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ADVOCACY AT A HIGHER LEVEL

Evidence Code Section 1157

2021 Update

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A. INTRODUCTION.

1. Statutory Language.

As amended January 1, 2018, Evidence Code section 1157 provides:

> (a) Neither the proceedings nor the records of organized committees of medical, medical-dental, podiatric, registered dietitian, psychological, marriage and family therapist, licensed clinical social worker, professional clinical counselor, pharmacist, or veterinary staffs in hospitals, or of a peer review body, as defined in Section 805 of the Business and Professions Code, having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or for that peer review body, or medical or dental review or dental hygienist review or chiropractic review or podiatric review or registered dietitian review or pharmacist review or veterinary review or acupuncturist review or licensed midwife review committees of local medical, dental, dental hygienist, podiatric, dietetic, pharmacist, veterinary, acupuncture, or chiropractic societies, marriage and family therapist, licensed clinical social worker, professional clinical counselor, or psychological review committees of state or local marriage and family therapist, state or local licensed clinical social worker, state or local licensed professional clinical counselor, or state or local psychological associations or societies or licensed midwife associations or societies having the responsibility of evaluation and improvement of the quality of care, shall be subject to discovery.
>
> (b) Except as hereinafter provided, a person in attendance at a meeting of any of the committees described in subdivision (a) shall not be required to testify as to what transpired at that meeting.
>
> (c) The prohibition relating to discovery or testimony does not apply to the statements made by a person in attendance at a meeting of any of the committees described in subdivision (a) if that person is a party to an action or proceeding the subject matter of which was reviewed at that meeting, to a person

requesting hospital staff privileges, or in an action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

(d) The prohibitions in this section do not apply to medical, dental, dental hygienist, podiatric, dietetic, psychological, marriage and family therapist, licensed clinical social worker, professional clinical counselor, pharmacist, veterinary, acupuncture, midwifery, or chiropractic society committees that exceed 10 percent of the membership of the society, nor to any of those committees if a person serves upon the committee when his or her own conduct or practice is being reviewed.

(e) The amendments made to this section by Chapter 1081 of the Statutes of 1983, or at the 1985 portion of the 1985-86 Regular Session of the Legislature, at the 1990 portion of the 1989-90 Regular Session of the Legislature, at the 2000 portion of the 1999-2000 Regular Session of the Legislature, at the 2011 portion of the 2011-12 Regular Session of the Legislature, or at the 2015 portion of the 2015-16 Regular Session of the Legislature, do not exclude the discovery or use of relevant evidence in a criminal action.

2. About the Statute Generally.

(a) Blanket protection from discovery.

Section 1157 "gives a blanket exclusion from discovery to proceedings and records of committees of hospital medical staffs concerned with evaluation and improvement of the quality of care in the hospital." (*Roseville Community Hospital v. Superior Court* (1977) 70 Cal.App.3d 809, 813 (*Roseville*); cf. *Fox v. Kramer* (2000) 22 Cal.4th 531, 548 (*Fox*) [Legislature "did *not* establish a broad general privilege for peer review materials"].)

(b) Limited testimonial protection.

The statute also provides a limited testimony prohibition—no one can be required to testify regarding what occurred at a committee meeting.

(c) Entities covered.

The statute extends those same protections to the hospital staff committees of various specified health care professionals other than physicians, to review committees of various specified health professional societies, to committees of large groups and clinics, and to committees of health care service plans and nonprofit hospital service plans. (See Section H, *post*.)

(d) Proceedings to which applicable.

The discovery exclusion applies to deposition questions in addition to document production requests, interrogatories, and requests for admissions. (See *Santa Rosa Memorial Hospital v. Superior Court* (1985) 174 Cal.App.3d 711, 721, fn. 8 (*Santa Rosa*).) It also may apply to prevent the admission of evidence at trial. (See Section N, *post*.)

B. THE RATIONALES FOR SECTION 1157.

1. Importance of the Rationales.

It is important to focus on the policies underlying section 1157, because, in determining whether the statute applies in a given situation, the courts should consider, as they have in the past (see, e.g., *Santa Rosa*, *supra*, 174 Cal.App.3d at pp. 728–729), whether or not the rationale would be served by nondisclosure.

2. The General Purpose—Improving Quality of Care By Promoting Candor in Professional Reviews.

(a) Judicial recognition of purpose.

The Supreme Court has stated that "[t]he obvious general purpose of section 1157 is to improve the quality of medical care in the hospitals by the use of peer review committees." (*West Covina Hospital v. Superior Court* (1986) 41 Cal.3d 846, 851 (*West Covina Hospital*).) Another state's similar legislation has been said to be based on the premise that, "because of the expertise and level of skill required in the practice of medicine, the medical profession itself is in the best position to police its own activities." (*Corrigan v. Methodist Hosp.* (E.D.Pa. 1994) 857 F.Supp. 434, 436 (*Corrigan*).)

(b) Confidentiality important.

How does section 1157 further the effectiveness of peer review committees? By giving them some confidentiality so as to encourage candid participation in peer reviews. It is thus recognized that there is a "strong public interest in preserving the confidentiality of the medical peer review process." (*Fox*, *supra*, 22 Cal.4th at p. 539; see *id.* at p. 542 [purpose of section 1157 is "preserving the confidentiality of hospital peer review proceedings"]; *Cedars-Sinai Medical Center v. Superior Court* (1993) 12 Cal.App.4th 579, 589 (*Cedars-Sinai*) [the Legislature has determined "the public good requires confidentiality in medical staff evaluation proceedings"].)

(c) Expectation of disclosure inhibits candor.

"Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process." (*United States v. Nixon* (1974) 418 U.S. 683, 705 [94 S.Ct. 3090, 41 L.Ed.2d 1039].)

(d) *Matchett.*

The seminal explanation of the California Legislature's intention in enacting section 1157 appears in *Matchett v. Superior Court* (1974) 40 Cal.App.3d 623 (*Matchett*). It has been cited and relied on not only in subsequent Supreme Court and Court of Appeal opinions, but also by the Legislature when it has amended the statute (see Section R.4, *post*). The court stated:

> When medical staff committees bear delegated responsibility for the competence of staff practitioners, the quality of in-hospital medical care depends heavily upon the committee members' frankness in evaluating their associates' medical skills and their objectivity in regulating staff privileges. Although composed of volunteer professionals, these committees are affected with a strong element of public interest.
>
> Section 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality.

(*Matchett*, at pp. 628–629, fn. omitted; see *Fox*, *supra*, 22 Cal.4th at p. 542 [confidentiality "inures to the benefit of the general public by encouraging candid and uninhibited evaluations of physicians by their peers"]; *Fox*, at p. 543 [noting "the legislative goal of fostering medical staff candor"]; *Scripps Memorial Hospital v. Superior Court* (1995) 37 Cal.App.4th 1720, 1725 (*Scripps Memorial Hospital*) ["Absent

protection against disclosure, the fear is physicians will stop providing negative comments or constructive criticism"].)

(e) Statutes and regulations requiring peer review.

The validity of the *Matchett* court's statement that "these committees are affected with a strong element of public interest" (see *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 988 ["[T]he 'primary purpose of the peer review process' . . . is 'to protect the health and welfare of the people of California by excluding through the peer review mechanism "those healing arts practitioners who provide substandard care or who engage in professional misconduct." (§ 809, subd. (a)(6).)' "]; *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267 [same]; *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199 (*Kibler*) ["peer review of physicians also serves an important public interest"]; *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 897 [there is a "strong public policy in favor of effective medical peer review by hospitals"]; *Clarke v. Hoek* (1985) 174 Cal.App.3d 208, 220 (*Clarke*) ["There is a strong public interest in supporting, encouraging and protecting effective medical peer review programs and activities"]; see also *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 616 (*Unnamed Physician*) ["[Business and Professions Code s]ection 809 provides generally that peer review, fairly conducted, is essential to preserving the highest standards of medical practice"]) is demonstrated by state laws and administrative regulations governing hospitals. These laws (Health & Saf. Code, § 32128; Bus. & Prof. Code, § 2282) and regulations (Cal. Code Regs., tit. 22, §§ 70701, 70703) require that investigation of the competency of physicians for initial appointment to the medical staff, and regular periodic review of competency before reappointment, be conducted by medical staff committees.

(f) Peer review committee as quasi-public functionary.

The peer review process is the primary mechanism by which the quality of medical care rendered to patients in California hospitals is assured. (See *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 341–344 (*Elam*).) One court went so far as to refer to the peer review committee as "a quasi-public functionary." (*People v. Superior Court*

(Memorial Medical Center) (1991) 234 Cal.App.3d 363, 373 (*Memorial Medical Center*); see *Unnamed Physician*, *supra*, 93 Cal.App.4th at p. 617 ["The statutory scheme delegates to the private sector the responsibility to provide fairly conducted peer review"].)

(g) Candor of all involved in peer review.

It is not just the committee members' candor and objectivity that section 1157 strives to promote. The Supreme Court stated, " 'Committee members *and those providing information to the committee* must be able to operate without fear of reprisal. Similarly, it is essential that doctors seeking hospital privileges disclose all pertinent information to the committee.' " (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1227 (*Alexander*), emphasis added, disapproved on another ground in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, fn. 4.)

(h) Benefits of confidentiality questioned.

The premise underlying confidentiality, i.e., that without it, physicians would not participate candidly or at all in committee work, has been questioned, however.

- In *West Covina Hospital*, *supra*, 41 Cal.3d at page 854, footnote 6, the Supreme Court gave a less-than-enthusiastic endorsement to the principle, remarking, "Because the prohibition relating to discovery and testimony is not applicable when a doctor sues to obtain staff privileges [(see Section E.3.c.3, *post*)], it has been stated that the goal of candor is not furthered by the prohibition. (Goldberg, *The Peer Review Privilege: A Law in Search of a Valid Policy* (1984) 10 Am. J.L. & Med. 151, 155 et seq.) However, we must accept the legislative judgment that candor is promoted."

- Stronger criticisms of the policy have been stated elsewhere. In *Wesley Medical Center v. Clark* (Kan. 1983) 669 P.2d 209, 218–219 (*Wesley Medical Center*), superseded by statute as stated in *Fretz v. Keltner* (D.Kan. 1985) 109 F.R.D. 303, 309 (*Fretz*), the Kansas Supreme Court stated:

> While it may be true that some members of the medical profession might seek to shirk their duties to others in the profession and to the public by refusing to participate in peer review functions or, in doing so, might be less than candid in their comments and evaluations, we do not ascribe such a lack of integrity to the vast majority of the members of the medical profession. The integrity of the medical profession is held in high esteem by the public and by the courts and we are not convinced that the occasional revelation, under appropriate protective and limiting orders of the trial court, of some peer review committee proceedings will result in the drastic collapse of the system as envisioned by [defendant hospital].

