71.
126. *Id.* at 72.
127. HCA Health Servs. v. Levin, 260 Va. 215, 221, 530 S.E.2d 417, 420 (2000).
128. 49 Va. Cir. 328 (Cir. Ct. 1999) (Norfolk City).

> knowledgeable about the incident at a time the incident is fresh in mind.[129]

Judge T. J. Markow was not convinced by this reasoning. Recognizing the two-year period between the accident and the discovery phase of the suit, he wrote,

> The court concedes that the quality of the information available to the plaintiff now is probably not of the same quality as that obtained by the hospital, but there is no reason to assume or believe that it is, and will not be, the substantial equivalent. The rule does not allow breach of the protection just because the material you can obtain is not as good as that protected. It must be shown to be of substantially inferior quality. That has not been shown here.[130]

VII. CONCLUSION

The debate surrounding the proper application of Virginia Code sections 8.01-581.17(B) and (C) has created an interesting dichotomy. If a healthcare provider seeks to protect its policies, quality assurance must take precedence over risk management. On the other hand, if a healthcare provider seeks to protect its incident reports, it must distance them from medical records by shrouding them as risk management materials or quality assurance documents.

Clearly the most beneficial route for both healthcare providers and patients generally is to emphasize quality assurance in the creation of policies and incident reports. Not only does this approach insulate healthcare providers, it also benefits patients. It is the individual litigant, however, who bears the concomitant burden—she is injured anew by the denial of discovery of perhaps the two most valuable additions to the case: healthcare provider policies and incident reports.

In light of these competing interests, it is not surprising that the circuit courts have divided evenly on the purpose, construction, and interpretation of Virginia Code section 8.01-581.17. With attractive logic on both sides of the debate, it will doubtlessly continue to rage until the Supreme Court of Virginia rules definitively on the matters presented or the Virginia General Assembly clarifies the statute.

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129. *Id.* at 329.

130. Hedgepeth v. Jesudian, 15 Va. Cir. 352, 355 (Cir. Ct. 1989) (Richmond City).

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