

# LEGAL EAGLE EYE NEWSLETTER

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## Root Cause Analysis: Risk Manager's Notes From Nurses' Interviews Are Not Privileged.

In an obstetric malpractice case the lawyers for the attending obstetrician and his partner wanted to see the hospital's risk manager's handwritten notes taken during her interviews with the labor and delivery nurses who were involved in the patients' care.

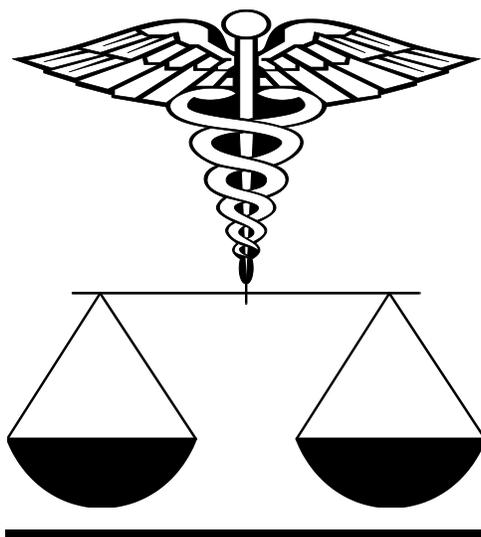
For the physicians the issue was whether the hospital's nurses actually articulated their concerns cogently enough to them that the physicians had good reason to take action.

For the hospital the issue was whether the attending obstetrician or his partner whom the nurses also tried to convince to take action acted promptly and effectively enough based on the concerns the hospital's nurses reported to them about the monitor tracings.

The Court expressly overruled the hospital's argument that the risk manager's notes came under the attorney client or the attorney work product privilege which would have exempted them from discovery in the lawsuit.

The Supreme Court of Kentucky ruled the hospital had to turn over the risk manager's notes to the physicians' attorneys.

After sifting through the conflicting evidence the Court was convinced the risk manager interviewed the physicians and nurses for the purpose of preparing a root cause analysis.



***The risk manager's notes from her interviews with the nurses and physicians were not prepared for the hospital's legal counsel or in anticipation of litigation.***

***The purpose of the interviews was to prepare a root cause analysis of the adverse incident which was required by the Joint Commission and pertinent state regulations.***

SUPREME COURT OF KENTUCKY  
June 16, 2016

The Court classified the risk manager's purpose in talking to the nurses as a business purpose as opposed to a purpose associated with potential or actual litigation against the hospital.

The business purpose behind the risk manager's actions stemmed from her understanding that the Joint Commission required the hospital to investigate and prepare a root cause analysis of the adverse incident in question.

The risk manager later forwarded her interview notes to the hospital's legal counsel as requested by counsel when litigation appeared imminent, but that did not mean the risk manager's notes were prepared for the hospital's attorneys in anticipation of litigation.

Attorney client or attorney work product privilege applies to a witness statement only if the statement was given for the specific purpose of the hospital's legal defense in anticipated or actual pending litigation.

The Court also pointed out that the risk manager did not advise the nurses or the physicians what her purpose was in interviewing them. The interviewees were never expressly made aware when they recounted their recollections of the incident that their statements might be turned over to the hospital's attorneys.

***Frankfort v. Shepherd*, \_\_\_ S.W. 3d \_\_\_, 2016 WL 3376030 (Ky., June 16, 2016).**

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