- See *Virmani v. Novant Health Inc.* (4th Cir. 2001) 259 F.3d 284, 290, footnote 7 (*Virmani*) ("A doctor called upon to serve on a medical peer review committee may have a sense of obligation to the public at large, in addition to a personal desire to maintain quality health care, which may overcome any reluctance to serve and be forthcoming on a peer review committee, even in the absence of a privilege"); *Syposs v. United States* (W.D.N.Y. 1998) 179 F.R.D. 406, 411–412 (*Syposs*) ("the Hospitals have failed to provide any reason to believe some physicians would not provide candid appraisals of their peers absent the asserted privilege"), decision adhered to (W.D.N.Y. 1999) 63 F.Supp.2d 301, 306–309; *Robertson v. Neuromedical Center* (M.D.La. 1996) 169 F.R.D. 80, 83 (*Robertson*) ("The hospitals [opposing discovery] have no evidence to support their claim that physicians will be less honest in their evaluations if they know it is possible that they may not be kept confidential. . . . [T]his court . . . is not ready to assume the worst about physicians engaging in hospital peer review processes."); *LeMasters v. Christ Hosp.* (S.D. Ohio 1991) 791 F.Supp. 188, 191 (*LeMasters*) ("most physicians feel an ethical duty to the profession and

to the public to keep the standard of health care high"; "if participating in peer review proceedings periodically is made a requirement for maintaining staff privileges, it is doubtful that many physicians will uproot their practices simply to avoid serving on a peer review committee"); *Petition of Atty. Gen.* (Mich. 1985) 369 N.W.2d 826, 838 (dis. opn. of Boyle, J.) ("Given such insulation from involvement in civil litigation arising from good-faith peer review action [i.e., qualified immunity from liability and partial statutory protection of committee records], we are unwilling to assume that participating physicians would shirk their sworn obligation to the service of humanity by eschewal or perfunctory participation"); *Centennial Healthcare Management Corp. v. Michigan Department of Consumer & Industry Services* (Mich.App. 2002) 657 N.W.2d 746, 754, footnote 11 (*Centennial Healthcare*) (noting "that authority exists that rejects the premise that the function of a peer review committee would be impaired if [a peer review] privilege did not exist"); see also *University of Pennsylvania v. E.E.O.C.* (1990) 493 U.S. 182, 200–201 [110 S.Ct. 577, 107 L.Ed.2d 571] (*University of Pennsylvania*) (making similar comments about academic peer reviewers).

3. The Limited Purpose of Preventing the Use of Professional Review Information By Plaintiffs in Damage Actions.

(a) No complete confidentiality.

Section 1157 does not guarantee complete confidentiality of professional review information. Rather, it is aimed at preventing plaintiffs in damage actions from obtaining and using that information.

(b) Why disclosure inhibits candor despite a lack of complete confidentiality.

Although the *Matchett* court did not explain *why* external access to peer review conducted by staff committees stifles candor and inhibits objectivity, it is clear that candor and objectivity are adversely affected by two fears: (1) fear that committee members' peer review statements or activities

will expose them to liability and (2) fear that the fruits of a staff committee's efforts will be used against a colleague or the hospital in a malpractice suit. Qualified immunities from liability address the first fear; section 1157 addresses the second.

(c) California courts recognize harm of adverse use of peer review.

- The Court of Appeal stated in *California Eye Institute v. Superior Court* (1989) 215 Cal.App.3d 1477, 1484 (*California Eye Institute*), "Candid and frank participation in peer review proceedings is encouraged by assuring peer review activities will *not be put to adverse use* in a damage action." (Emphasis added.)

- In *Brown v. Superior Court* (1985) 168 Cal.App.3d 489, 501 (*Brown*), the Court of Appeal explained the reason for the immunity in similar terms:

> The Legislature intended through section 1157 to encourage full and free discussions in the hospital committees in order to foster health care evaluation and improvement. The unrestricted nature of the discussion is not to insulate participants from the scrutiny of the staff members being reviewed; the exceptions in section 1157 do not prohibit discovery by 'any person requesting hospital staff privileges.' [(See Section E.3.c.3, *post*.)] It is not the opinions of the participants vis-a-vis their colleagues that are protected under section 1157, since their colleagues under certain circumstances can discover the criticisms of their peers.
>
> The Legislature must have sought to impose confidentiality on committee proceedings in order to allow committee members to be able to admit and thereafter deal with the faults of staff members without risking an adverse impact from the admission.

(See *Willits v. Superior Court* (1993) 20 Cal.App.4th 90, 103 (*Willits*); *Clarke*, *supra*, 174 Cal.App.3d at p. 220.)

(d) Other states' courts in agreement.

Other states' courts have recognized there is an understandable reluctance to amass evidence that could be used against the doctor being reviewed or the hospital itself.

- Then New Hampshire Supreme Court Justice David Souter wrote that the reason for enacting that state's equivalent of section 1157 "was the natural reluctance of hospital employees and staff members to engage in [quality of care] evaluation after the fact, by furnishing information and voicing critical judgments, if in so doing they would also be compiling a fund of material discoverable by adverse parties in any subsequent litigation against the hospital." (*In re "K"* (N.H. 1989) 561 A.2d 1063, 1067 (*In re "K"*).)

- One judge stated in dissent: "If discovery is allowed in cases such as this one [medical malpractice], the peer review process will most likely suffer. No longer will frank and open discussion be the hallmark of the successful peer review; the constant threat of lawyers scouring the pages of a peer review file will chill the candor of peer review participants. At the very least, peer review participants will learn to choose each phrase or opinion with the utmost of care, lest they endanger a colleague; minor constructive criticism might give way under the lingering dark cloud of a malpractice action." (*State ex rel. Chandra v. Sprinkle* (Mo. 1984) 678 S.W.2d 804, 811 (*Chandra*) (dis. opn. of Welliver, J.).) After this decision, the Missouri Legislature enacted a statute providing a privilege for peer review committees. (See Mo. Rev. Stat., § 537.035; *State ex rel. Lester E. Cox Medical Centers v. Darnold* (Mo. 1997) 944 S.W.2d 213, 214–215 & fn. 2.)

4. Relieving Committee Members From the Burdens of Participating in Litigation.

(a) Alternative rationale.

Like most of the Court of Appeal opinions dealing with section 1157, the Supreme Court has quoted *Matchett* extensively and with approval regarding the need for confidentiality in order to promote candor in peer review proceedings. (*Alexander*, *supra*, 5 Cal.4th at pp. 1226–1227; *West Covina Hospital*, *supra*, 41 Cal.3d at pp. 852–854.) However, the Supreme Court identified an additional policy consideration. The Court stated that not only the threat of disclosure of peer review matters, but also the time burdens on physicians of the litigation process are disincentives to voluntary physician participation in peer review activities.

(b) Burdens of discovery and involuntary testimony.

In *West Covina Hospital*, *supra*, 41 Cal.3d at pages 851–852, the Court stated: "If doctors who serve on such committees were subject in malpractice cases to the burdens of discovery and involuntary testimony on the basis of their committee work, the evidentiary burdens could consume large portions of the doctors' time to the prejudice of their medical practices or personal endeavors and could cause many doctors to refuse to serve on the committees." (See *Fox*, *supra*, 22 Cal.4th at pp. 539–540.)

5. Other Factors Underlying the Discovery Immunity.

The disincentives to effective professional review that discovery immunity statutes are intended to remove include more than committee members' fear of assisting a plaintiff in making a case against a colleague or hospital and the time burdens of the litigation process.

(a) Professional and personal considerations.

- Quoting a law review article, the Florida Supreme Court stated, " '[D]octors seem to be reluctant to engage in strict peer review due to a number of apprehensions: loss of referrals, respect, and friends, possible retaliations, vulnerability to torts, and fear of

malpractice actions in which the records of the peer review proceedings might be used. It is this ambivalence that lawmakers seek to avert and eliminate by shielding peer review deliberations from legal attacks.' " (*Cruger v. Love* (Fla. 1992) 599 So.2d 111, 115 (*Cruger*).)

- Quoting another law review article, the Maryland high court recognized, " '[P]hysicians are frequently reluctant to participate in peer review evaluations for fear of exposure to liability, entanglement in malpractice litigation, loss of referrals from other doctors, and a variety of other reasons.' " (*Baltimore Sun v. University* (Md. 1991) 584 A.2d 683, 686 (*Baltimore Sun*).)

(b) Controlling healthcare costs.

One state high court held that its state's legislature "enacted these peer review statutes in an effort to control the escalating cost of health care by encouraging self-regulation by the medical profession through peer review and evaluation." (*Cruger*, *supra*, 599 So.2d at p. 113.)

(c) Adverse effect on litigation system.

One court noted that discovery of committee documents can adversely affect the litigation system as well as the committee system. In *Marrese v. Am. Academy Ortho. Surgeons* (7th Cir. 1984) 726 F.2d 1150 (en banc) (*Marrese*), reversed on other grounds (1985) 470 U.S. 373 [105 S.Ct. 1327, 84 L.Ed.2d 274], the court noted, "we may not ignore as judges what we know as lawyers - that discovery of sensitive documents is sometimes sought not to gather evidence that will help the party seeking discovery to prevail on the merits of his case but to coerce his opponent to settle regardless of the merits rather than have to produce the documents." (*Id.* at p. 1161.)

C. PROTECTING PROFESSIONAL REVIEWS TAKES PRECEDENCE OVER PLAINTIFFS' ACCESS TO EVIDENCE.

1. Harm to Plaintiff's Case Is Irrelevant.

Application of the section 1157 discovery immunity is unaffected by the harm it may cause to a plaintiff's case. (But cf. Section O.3.g, *post* [regarding discovery in federal question cases].) Again, the *Matchett* court's discussion of this issue is accepted as dispositive:

> Th[e] confidentiality [provided by section 1157] exacts a social cost because it impairs malpractice plaintiffs' access to evidence. In a damage suit for in-hospital malpractice against doctor or hospital or both, unavailability of recorded evidence of incompetence might seriously jeopardize or even prevent the plaintiff's recovery. Section 1157 represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence.

(*Matchett*, *supra*, 40 Cal.App.3d at p. 629, fn. omitted.)

2. Evidence Is "Off Limits."

One court similarly stated that the discovery sought in the case before it "would in all likelihood lead to very material and admissible evidence. But the Legislature has made the judgment call that an even more important societal interest is served by declaring such evidence 'off limits.' " (*West Covina Hospital v. Superior Court* (1984) 153 Cal.App.3d 134, 138 (*West Covina*); see *Memorial Medical Center*, *supra*, 234 Cal.App.3d at p. 373; *California Eye Institute*, *supra*, 215 Cal.App.3d at p. 1485.)

3. Evidence Might Not Exist At All If Not For Section 1157's Protections.

Complaints about the unavailability of relevant evidence overlook the Legislature's conclusion that the evidence might not be there in the first place were it not for section 1157's protections. As the U.S. Supreme Court said when it adopted a federal psychotherapist-patient privilege, "[W]ithout a privilege, much of the desirable evidence to which litigants . . . seek access—for example, admissions against interest by a party—is unlikely to come into

being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." (*Jaffee v. Redmond* (1996) 518 U.S. 1, 11–12 [116 S.Ct. 1923, 135 L.Ed.2d 337] (*Jaffee*).)

D. JUDICIAL HOSTILITY TO SECTION 1157 CAN BE COUNTERED IN MALPRACTICE CASES BY STRESSING PLAINTIFFS' ALTERNATIVE SOURCES OF EVIDENCE.

1. Judicial Hostility.

Despite the well-documented public policy served by section 1157, there is often a judicial hostility to the statute because it denies relevant evidence to plaintiffs:

- The Court of Appeal in *Brown*, *supra*, 168 Cal.App.3d at pages 494–495, quoted a discovery referee's and a judge's apologetic explanations to the plaintiff's counsel of their rulings upholding the section 1157 discovery immunity. (" 'I have to confess that all of my sympathy is with you in this case, but I can't rule in your favor because I don't believe that that is the law. [¶] I believe that the Legislature, in its wisdom or lack thereof have written this in such a way that I can't give you what you want' "; " 'I think it's a little on the outrageous side that all of the hospitals are no longer holding it in administrative files and putting everything in those committees and everything is going there, but 1157 says that is privilege. There is no question in the court's mind that the hospitals are abusing 1157, but I can't do anything about that.' ")

- In *Mt. Diablo Hospital Dist. v. Superior Court* (1986) 183 Cal.App.3d 30, 33 (*Mt. Diablo II*), the trial judge was quoted as saying he was " '[p]hilosophically . . . opposed to all of 1157 because I think it's inappropriate.' "

- But see *Alexander*, *supra*, 5 Cal.4th at page 1226, footnote 8 ("reject[ing] the Court of Appeal's suggestion that Hospital's administrative staff is guilty of '[m]ere placement of the applications and reapplications for staff privileges in the medical staff committee files as a device to avoid discovery' "); *Sistok v. Kalispell Regional Hosp.* (Mont. 1991) 823 P.2d 251, 253 (*Sistok*) (flatly rejecting a plaintiff's argument that "hospitals are able to sabotage lawsuits by keeping all relevant information with the committee"), overruled on other grounds in *Huether v. District Court* (Mont. 2000) 4 P.3d 1193, 1197 (*Huether*).

2. Look to Alternate Sources.

At least in malpractice and hospital corporate negligence (*Elam*) cases, the judicial hostility can be countered with reminders that plaintiffs have alternate sources of evidence and that it is the review process, and not necessarily the information reviewed, that is the object of legislative protection.

- In *Mt. Diablo II*, *supra*, 183 Cal.App.3d at page 35, the court noted that the plaintiffs there had to "discover evidence regarding any breach [of the hospital's duty] from sources other than protected committee records and proceedings."

- Alternate sources of evidence do exist. As discussed later (Section G.4, *post*), much information considered by a committee is not itself immune from discovery if obtained from alternate sources; it is only the fact that the committee considered the information that is protected.

- The Supreme Court held a physician's staff privileges application is not discoverable, but stated section 1157 does not "prevent a plaintiff from otherwise discovering relevant information by, inter alia, deposing a physician and asking whether he or she was previously denied staff privileges, or by reviewing public records to determine whether the physician has suffered a malpractice judgment or disciplinary action." (*Alexander*, *supra*, 5 Cal.4th at p. 1223, fn. 4.)

- See *Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 599, footnote 3 (quoting *Alexander* to refute contention that section 1157 as interpreted in *Alexander* " '[has] largely [. . . rendered] extinct' " *Elam* liability); *Cedars-Sinai*, *supra*, 12 Cal.App.4th at page 589 (noting that although barring discovery of the identities of a committee's members "makes more difficult the task of locating a committee member who participated in the evaluation ofa defendant doctor and is willing to testify, it does not prevent it").

3. Plaintiffs Should Prepare Their Own Cases.

In a malpractice action, a plaintiff can have his or her own experts review his or her medical records to determine whether there has

been negligence; it is not necessary to know what medical staff committee members thought of the defendant physician's conduct. As Justice David Souter wrote for the New Hampshire Supreme Court, "the statute in question here simply leaves certain potential malpractice plaintiffs in the position of any litigant, or intending litigant, who cannot depend on the luxury of relying on the opposing party to furnish pretrial investigation and preliminary expert evaluation." (*In re "K"*, *supra*, 561 A.2d at p. 1072.)

E. EXCEPTIONS AND NONEXCEPTIONS TO SECTION 1157.

1. Exceptions Usually Construed Narrowly.

Section 1157 itself contains a number of exceptions to the discovery and testimonial prohibitions stated in subdivisions (a) and (b). For the most part, the exceptions have been narrowly construed and subdivisions (a) and (b) have been broadly applied. (See *Scripps Memorial Hospital*, *supra*, 37 Cal.App.4th at p. 1724 [section 1157 cases "as a general rule construe the statutory protection against discovery expansively and any exceptions narrowly"]; see also *Irving Healthcare System v. Brooks* (Tex. 1996) 927 S.W.2d 12, 17 (*Irving Healthcare System*) [" 'Nothing is worse than a half-hearted privilege; it becomes a game of semantics that leaves parties twisting in the wind while lawyers determine its scope' "].)

2. Voluntary Testimony Allowed.

(a) Only required testimony barred.

One exception that has *not* been narrowly construed is one that appears in the statute by implication only. Subdivision (b) provides that "no person in attendance at a meeting of any of [the covered] committees shall be required to testify as to what transpired at that meeting." The Supreme Court held in *West Covina Hospital*, *supra*, 41 Cal.3d 846 that since only "required" testimony is prohibited, voluntary testimony about a committee meeting is permissible. (See *Fox*, *supra*, 22 Cal.4th at pp. 539, 542, 544.)

(b) Voluntary discovery production allowed?

In *Fox*, *supra*, 22 Cal.4th at page 542, the Supreme Court said, "Evidence Code section 1157, subdivision (a), does not bar introduction of evidence voluntarily offered by a participant in the peer review proceedings *or voluntarily produced in the course of discovery*." (Emphasis added.) This statement was dicta, however.

(c) Questionable reasoning.

The Supreme Court's reasoning in *West Covina Hospital* is questionable. (The willing disclosure of peer review matters by one peer review participant can have just as chilling an

effect on the candor of all other participants as compelled disclosure.) Also, *West Covina Hospital* was decided by a 4-3 vote. Thus, it is good practice to object to any voluntary disclosure of peer review matters to preserve the issue for possible Supreme Court review when *West Covina Hospital* can be directly challenged.

3. The "Any Person Requesting . . . Privileges" and "Statements Made" Exceptions.

(a) Narrow construction.

Subdivision (c) provides that the discovery and testimonial prohibition does not apply "to any person requesting hospital staff privileges" or "to the statements made by any person in attendance at a meeting of [a staff committee] who is a party to an action or proceeding the subject matter of which was reviewed at that meeting." These exceptions have been narrowly construed, so as to be inapplicable in medical malpractice, corporate negligence, and physicians' damage actions.

(b) Medical malpractice and corporate negligence actions.

(1) Exception not applicable.

It is settled that the "any person requesting . . . privileges" and "statements made" exceptions do not apply to allow discovery in medical malpractice or corporate negligence (*Elam*) actions. (See *Snell v. Superior Court* (1984) 158 Cal.App.3d 44, 48 (*Snell*); *Schulz v. Superior Court* (1977) 66 Cal.App.3d 440, 444–446 (*Schulz*); *Matchett*, *supra*, 40 Cal.App.3d at pp. 628–630.)

(2) More about corporate negligence actions.

See Section F, *post*, for a more detailed discussion of the applicability of section 1157 in corporate negligence actions.

(c) Actions by physicians.

(1) Section 1157 limited to malpractice and *Elam* actions?

Physician plaintiffs argued that section 1157 did not apply to their lawsuits, but applied *only* in medical malpractice and corporate negligence cases, relying on the "any person requesting . . . privileges" exception. Their argument was supported by dictum in *Matchett*, *supra*, 40 Cal.App.3d at pages 629–630, that "[t]o all appearances the exception was designed to set the immunity to one side and to permit discovery in suits by doctors claiming wrongful or arbitrary exclusion from hospital staff privileges." (See *id*. at p. 629 ["[t]he statute . . . is aimed directly at malpractice actions in which a present or former hospital staff doctor is a defendant"].) The Court of Appeal later adopted the *Matchett* dictum as law in *Roseville*, *supra*, 70 Cal.App.3d at page 814.

(2) Protections apply in damages actions by physicians.

The argument, and the *Matchett-Roseville* interpretation of the exception, was rejected in *California Eye Institute*, *supra*, 215 Cal.App.3d 1477. (See *Joel v. Valley Surgical Center* (1998) 68 Cal.App.4th 360, 367–368; *St. Francis Memorial Hospital v. Superior Court* (1988) 205 Cal.App.3d 438 (*St. Francis Memorial Hospital*).) The *California Eye Institute* court held: "Under the plain meaning of the language of the narrow exception to section 1157, a physician may obtain access to [committee] records only if he/she is 'requesting hospital staff privileges.' [Plaintiff's] action is one for damages rather that [*sic*] an action for administrative mandamus (Code Civ. Proc., § 1094.5) seeking to currently become or remain a hospital staff member. Accordingly, [plaintiff] does not fall within the plain and unambiguous terms of the exception to section 1157 applicable only where a person is 'requesting hospital staff privileges.' " (*California Eye Institute*, at p. 1481.)

(3) Section 1157 inapplicable only in administrative mandamus actions.

The court in *California Eye Institute* held the section 1157 prohibition applies in damages actions brought by physicians (typically, actions following the denial or revocation of hospital staff privileges) and is only avoided in the limited situation where a physician brings an administrative mandamus action (which normally must precede any damages action (see *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 482–485)) to challenge an adverse staff privileges action.

(4) Physician due process rights in mandamus actions.

Another state's exception, similar to the "any person requesting . . . privileges" exception, has been said to be "[u]ndoubtedly . . . premised on the due process rights of a physician aggrieved by the decision of the medical review committee." (*Baltimore Sun*, *supra*, 584 A.2d at p. 687.)

(5) Literal reading of "person requesting privileges."

Similar to the *California Eye Institute*'s literal construction of the "any person requesting . . . privileges" exception is *University of Southern California v. Superior Court* (1996) 45 Cal.App.4th 1283 (*University of Southern California*). There, a physician sued seeking reinstatement to a residents postgraduate surgical training program. The court held that the exception was inapplicable and that section 1157 thus barred the physician's discovery request, because she "was not a physician with staff privileges," but "an employee and a student." (*Id.* at pp. 1289–1290.)

(6) "Statements made" exception not applicable.

The *University of Southern California* court also held inapplicable the "statements made by any person in

attendance" exception, an issue that was not discussed in *California Eye Institute*. The physician argued that since she had filed a lawsuit concerning her termination from a training program, "the statements previously made by those who evaluated her performance in the training program are 'statements by a party to an action the subject matter of which was reviewed.' " (*University of Southern California*, *supra*, 45 Cal.App.4th at p. 1291.) The court concluded such a broad interpretation of the exception would leave section 1157 with "little or no meaning. It would not apply whenever suit is filed, which is the only situation in which discovery is available." (*Ibid*; see *id.* at p. 1292 ["The exception would then swallow the rule"].)

(7) Similar New York case law.

A New York case, *Daly v. Genovese* (App.Div. 1983) 466 N.Y.S.2d 428 (*Daly*), supports the argument that the "statements made by any person in attendance" exception only applies if the subject matter of the case at bar "was reviewed" at the committee meeting in issue. In *Daly*, the court held the same exception in the New York statute "does not apply in a defamation action, where the subject matter of the action is the allegedly slanderous statements made at the meeting, and not the alleged malpractice which was reviewed thereat." (*Id.* at p. 430.)

(8) Narrow construction of exceptions consistent with legislative purpose.

- The *California Eye Institute* court explained that its holding furthered the legislative purpose of the statute:

> The inhibiting effect on candor and frankness of permitting discovery of what occurred at peer review committee meetings in damage actions by physicians against committee members or others is no less severe than in permitting such

> discovery in malpractice actions. Therefore, the policies reflected in section 1157 apply with equal, if not greater, force to damage actions by physicians. . . . The disincentive to full and frank participation in committee activities is much greater from the threat of disclosure in damage actions of any type than in mandate proceedings where the worst that can happen is the reversal of the hospital's staff privileges decision.

(*California Eye Institute*, *supra*, 215 Cal.App.3d at p. 1484.)

- In *Gates v. Deukmejian* (E.D.Cal., July 27, 1998, No. CIV S–87–1636 LKKJFM) 1988 WL 92568, at page *3, footnote 5 (*Deukmejian*) [nonpub. opn.], the court noted section 1157's purpose was served by prohibiting discovery in non-malpractice cases even though "the statute might be aimed at [malpractice] actions."

- The Florida Supreme Court stated that "[a] doctor questioned by a review committee would reasonably be just as reluctant to make statements, however truthful or justifiable, which might form the basis of a defamation action against him as he would be to proffer opinions which could be used against a colleague in a malpractice suit." (*Holly v. Auld* (Fla. 1984) 450 So.2d 217, 220.)

- Similarly, the Oregon Supreme Court has stated, "[T]he privilege . . . is based not on confidentiality but on the need to encourage frank communication. It is not to preserve the privacy of the communication but to prevent the participants from incurring legal liability for what they say." (*Straube v. Larson* (Or. 1979) 600 P.2d 371, 376 (*Straube*).)

(9) Narrow construction of exceptions not inconsistent with limited immunity-from-liability statutes.

a) Immunity from *liability* not relevant.

The *California Eye Institute* court rejected the argument that discovery should be permitted in actions alleging malicious conduct by committee members since a separate statute immunizing committee members from *liability* does not apply when they act with malice (Civ. Code, § 43.7, subd. (b)). (*California Eye Institute*, *supra*, 215 Cal.App.3d at pp. 1484–1486.)

b) Legislative choice.

Although candidly acknowledging "that application of the [discovery] immunity in an action by a physician claiming malicious conduct on the part of the peer review committee might constitute a greater impairment on the physician's ability to pursue his/her action than that imposed on a plaintiff alleging medical malpractice" (*California Eye Institute*, *supra*, 215 Cal.App.3d at p. 1485), the court refused to interfere with what it found to be a conscious legislative choice (*ibid.* ["The Legislature may choose for policy reasons to restrict access to certain evidence even though that evidence might be relevant to a cause of action expressly permitted"]).

c) Other states' case law consistent.

The court's holding is consistent with the following cases:

- A New York court stated, "[T]he allegation that the statements in question were made with malice, while relevant to a determination of whether they are privileged with respect to *liability*, is

wholly irrelevant to the question of whether they are privileged from *discovery* under the terms of the statute." (*Daly*, *supra*, 466 N.Y.S.2d at p. 430.)

- Accord, *Irving Healthcare System*, *supra*, 927 S.W.2d at page 16 ("The extension of civil immunity and the exemption of matters from discovery are related but distinct"); *Freeman v. Piedmont Hospital* (Ga. 1994) 444 S.E.2d 796, 797–798; *Frank v. Trustees of Orange County Hosp.* (Ind.Ct.App. 1988) 530 N.E.2d 135, 138 (*Frank*); *Terre Haute Regional Hosp. v. Basden* (Ind.Ct.App. 1988) 524 N.E.2d 1306, 1309–1310 (*Terre Haute Regional Hosp.*); *Franco v. Dist. Court In & For City & Cty.* (Colo. 1982) 641 P.2d 922, 930–931.

- But see *Good Samaritan Hosp. Ass'n v. Simon* (Fla.Dist.Ct.App. 1979) 370 So.2d 1174.

(10) Is already-discovered evidence admissible?

a) Open question.

The *California Eye Institute* opinion specifically did *not* decide "whether evidence discovered in a successful petition for administrative mandamus would be admissible should a damage action subsequently be filed." (*California Eye Institute*, *supra*, 215 Cal.App.3d at p. 1486, fn. 5.)

b) Evidence should be excluded.

Such evidence should not be admissible, however. In *Henry Mayo Newhall Memorial Hosp. v. Superior Court* (1978) 81 Cal.App.3d 626, 635–636 (*Henry Mayo*), the court held the introduction into evidence in a physician's mandamus proceeding of a committee meeting

transcript did not permit use of the transcript in a later medical malpractice action. Since "the policies reflected in section 1157 apply with equal, if not greater, force to damage actions by physicians" as to medical malpractice actions (*California Eye Institute*, *supra*, 215 Cal.App.3d at p. 1484), the result reached in *Henry Mayo* for a malpractice action should be the same as in a physician's damages action.

c) Purpose of section 1157.

Also, because one of the primary purposes of section 1157 is to prevent the adverse use of peer review matters (see *ante*, Section B.3.c), it should not matter whether the evidence has been previously discovered; it would be an adverse use regardless.

d) More about admissibility.

For further discussion of admissibility into evidence of peer review matters, see Section N, *post*.

e) Effect of peer review legislation.

One argument that a physician-plaintiff might make is that legislation specifying numerous due process rights for physicians subject to peer review (Bus. & Prof. Code, § 809 et seq.) requires disclosure of committee materials in damage actions. However, Business and Professions Code section 809.8 states that the legislation does *not* affect "the provisions relating to discovery and testimony in Section 1157 of the Evidence Code."

(d) General limitations on the "statements made" exception.

(1) Only a party's statements should be discoverable.

Even if the "statements made" exception does apply in a particular case, the ensuing discovery or testimony

should be strictly limited to the statements made by the person in attendance at the meeting who is a party to the action. Nothing else that occurred at the meeting, no one else's statements, and no documents should be disclosed.

(2) Persons, not entities.

Further, the exception should be construed as referring only to statements made by natural persons, not corporate entities, such as hospitals, who could be said to be "in attendance" at a committee meeting through an employee who is also a committee member. (See *Lakshmanan v. North Shore University Hospital* (App.Div. 1994) 610 N.Y.S.2d 528, 529 (*Lakshmanan*); *Lenard v. New York Univ. Med. Center* (App.Div. 1981) 442 N.Y.S.2d 30; *Burnside v. Foot Clinics of New York* (Sup.Ct. 1982) 453 N.Y.S.2d 311, 312–313; *Silva v. State* (Ct.Cl. 1981) 441 N.Y.S.2d 43, 44–45.)

(3) New York law consistent—up to a point.

In relying on New York case law on this point, however, counsel should be aware that, contrary to California case law, the "any person in attendance" exception in the New York version of section 1157 has been construed to permit discovery in *medical malpractice* actions of statements made by parties to the action. (See *Koithan v. Zornek* (App.Div. 1996) 642 N.Y.S.2d 115; *Lakshmanan*, *supra*, 610 N.Y.S.2d at p. 529; *Swartzenberg v. Trivedi* (App.Div. 1993) 594 N.Y.S.2d 927, 928; *Carroll v. Nunez* (App.Div. 1988) 524 N.Y.S.2d 578, 579–580 (*Carroll*); *De Paolo v. Wisoff* (App.Div. 1983) 461 N.Y.S.2d 893, 895; *Estate of Carroll v. St. Luke's Hospital* (App.Div. 1982) 457 N.Y.S.2d 128, 129; *Romero v. Cohen* (Sup.Ct. 1998) 679 N.Y.S.2d 264, 266–267; cf. *Logue v. Velez* (N.Y. 1998) 699 N.E.2d 365 [exception not applicable in case alleging hospital negligence in granting staff privileges].)

(But see *Parker v. St. Clare's Hosp.* (App.Div. 1990) 553 N.Y.S.2d 533, 534 (*Parker*).)

4. The Insurance Bad Faith Exception.

Subdivision (c) also makes the prohibitions inapplicable "in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits." This exception has not yet been construed by an appellate court.

5. Professional Society Committees Exceptions.

(a) Limited protections for professional societies.

Subdivision (d) limits the applicability of section 1157's prohibitions when information is sought from committees of professional *societies*. The prohibitions do not apply if such a committee "exceed[s] 10 percent of the membership of the society" or if a "person serves upon the committee when his or her own conduct or practice is being reviewed."

(b) Hospital staff committees are not professional societies.

In *West Covina*, *supra*, 153 Cal.App.3d 134, the Court of Appeal confirmed that the "person serv[ing]" portion of subdivision (d) applies only to society committees, *not* to hospital staff committees. (See also *County of Los Angeles v. Superior Court* (1990) 224 Cal.App.3d 1446, 1452, fn. 4 (*County of Los Angeles I*) [construing the first portion of subdivision (d) and holding "subdivision (d) applies only to proceedings of medical societies, and not to meetings of hospital medical staffs"].)

6. Criminal and Administrative Investigations.

(a) Case law conflict regarding criminal cases.

The Courts of Appeal are split concerning whether section 1157 applies in criminal actions. *Memorial Medical Center*, *supra*, 234 Cal.App.3d 363 holds the statute does not provide protection in a criminal case. *Scripps Memorial Hospital*, *supra*, 37 Cal.App.4th 1720 disagrees with *Memorial Medical Center* and holds that section 1157 generally prohibits discovery in criminal cases, except for healthcare providers brought within the statute's ambit in 1983, 1985, and 1990, and also, presumably, in 2000. In *People v. Superior*

Court (Laff) (2001) 25 Cal.4th 703, 724, the Supreme Court said that section 1157 "specifies that the privilege for the records of a hospital peer review committee does not apply in a criminal action." This statement should be disregarded. It is dictum—the issue before the [C]ourt in the case had nothing to do with section 1157—and it is an inaccurate generalization that does not even acknowledge, let alone attempt to resolve, the split of authority on the issue.

(b) Basis for the conflict.

The dispute in the case law centers on the interpretation of subdivision (e) of section 1157, which provides that the 1983, 1985, 1990, and 2000 amendments of the statute (adding to the statute's scope podiatric, registered dietitian, psychological, marriage and family therapist, and licensed clinical social worker staff committees, as well as committees of large medical groups and clinics and of health care service plans and nonprofit hospital service plans) "do not exclude the discovery or use of relevant evidence in a criminal action."

(c) Section 1157 inapplicable to administrative subpoenas.

Section 1157 does not apply to prevent disclosure of committee information in an administrative investigation. In *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4 (*Arnett*), the Supreme Court held that the Medical Board of California could obtain committee information by investigative subpoena because section 1157 prohibits only "discovery" and such a subpoena is not "discovery."

- **Impairment reports.**

Whenever it appears that any person holding certain medial licenses, certificates or permits "may be unable to practice his or her profession safely because the licentiate's ability to practice is impaired due to mental illness, or physical illness affecting competency, the licensing agency may order the licentiate to be examined by one or more physicians and surgeons or psychologists designated by the agency." (Bus. & Prof. Code, § 820.) "The report of the examiners shall be made available to the licentiate and may be received as

direct evidence" in the licensing agency's proceedings to determine whether to revoke, suspend, or place conditions on the licentiate's right to practice. (*Ibid.*; *id.*, § 822.)

(d) But, no discovery of peer review materials obtained by administrative agency.

Any information that is given to an administrative agency, such as the Medical Board, whether under subpoena or otherwise, is not subject to further disclosure. (See Section L.4, *post*.)

(e) Section 1157 possibly applicable after Medical Board files accusation.

The Supreme Court did not decide whether Evidence Code section 1157 and Government Code section 11507.6 would limit Medical Board discovery after the filing of a formal accusatory proceeding against a physician. (*Arnett*, *supra*, 14 Cal.4th at p. 26.)

7. Actions By Hospital Employees.

(a) Section 1157 applicable.

Section 1157 applies in actions by hospital employees. In *Willits*, *supra*, 20 Cal.App.4th 90, a nurse who had accidently been stuck with a needle used on an AIDS patient sued the company that managed the hospital. Seeking discovery, she asserted section 1157 did not apply. Because the statute applies only to committees "having the responsibility of evaluation and improvement of the quality of care rendered in the hospital" (§ 1157, subd. (a)), the nurse argued section 1157 only pertains to services to *patients* and is thus inapplicable in actions by hospital employees. The Court of Appeal disagreed.

(b) Other states' case law conflicting.

See *Mulder v. VanKersen* (Ind.Ct.App. 1994) 637 N.E.2d 1335, 1339 (*Mulder*) (in nurse's defamation action, communications to executive committee about nurse's alleged marijuana use are protected because directly related to evaluation of patient care). But see *Dunkin v. Silver Cross Hosp.* (Ill.App.Ct. 1991) 573 N.E.2d 848, 850 (*Dunkin*)

(Illinois Legislature's intent was to protect only "those reports and studies on quality control and hospital conditions that relate to *patient* medical care" (emphasis added).)

8. Products Liability Actions.

(a) Section 1157 should be applicable.

In a products liability action against the manufacturer of a medical product, the defendant manufacturer may attempt to obtain discovery of committee records at the hospital where the product was used. Although there are no California cases on point, section 1157 should bar the discovery. The broad terms of the statute's prohibitions certainly seem to encompass products liability actions, and none of the exceptions should apply to such actions.

(b) Other state's case law supportive.

Another state's statute has been applied to preclude discovery in products liability actions. (See *Hughes v. American Regent Laboratories* (D.Mass. 1992) 144 F.R.D. 177 (*Hughes*).)

9. Premises Liability Actions.

In *In re Osteopathic Medical Center of Texas* (Tex.App. 2000) 16 S.W.3d 881, 885 (*In re Osteopathic Medical Center*), the court rejected the argument that its state's peer review privilege was inapplicable in premises liability cases.

10. Elder Abuse Actions.

An unpublished Court of Appeal opinion, which may not be cited to a court (Cal. Rules of Court, rule 8.1115(a)), held that section 1157 applies to lawsuits brought under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.). (*Sutter Davis Hosp. v. Superior Court* (Cal.Ct.App., Sept. 8, 2004, C045798) 2004 WL 1988009, at pp. *10–*11 (*Sutter*) [nonpub. opn.].)

11. California Public Records Act.

Documents protected by section 1157 are expressly exempt from disclosure under the California Public Records Act. (Gov. Code, §§ 6254, subd. (k), 6276, 6276.30 [specifically, "[m]edical information,

disclosure by provider unless prohibited by patient in writing, Section 56.16 of the Civil Code"].)

F. THE DECISION IN *ELAM V. COLLEGE PARK HOSPITAL* DOES NOT AFFECT SECTION 1157.

1. The *Elam*–Section 1157 Relationship.

In *Elam*, *supra*, 132 Cal.App.3d 332, the Court of Appeal held a hospital has a duty to its patients to carefully select and review the competency of its medical staff. Plaintiffs argued that the existence of an *Elam* cause of action requires that section 1157 be construed to permit discovery of staff committee records in a suit against a hospital for negligent selection or retention of a staff physician. This argument has been rejected.

2. Section 1157 Held Applicable in *Elam* Actions Before *Elam*.

In *Matchett*, *supra*, 40 Cal.App.3d 623, years before *Elam*, the Court of Appeal assumed the existence of the hospital's duty later recognized in *Elam*, yet still held section 1157 precluded disclosure of staff committee records. (See Loveridge & Kimbal, *Hospital Corporate Negligence Comes to California: Questions in the Wake of* Elam v. College Park Hospital (1983) 14 Pacific L.J. 803, 827–828 ["Eight years before the *Elam* decision, the question of the discovery of medical staff committee records in a hospital corporate negligence case was squarely addressed in *Matchett v. Superior Court*," a case where the plaintiff alleged "a corporate negligence cause of action against the hospital indistinguishable from the cause of action upheld in *Elam*"].)

3. Section 1157 Held Applicable in *Elam* Actions After *Elam*.

Since *Elam*, three cases have expressly held the *Elam* decision has no impact on section 1157: *Mt. Diablo Hospital Medical Center v. Superior Court* (1984) 158 Cal.App.3d 344, 347 (*Mt. Diablo I*); *Snell*, *supra*, 158 Cal.App.3d at pages 48–49; and *West Covina*, *supra*, 153 Cal.App.3d at pages 138–139. (See *Santa Rosa*, *supra*, 174 Cal.App.3d at pages 723–724; *Brown*, *supra*, 168 Cal.App.3d at page 500.)

4. Supreme Court Opinions in *Elam*–1157 Cases.

Two Supreme Court opinions concerning section 1157 in civil litigation were in *Elam* cases. (*Alexander*, *supra*, 5 Cal.4th at

p. 1221, fn. 1; *West Covina Hospital*, *supra*, 41 Cal.3d at p. 849.) Although the court did not specifically reject an *Elam* exception to section 1157 in those cases, its analyses of the statute could be argued to presume the statute's general applicability in that type of case.

5. Legislative Action After *Elam*.

The Legislature has amended section 1157 twelve times since the *Elam* decision and eight times since the just mentioned *Mt. Diablo I*, *Snell*, and *West Covina* Court of Appeal opinions to expand the scope of the discovery and testimonial immunity. (Stats. 2017, ch. 775, § 109; Stats. 2016, ch. 86, § 128; Stats. 2015, ch. 274, § 1; Stats. 2011, ch. 381, § 23; Stats. 2000, ch. 136, § 1; Stats. 1994, ch. 815, § 3; Stats. 1990, ch. 196, § 2; Stats. 1985, ch. 725, § 1; Stats. 1983, ch. 1081, § 2.5; Stats. 1983, ch. 422, § 1; Stats. 1983, ch. 289, § 3; Stats. 1982, ch. 705, § 3.) This is strong evidence of legislative intent that section 1157 be construed no differently after *Elam* than before *Elam*. (See *West Covina Hospital*, *supra*, 41 Cal.3d at p. 852 ["when, as here, the Legislature amends a statute without altering portions of the provision that have been judicially construed, the Legislature is presumed to have been aware of and acquiesced in the prior judicial construction"]; *English v. Marin Mun. Water Dist.* (1977) 66 Cal.App.3d 725, 731 ["the Legislature is presumed to be cognizant of judicial decisions relevant to the subject matter of a statute"], disapproved on another ground in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699.)

6. Other States' Case Law Mostly Consistent.

For the most part, other states' courts are in agreement with the California opinions that section 1157-type statutes are applicable in hospital corporate negligence cases. (See *Ex parte Qureshi* (Ala. 2000) 768 So.2d 374, 378–380; *Brownwood Regional Hospital v. Eleventh Court of Appeals* (Tex. 1996) 927 S.W.2d 24, 27; *Pritchard v. SwedishAmerican Hosp.* (Ill.App.Ct. 1989) 547 N.E.2d 1279, 1286 (*Pritchard*); *Shelton v. Morehead Memorial Hosp.* (N.C. 1986) 347 S.E.2d 824, 828–829 (*Shelton*); *Humana Hospital v. Superior Ct.* (Ariz. 1987) 742 P.2d 1382, 1385–1386, 1388 (*Humana Hospital*); *Shamburger v. Behrens* (S.D. 1986) 380 N.W.2d 659, 665; *Posey v. District Court, etc.* (Colo. 1978) 586 P.2d 36; *Parker*, *supra*, 553 N.Y.S.2d at p. 534; *Lilly v. Turecki* (App.Div. 1985) 492 N.Y.S.2d 286 (*Lilly*); *Larsson v. Mithallal* (App.Div. 1979) 421 N.Y.S.2d

922.)

(But see *Greenwood v. Wierdsma* (Wyo. 1987) 741 P.2d 1079, 1087–1089 (*Greenwood*), holding limited by *Adams v. Walton* (Wyo. 2011) 248 P.3d 1167.)

G. WHAT ARE "RECORDS" AND "PROCEEDINGS" UNDER SECTION 1157?

1. The Terms Should Be Construed Broadly.

(a) "Records" and "proceedings" are not defined.

Section 1157, subdivision (a) provides that "[n]either the proceedings nor the records of [various committees] . . . shall be subject to discovery." The breadth of the terms "proceedings" and "records" is not stated in the statute. It should nonetheless be argued that the statute protects a wide range of committee documents and information.

(b) A narrow definition is probably not intended.

The Supreme Court has stated, "it is unlikely the Legislature intended a narrow or limited definition of 'records' in section 1157(a)." (*Alexander*, *supra*, 5 Cal.4th at p. 1225, fn. 6.)

(c) But, *administration* records and proceedings are not protected.

Section 1157 does not protect hospital administration records and proceedings, as opposed to staff committee records and proceedings. (See Section G. 5, *post*.) Thus, although the protection for staff committee records and proceedings is a comprehensive one, it does not extend beyond staff committees. However, peer review committee reports need not be authored by the entire committee to be protected—it is enough to show the individual who prepared the documents did so in connection with their responsibilities for the committee. (*County of Los Angeles v. Superior Court* (2006) 139 Cal.App.4th 8, 16 (*County of Los Angeles II*).)

2. Material Generated From a Committee.

(a) Some materials are obviously protected.

There are "[c]ertain types of information [which] are so clearly within the exclusive sphere of a protected medical staff committee . . . that section 1157 can be found applicable without extensive judicial inquiry." (*Santa Rosa*, *supra*, 174 Cal.App.3d at p. 727.)

(b) Examples of obviously protected materials.

(1) Committee reports, analyses, findings, and recommendations.

See *Santa Rosa*, *supra*, 174 Cal.App.3d at page 727 ("the infection control committee's self-generated analysis of the adequacy of work performed by hospital staff members engaged in infection control or of procedures utilized by them"); *Henry Mayo*, *supra*, 81 Cal.App.3d at page 629.

(2) Committee files, including "personnel" files.

See *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1129, footnote 14 (*Hinson*), disapproved on other grounds in *Alexander*, *supra*, 5 Cal.4th at page 1218; *Snell*, *supra*, 158 Cal.App.3d at page 46; *Matchett*, *supra*, 40 Cal.App.3d at p. 626.

(3) Transcripts of committee meetings.

Henry Mayo, *supra*, 81 Cal.App.3d at page 629.

(4) Committee minutes.

St. Francis Memorial Hospital, *supra*, 205 Cal.App.3d at page 440; *Mt. Diablo II*, *supra*, 183 Cal.App.3d at page 35; *West Covina*, *supra*, 153 Cal.App.3d at page 139.

(5) Opinions formed by a committee member as a result of his or her participation in the committee.

Brem v. DeCarlo, Lyon, Hearn & Pazourek, P.A. (D.Md. 1995) 162 F.R.D. 94 (*Brem*).

(6) Memorandum memorializing communications that had earlier been made to a committee.

Mulder, *supra*, 637 N.E.2d at page 1339.

(7) Inquiries about a physician to hospital from other hospitals and responses to the inquiries.

Irving Healthcare System, *surpa*, 927 S.W.2d at page 21.

(8) Inquiry from a committee to a physician being investigated.

Armstrong v. Dwyer (3d Cir. 1998) 155 F.3d 211, 219–220 (*Armstrong*); *Conner v. Cedars-Sinai Medical Center* (Cal.Ct.App., June 17, 2015, B248272) 2015 WL 3767970, at page *4 [nonpub. opn.] ("records relating to Cedars' performance evaluations of Dr. Shirvani's competence, which plaintiff seeks to support his claim that Cedars was negligent in hiring and retaining her as a staff physician," were protected by section 1157).

3. Information Submitted to a Committee.

(a) Protected just like materials created by a committee.

For purposes of applying the protections of section 1157, there is no difference between materials prepared by a committee and those submitted to a committee. The Supreme Court made this clear in *Alexander*, *supra*, 5 Cal.4th 1218.

(b) The Supreme Court's *Alexander* decision.

Rejecting an earlier Court of Appeal decision, *Hinson*, *supra*, 218 Cal.App.3d at page 1128, the Supreme Court held "a court has no authority to qualify the statutory protection by limiting it to materials that are 'generated by' a committee." (*Alexander*, *supra*, 5 Cal.4th at p. 1225.) The Court quoted from a Florida Supreme Court opinion: " 'We reject the interpretation . . . that . . . documents, information, or records in the possession of the committee are not protected if they originated from sources outside the board or committee proceedings. If the legislature intended the privilege to extend only to documents created by the board or committee, then surely that is what it would have said.' "

(*Id*. at p. 1226, quoting *Cruger*, *supra*, 599 So.2d at p. 114.)

(c) The Court of Appeal's *Matchett* decision is consistent with *Alexander*.

In *Matchett*, *supra*, 40 Cal.App.3d 623, the court did not differentiate between documents furnished to and documents prepared by hospital staff committees when the plaintiff sought discovery of the complete files of those committees. Instead, the court held that "the records and proceedings of these committees reflecting inquiry into the qualifications of [the defendant physician] are immune from discovery." (*Id.* at p. 631.)

(d) Legislative policy is consistent, too.

Protecting materials submitted to a committee is consistent with the policy behind section 1157.

(1) Committees compile information.

Part of the committee function is to "*compile* records and evaluations." (*California Eye Institute*, *supra*, 215 Cal.App.3d at p. 1483, emphasis added.)

(2) Disclosure would be a disincentive to providing information to committees.

Compelling hospital committees to disclose documents furnished to it by others would have a definite chilling effect on the effective functioning of such committees. Whether gathering documents and eliciting statements from others, or preparing documents itself, a committee is amassing evidence that could be used in a malpractice action against the doctor being reviewed or the hospital, or in a physician's damages action against persons providing information to the committee or the committee members themselves. It is essential that committee members and persons assisting the committee's investigation not fear that the fruits of their efforts will be used against a colleague, the hospital, or themselves.

(3) Peer review depends on a "reliable stream of information."

Effective peer review depends not only on candid analyses and evaluations by medical staff committees, but also on candid information submitted to those committees. Another state's court said, " 'The value of the investigation is questionable, if the input is not reliable. It is clear that the reliability of the input in this situation varies inversely with the risk of disclosure of the input or resulting criticisms.' " (*Bundy v. Sinopoli* (N.J.Sup.Ct. 1990) 580 A.2d 1101, 1105 (*Bundy*), overruled on another ground in *Payton v. New Jersey Turnpike Authority* (N.J. 1997) 691 A.2d 321, 331.) Similarly, the court stated in *Laws v. Georgetown University Hosp.* (D.D.C. 1987) 656 F.Supp. 824, 826 (*Laws*), "the effectiveness of a hospital staff meeting is contingent upon a reliable stream of information detailing the circumstances of medical procedures under review."

(e) Types of submitted information that are protected from discovery.

(1) Staff privileges applications.

Specifically at issue in *Alexander* was whether section 1157 protects from discovery applications for hospital staff privileges submitted by physicians to medical staff committees. The Court held it does, ruling that applications are committee "records" because the applications "are the province of the hospital's medical staff committee." (*Alexander*, *supra*, 5 Cal.4th at p. 1224.) The Court of Appeal had earlier held in *Snell*, *supra*, 158 Cal.App.3d at page 46, that a plaintiff could not discover " 'personnel files . . . including . . . *all applications for surgical privileges*.' " (Emphasis added.)

(2) Statements made to a committee.

See *Schulz*, *supra*, 66 Cal.App.3d at pages 442–443.

(3) Letters and reports to a committee.

Schulz, *supra*, 66 Cal.App.3d at page 443.

(4) Incident reports.

Although there is no published California case law regarding whether section 1157 protects incident reports from discovery, incident reports have been held protected on other grounds. (See *Scripps Health v. Superior Court* (2003) 109 Cal.App.4th 529 [incident reports held protected by attorney-client privilege; court expressly declines to address whether section 1157 provides protection].)

In an unpublished opinion, which may not be cited to a court (Cal. Rules of Court, rule 8.1115(a)), the Court of Appeal held that section 1157 protected an incident report from discovery. (*Sutter*, *supra*, 2004 WL 1988009.) The court prevented the disclosure of a form report of a patient's fall in a hospital because the form "was part of a quality of care investigation by . . . the quality management director, on behalf of . . . [a] committee to whom the [Medical Executive Committee] delegated the responsibility for evaluating and improving the quality of care provided by medical staff who were not physicians." (*Id.* at p. *6.)

Decisions from other states' courts are mixed. In *Johnson v. Univ. Hosp. of Cleveland* (Ohio Ct.App. 2002) 780 N.E.2d 619, 621, 623, the court held that an incident report of a patient's fall is protected as long as "the events giving rise to the incident are . . . reported in the [patient's] medical record"; if the medical record does not include such a report, the incident report is discoverable but only that part of the report describing the incident. (In Ohio, this case is obsolete, because the Legislature there has since enacted a statute specifically protecting incident reports from discovery. (See *DePaul v. St. Elizabeth Health Center* (Ohio Ct.App., Sept. 17, 2004, 03-MA-137) 2004 WL 2334370 [nonpub. opn.].))

In *In re Osteopathic Medical Center*, *supra*, 16 S.W.3d at page 886 the court in a slip-and-fall case held protected a "Patient Quality Event Tracking Report" that "was made exclusively for the Hospital's medical peer review committee," but allowed discovery of a "Security Services Incident Report" because "it appears to have been prepared as a routine matter by the Hospital's security department for purposes of general information gathering."

Additionally, in *Krusac v. Covenant Medical Center, Inc.* (Mich. 2015) 865 N.W.2d 908, 914–915, the court held the state's peer review privilege protects "all records, data, and knowledge collected for or by a peer review committee in furtherance of its statutorily mandated purpose of reducing morbidity and mortality and improving patient care. This includes objective facts gathered contemporaneously with an event contained in an otherwise privileged incident report."

(See *Katherine F. v. New York* (N.Y. 1999) 723 N.E.2d 1016 [no discovery of incident reports regarding sexual assault of minor psychiatric patient by hospital employee]; *Dorris v. Detroit Osteopathic Hospital Corp.* (Mich. 1999) 594 N.W.2d 455, 462–464 (no discovery of incident report if it was "collected for the purpose of retrospective review by the peer review committee"); *Community Hospitals v. Medtronic, Inc.* (Ind.Ct.App. 1992) 594 N.E.2d 448, 451 (*Community Hospitals*) [incident report submitted to Quality Assurance Department protected from discovery; court notes prohibiting discovery "would serve to foster an effective review of medical care," but statute expressly protects all communications to a peer review committee]; *Manthe v. Vanbolden* (N.D.Tex. 1991) 133 F.R.D. 497, 501 [statutory protection "is intended to encourage other hospital personnel to make their reports about incidents so they may be looked into by a professional staff"; statute protects "those documents prepared at the behest, request and created on the impetus of the committee"; but, no protection for documents in committee files "which were created without request or

by direction of the committee or documents not created for committee purposes"]; *Flannery v. Lin* (Ill.App.Ct. 1988) 531 N.E.2d 403 (*Flannery*) [code blue evaluation report concerning specific incident prepared for committee held not discoverable]; *Gallagher v. Detroit-Macomb Hosp. Ass'n.* (Mich.Ct.App. 1988) 431 N.W.2d 90, 94 [incident report routed to hospital committee]; cf. *Carr v. Howard* (Mass. 1998) 689 N.E.2d 1304, 1307–1309 (*Carr*) [statute specifically protects certain incident reports].)

(But see *In re Subpoena Duces Tecum to Jane Doe, Esq.* (N.Y. 2003) 787 N.E.2d 618, 622 (*Jane Doe*) [no protection for incident reports made under compulsion of statutory or regulatory dictate]; *Huether*, *supra*, 4 P.3d at p. 1197 [incident reports about plaintiff's decedent's treatment discoverable]; *State ex rel. AMISUB, Inc. v. Buckley* (Neb. 2000) 618 N.W.2d 684 [no protection for incident report or for list of falls by hospital patients]; *Chicago Trust Company v. Cook County Hosp.* (Ill.App.Ct. 1998) 698 N.E.2d 641, 645–649 (*Chicago Trust Company*) [hospital cannot invoke statute's protection "by declaring in advance that all incident documents prepared by the Hospital staff are part of the peer-review process"; protection applies only to documents "initiated, created, prepared, or generated by a peer-review committee"][1]; *Columbia/HCA Healthcare Corp. v. Eighth Judicial District Court* (Nev. 1997) 936 P.2d 844, 851 [same]; *Cochran v. St. Paul Fire and Marine Ins. Co.* (W.D.Ark. 1995) 909 F.Supp. 641, 644 [medication incident reports discoverable, in part because of express exception to discovery immunity, but also because the reports "are merely statements of fact [and] . . . contain no opinions of or conclusions reached by any administrative staff or

[1] The statute that was interpreted in *Chicago Trust Company*, *supra*, 698 N.E.2d 641, has been amended to add the phrase "or their designees." (735 Ill. Comp. Stat. 5 / 8-2101 (2003).) Accordingly, protection is probably not limited to documents initiated, created, prepared, or generated by a peer review committee—but extends to documents initiated, created, prepared, or generated by the peer review committee's *designees* as well.

review committee . . . [and thus do] not reveal any information regarding evaluation or review by any committee or administrative staff"]; *Matter of Kristen K. v. Children's Hosp. of Buffalo* (App.Div. 1994) 614 N.Y.S.2d 89, 90 (*Kristen K.*) [reports concerning investigation of sexual assault of patient not protected because statute "provides confidentiality for information relative to medical review functions"]; *Atkins v. Pottstown Memorial Medical Center* (Pa.Super. 1993) 634 A.2d 258 [incident report concerning patient's fall not protected]; *Dunkin*, *supra*, 573 N.E.2d 848 [no protection for incident reports concerning falls of nonpatients at hospital]; *John C. Lincoln Hosp. v. Superior Court* (Ariz.Ct.App. 1989) 768 P.2d 188, 191 [Quality Assurance Program Incident Reports "are not instances of peer review, but only occasional precipitants of peer review"].)

(f) Information need not be submitted to entire committee.

An unpublished Court of Appeal opinion, which may not be cited to a court (Cal. Rules of Court, rule 8.1115(a)), held that a document need not be submitted to an entire medical staff committee to be protected by section 1157. (*Sutter*, *supra*, 2004 WL 1988009, at p. *6 ["nothing in *Alexander* holds that section 1157 requires that the materials be submitted to the entire medical staff committee for the privilege to apply"].)

4. Documents and Information Available From Non-committee Sources.

(a) Compare: information reviewed vs. the fact that the information was reviewed by a committee.

Section 1157 protects the professional review committee system. Thus, it is important to prevent disclosure of not just the committee's findings and conclusions, but also what information a committee reviewed. (See Section G.6.c, *post*.) Although the information reviewed by a committee is not itself immune from discovery just because it found its way to a committee, the information, if discoverable, must be obtained from sources other than a committee. (See *Doe v.*

UNUM Life Ins. Co. of America (N.D.Ga. 1995) 891 F.Supp. 607, 609–611 (*UNUM Life Ins. Co.*).)

(b) Information does not become immune from discovery when it is considered by a committee.

In *Santa Rosa*, *supra*, 174 Cal.App.3d at page 724, the court stated: "Information developed or obtained by hospital administrators or others which does not derive from an investigation into the quality of care or the evaluation thereof by a medical staff committee, and which does not disclose the investigative and evaluative activities of such a committee, is not rendered immune from discovery under section 1157 merely because it is later placed in the possession of a medical staff committee or made known to committee members; and this may be so even if the information in question may be relevant in a general way to the investigative and evaluative functions of the committee. Just as ' "a party cannot [under the attorney-client privilege] conceal a fact merely by revealing it to his lawyer" ' [citations], a hospital cannot render its files immune from discovery simply by disclosing them to a medical staff committee." (See *Pomona Valley Hospital Medical Center v. Superior Court* (2012) 209 Cal.App.4th 687, 696–697 (*Pomona Valley*) [citing *Santa Rosa* to hold the same].)

(c) Committees do not "have a Midas touch."

Then New Hampshire Supreme Court Justice Souter wrote that a review committee "was not meant to have a Midas touch; it cannot convert a treatment record into a privileged review committee record merely by taking it into consideration." (*In re "K"*, *supra*, 561 A.2d at p. 1070; see, e.g., *Emory University Hospital v. Sweeney* (Ga.Ct.App. 1996) 469 S.E.2d 772, 776 (*Emory*) [prohibiting discovery of information from sources other than peer review committees "would invite the abuse of the peer review process by medical professionals by the simple expedient of insuring that all possible sources of inculpatory evidence were presented to the peer review committee. The purpose of the medical review process privileges is to protect the process for the public good, not to protect physicians from being held accountable for their tortious conduct."].)

(d) Examples of unprotected documents and information available from non-committee sources.

(1) Previous denial of privileges.

The fact that a physician was denied privileges at another hospital is not immune from discovery when a committee considers that fact in its peer review process. (See *Alexander*, *supra*, 5 Cal.4th at p. 1223, fn. 4.) (*That* the committee considered the fact should be protected.)

(2) Patient medical records.

The fact whether or not a particular patient's records were reviewed by a committee is protected from discovery (*Brown*, *supra*, 168 Cal.App.3d at pp. 496–497; see Section G.6.b, *post*), but the medical records themselves would not be (see *Beth Israel Hosp. v. District Court* (Colo. 1984) 683 P.2d 343, 344, 346 [hospital patient records discoverable even though the records were reviewed by a staff committee].)

(3) Hospital actions based on committee investigation.

Actions resulting from a committee's findings and conclusions are not immune from discovery. Thus, section 1157 should not bar discovery of any limitations that were placed on a physician's hospital privileges even though the hospital may have acted based on a committee's recommendation. (See Section G.9.a, *post*.) (The committee's recommendation itself is protected.)

(4) Information known by peer review participants.

"[A] person cannot be asked what he said in a committee proceeding. But he can be asked questions in discovery or on a witness stand that would elicit the same information given to the committee." (*Claypool v. Mladineo* (Miss. 1998) 724 So.2d 373, 387 (*Claypool*).)

5. Hospital Administration Files.

(a) Administration files different from committee files.

Section 1157 does not immunize from discovery files of the hospital administration as distinguished from the hospital medical staff. (*Santa Rosa*, *supra*, 174 Cal.App.3d at p. 726; *Brown*, *supra*, 168 Cal.App.3d at p. 501; *Saddleback Community Hospital v. Superior Court* (1984) 158 Cal.App.3d 206, 208–209 (*Saddleback*); *Schulz*, *supra*, 66 Cal.App.3d at pp. 446–447; *Matchett*, *supra*, 40 Cal.App.3d at p. 628.)

Some states' peer review statute exclude from protection "records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility." (See, e.g., Tex. Health & Safety Code Ann., § 161.032, subd. (f).)

(b) But committee materials in administration files are protected.

Hospital administration files "are discoverable only to the extent they do not contain references to the immune proceedings." (*Saddleback*, *supra*, 158 Cal.App.3d at p. 209; accord, *County of Kern v. Superior Court* (1978) 82 Cal.App.3d 396, 401–402 (*County of Kern*); *Henry Mayo*, *supra*, 81 Cal.App.3d at pp. 636–637; *Schulz*, *supra*, 66 Cal.App.3d at pp. 446–447; *Matchett*, *supra*, 40 Cal.App.3d at p. 628; see *Shelton*, *supra*, 347 S.E.2d at p. 830 ["Documents and information which are otherwise immune from discovery . . . do not . . . lose their immunity because they were transmitted to" the hospital administration]; *Robinson v. LeRoy* (D.Del., Nov. 16, 1984, No. CIV. A. No. 84–121 CMW) 1984 WL 14129, at p. *1 (*Robinson*) [nonpub. opn.] ["The plaintiff cannot evade the statute by seeking memoranda or minutes of the Board of Trustees which may refer to or incorporate [committee] records"].)

(c) *In camera* review possible.

In deciding whether the party resisting discovery has met the burden of establishing entitlement to nondisclosure, the trial judge may conduct an ex parte *in camera* hearing, "reviewing each item of evidence requested and acting 'upon those portions of . . . [a] pretrial discovery motion which are directed only at hospital administration files not resulting from [any] investigation conducted by [an] advisory board.' " (*Saddleback*, *supra*, 158 Cal.App.3d at p. 209; accord, *County of Kern*, *supra*, 82 Cal.App.3d at pp. 401–402; *Henry Mayo*, *supra*, 81 Cal.App.3d at pp. 636–637; *Schulz*, *supra*, 66 Cal.App.3d at pp. 446–447.) Regarding *in camera* hearings generally, see Section J, *post*.

6. Proceedings of a Committee.

(a) "Proceedings" include many committee activities.

The Court of Appeal held in *Cedars-Sinai*, *supra*, 12 Cal.App.4th at page 586, that the protected "proceedings" of a committee "include evaluation of the qualifications of applicants and holders of staff privileges, consideration of recommendations for appointment, reappointment, curtailment and exclusion from staff privileges, and provision for peer group methods of reviewing basic medical, surgical and obstetrical functions."

(b) Whether a patient's records were reviewed.

In *Brown*, *supra*, 168 Cal.App.3d at pages 496–497, the Court of Appeal held nondiscoverable the mere fact whether or not a particular patient's records were reviewed by a committee, because requesting that information "seeks to determine the factual content of a medical committee meeting . . . ." (See *ante*, Section G.4.d.2.)

(c) Listing documents submitted to a committee.

Another state's court barred a listing of documents submitted to a committee even though the documents themselves could be obtained from non-committee sources, because the list would "reveal[ ] that at least one participant in the proceeding considered this particular point of inquiry

important. Such a list, therefore, by its very nature involves 'the internal workings and deliberative process' of the peer review proceeding." (*Yuma Reg. Medical Ctr. v. Superior Court* (Ariz.Ct.App. 1993) 852 P.2d 1256, 1260 (*Yuma*); see Section K.1, *post*.) This is consistent with the California Supreme Court's reasoning in holding that the attorney-client privilege "covers the transmission of documents which are available to the public, and not merely information in the sole possession of the attorney or client." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600 (*Mitchell*).) The court explained that "it is the actual fact of the transmission which merits protection, since discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy." (*Ibid.*; cf. *West Florida Regional Medical Center, Inc. v. See* (Fla. 2012) 79 So.3d 1, 11 (*West Florida*) ["We conclude that a blank application for medical staff privileges does not fall within [Florida's peer review privilege]"]; see *Irving Healthcare System*, *supra*, 927 S.W.2d at p. 18 ["deposition questions inquiring about . . . what [a peer review] committee considered are objectionable"]. But see *May v. Wood River Township Hospital* (Ill.App.Ct. 1994) 629 N.E.2d 170, 174 [if a committee reviewed a physician's colleague's deposition testimony, the deposition itself would not be protected, "nor should the fact that it was considered be immune from discovery"].)

7. Whether a Committee Has Evaluated a Member of the Staff.

(a) The "fact of evaluation."

One thing that has been held *not* to constitute a committee record or proceeding is the information whether or not a committee has evaluated a physician for staff privileges. (*Brown*, *supra*, 168 Cal.App.3d at pp. 501–502 [permissible to require "a 'yes' or 'no' answer to a question directed to the fact of evaluation"]; see *Mt. Diablo II*, *supra*, 183 Cal.App.3d at p. 35, fn. 6.)

(b) No disclosure beyond the fact of evaluation.

No follow-up questions are allowed, however. (*Brown*, *supra*, 168 Cal.App.3d at p. 502 ["If an evaluation has occurred,

section 1157 protects the committees and hospital from further disclosure"].) The same Court of Appeal that decided *Brown* later said that the protected "proceedings" of a committee "include evaluation of the qualifications of applicants and holders of staff privileges, consideration of recommendations for appointment, reappointment, curtailment and exclusion from staff privileges, and provision for peer group methods of reviewing basic medical, surgical and obstetrical functions." (*Cedars-Sinai*, *supra*, 12 Cal.App.4th at p. 586.) This reinforces the narrow scope of the *Brown* holding. Nothing about a committee's evaluation of a physician should be discovered other than the mere fact that the evaluation occurred.

(c) Routine evaluations only?

Brown can be read to permit inquiry into the occurrence of only the routine periodic evaluations and reevaluations of medical staff applicants and members required by state law and hospital by-laws, not whether or not a committee review occurred at any other time, such as after a particular patient treatment. If it is disclosed that an otherwise unscheduled evaluation of a defendant physician occurred shortly after a plaintiff's unsuccessful surgery, the content of a committee meeting would be disclosed. This limitation is consistent with *Brown* itself. There, the court refused to allow a question whether a particular patient's records had been reviewed by a committee, holding that section 1157 prohibits discovery of "the factual content of a medical committee meeting." (*Brown*, *supra*, 168 Cal.App.3d at p. 497; see Section G.8.a, *post*; see also *Santa Rosa*, *supra*, 174 Cal.App.3d at pp. 728–729; *West Covina*, *supra*, 153 Cal.App.3d at p. 137 [no discovery of "at what hospital committee meetings, if any, [a physician's] work was discussed"]; Section G.8.b, *post*.)

8. Whether a Patient's Records Have Been Reviewed By a Committee.

(a) No discovery.

Brown held that section 1157 protects from discovery whether or not a particular patient's records have been reviewed by a hospital staff committee. (*Brown*, *supra*, 168 Cal.App.3d at pp. 496–497; see *State ex rel. St. Anthony's*

Medical Center v. Provaznik (Mo.Ct.App. 1993) 863 S.W.2d 21 [no discovery of whether any meeting was held by, or any report was made to, any hospital or medical society concerning occurrence complained of in the lawsuit]; *Hollowell v. Jove* (Ga. 1981) 279 S.E.2d 430, 434 (*Hollowell*) ["The discovery of whether any medical review committee meetings relating to the care of the decedent were held . . . necessitate[s] an intrusion into the 'proceedings' of the committee"].)

(But see *Coburn v. Seda* (Wash. 1984) 677 P.2d 173, 178 (*Coburn*) ["discovery of the location and time of the review would . . . be unlikely to inhibit criticism"]; *Serafin v. Peoples Community Hospital Auth.* (Mich.App. 1976) 242 N.W.2d 438, 442 [held discoverable "whether, when and where [a conference concerning the plaintiff's decedent's death] was held and who took the notes and under whose custody the notes were held," although subpoena of the notes themselves was held barred].)

(b) Limitation: only non-routine reviews are protected.

Brown's blanket rule was qualified in *Santa Rosa*, *supra*, 174 Cal.App.3d 711. The court there stated that such information should be protected only if the hospital shows that a committee review of a patient's records is not done as a matter of course and thus indicates a suspicion of impropriety. The court held: "If the committee regularly reviews the care and treatment of all or of randomly selected patients, or if review is otherwise automatically undertaken (as, for example, upon request of the patient or his or her physician), the mere fact of committee review would not constitute a record or proceeding of that committee." (*Id.* at p. 729.)

9. Whether a Physician's Staff Privileges Have Been Adversely Affected.

(a) Section 1157 does not prevent disclosure of hospital action taken.

In *Hinson*, *supra*, 218 Cal.App.3d at pages 1128–1129, the court held section 1157 did *not* prevent discovery of information whether a hospital has ever denied, suspended,

revoked, or terminated a physician's staff privileges.

(b) Important distinction between hospital administration and medical staff committee.

The *Hinson* court stated that, "as opposed to the underlying facts of the investigation and evaluation . . . [i]t seems probable that the actual decision to deny, suspend or terminate a particular physician's privileges is an act of the hospital administration rather than that of a medical staff committee." (*Hinson*, *supra*, 218 Cal.App.3d at p. 1128; cf. *Alexander*, *supra*, 5 Cal.4th at p. 1224 ["Although a hospital's administrative governing body makes the ultimate decision about whether to grant or deny staff privileges, it does so based on the recommendation of its medical staff committee"].)

(c) Other states' case law generally consistent.

Most other states' courts are in accord with *Hinson*. (See *McGee v. Bruce Hospital System* (S.C. 1993) 439 S.E.2d 257, 260 (*McGee*) ["the confidentiality statute was intended to protect the review process, but not restrict the disclosure of the result of the process"]; *Moretti v. Lowe* (R.I. 1991) 592 A.2d 855, 858 (*Moretti*); *Pritchard*, *supra*, 547 N.E.2d at p. 1285; *Greenwood*, *supra*, 741 P.2d at p. 1089; *Anderson v. Breda* (Wash. 1985) 700 P.2d 737, 741; *Richter v. Diamond* (Ill. 1985) 483 N.E.2d 1256, 1258 (*Richter*); *Payne v. Nicholas* (Ill.App.Ct. 1987) 509 N.E.2d 547, 554; *State, Good Samar. Med. Ctr. etc. v. Maroney* (Wis.Ct.App. 1985) 365 N.W.2d 887, 892–893; *Gleason v. St. Elizabeth Medical Center* (Ill.App.Ct. 1985) 481 N.E.2d 780, 781 (*Gleason*), overruled on another ground in *Reagan v. Searcy* (Ill.App.Ct. 2001) 751 N.E.2d 606, 609–610 (*Reagan*)[2]; *Byork v. Carmer* (App.Div. 1985) 487 N.Y.S.2d 226, 227–228.)

(But see *Boca Raton Community Hosp. v. Jones* (Fla.Dist.Ct.App. 1991) 584 So.2d 220, 221 [without discussion, precluding discovery of, inter alia, "memoranda, correspondence and other documentation indicating that the

[2] *Reagan* held, "To the extent that *Gleason* holds that because a patient waived the privilege in one action the privilege is waived in any future action, we overrule that holding." (*Reagan*, *supra*, 751 N.E.2d at pp. 609–610.)

doctor was given staff privileges at the hospital"]; *Ekstrom v. Temple* (Ill.App.Ct. 1990) 553 N.E.2d 424, 429 (*Ekstrom*); *Burnett v. Ghassem Vakili, M.D., P.A.* (D.Del. 1988) 685 F.Supp. 430, 432 (*Burnett*), affd. (3d Cir. 1990) 902 F.2d 1559 [quoting state trial court opinion finding "a physician's 'application for, *and record of*, his privileges at [the hospital] are an essential part of the peer review process and are equally protected from discovery' " (emphasis added)].)

(d) Adverse hospital disciplinary actions are public information.

Barring discovery of information about a hospital's adverse action on a physician's staff privileges would seem to conflict with statutory law that requires disclosure to the public of "[a]ny summaries of hospital disciplinary actions that result in the termination or revocation of a licensee's staff privileges." (Bus. & Prof. Code, § 803.1, subd. (b)(6); see *id.*, § 2027 [information to be posted on the internet].)

10. Identity of Committee Members.

(a) Identity as well as work product of committee members are protected.

The Court of Appeal held in *Cedars-Sinai*, *supra*, 12 Cal.App.4th 579 that section 1157 prohibited the discovery of the identity of those members of a hospital's medical staff committees who reviewed the obstetrical privileges of two defendant physicians. The court stated, "It would be an incongruous result if the statute protected the work product of the review committee but exposed the identity of the evaluating committee members whose candor the statute seeks to promote." (*Id.* at p. 588.)

(b) Committee members should be protected from plaintiff attorney contacts.

The *Cedars-Sinai* court also concluded, "The Legislature's intent that the work of such committees be marked by confidentiality, frankness and candor would be frustrated in large measure if the physicians who performed these necessary tasks were subjected to inquiry from plaintiffs' lawyers regarding the evaluation." (*Cedars-Sinai*, *supra*, 12

Cal.App.4th at p. 588.)

(c) Voluntary testimony exception does not allow discovery of committee member identities.

The *Cedars-Sinai* court specifically rejected the plaintiffs' argument that the Supreme Court's opinion in *West Covina Hospital*, *supra*, 41 Cal.3d 846, allowing voluntary testimony about committee proceedings (see *ante*, Section E.2), implied a right to discover committee member identities to facilitate the solicitation of volunteer witnesses. (*Cedars-Sinai*, *supra*, 12 Cal.App.4th at pp. 588–589.) The court noted, "[W]hile denial of discovery [of identities] makes more difficult the task of locating a committee member who participated in the evaluation of a defendant doctor and is willing to testify, it does not prevent it." (*Id*. at p. 589.)

(d) Other California authority supporting protection of peer review participant identities.

- Although whether committee member identities were protected was not a contested or decided issue in either case, plaintiffs sought such information in both *West Covina*, *supra*, 153 Cal.App.3d at page 139 (attendance records) and *Mt. Diablo I*, *supra*, 158 Cal.App.3d at page 346 (identity of committee members), and the Court of Appeal issued writs to vacate trial court rulings ordering discovery.

- In *Clarke*, *supra*, 174 Cal.App.3d at page 221, footnote 5, the court stated the identity of a committee physician who proctored a surgery was protected from discovery by section 1157.

- Although not based on section 1157, the court in *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257 (*Goodstein*) held that a physician could not discover the identities of informants to a peer review committee that investigated claims of substance abuse by the physician.

- The court in *Unnamed Physician*, *supra*, 93 Cal.App.4th at pages 628–630, followed *Goodstein* in protecting from disclosure the names of hospital

physicians who participated in an internal peer review, citing "strong policy concerns for keeping the names of the internal reviewers confidential."

- In *Ferguson v. Writers Guild of America* (1991) 226 Cal.App.3d 1382, the court cited section 1157 as an analogy in upholding the practice of keeping confidential the identities of movie screen credit arbitrators. (*Id.* at p. 1391 ["The Writers Guild's insistence on this practice is supported by important and legitimate considerations, including the necessity that arbitrators be entirely freed from both real and perceived dangers of pressure, retaliation, and litigation"].)

- The *Cedars-Sinai* court did not pass on the issue, but counsel should consider also making an argument that the constitutional right to privacy protects the identities of committee members. (See Section S, *post*; *Goodstein*, *supra*, 66 Cal.App.4th at p. 1267.)

(e) Other states' case law mostly consistent.

Other states' courts have held that committee member names are protected from discovery. (*Yuma*, *supra*, 852 P.2d at pp. 1259–1260; *Hollowell*, *supra*, 279 S.E.2d at p. 434 ["The discovery of . . . who attended the meetings necessitate[s] an intrusion into the 'proceedings' of the committee"]; *Coburn*, *supra*, 677 P.2d at p. 178 ["Individuals may be hesitant to participate in peer or quality review proceedings if anonymity is not assured"]; cf. *Wall v. Ohio Permanente Medical Group, Inc.* (Ohio App. 1997) 695 N.E.2d 1233, 1238–1239 [unsupported allegation of abuse of peer review process insufficient "to show that the identity of peer review committee members was nonprivileged and relevant"]; see *UNUM Life Ins. Co.*, *supra*, 891 F.Supp. at p. 611, fn. 4 [no discovery of "who may have attended or given testimony at any meetings where plaintiff[-physician]'s situation was discussed"]; *All Children's Hosp. v. Davis* (Fla.Dist.Ct.App. 1991) 590 So.2d 546, 546 [discovery of names and addresses of committee members barred even though "not specifically protected by statute," because "the release of the names would neither be relevant nor lead to the discovery of admissible evidence"]; *Richter*, *supra*, 483 N.E.2d at p. 1257

[plaintiff conceded that the identities of persons who participated in reviewing a physician's work were protected].)

(But see *Claypool*, *supra*, 724 So.2d at pp. 388–389 [discovery of "names of the participants or bystanders during [*sic*] the peer review committees"; "defendants who assert the privilege should be required to provide the names and addresses of all present during the medical peer review committee proceedings to the plaintiffs so that they might schedule depositions of those persons"]; *Ekstrom*, *supra*, 553 N.E.2d at p. 429; see *Moretti*, *supra*, 592 A.2d at p. 858 [medical malpractice plaintiff can discover names and addresses of all persons having knowledge of facts pertaining to the plaintiff's claim "regardless of whether these persons sit on a peer-review committee or have presented evidence to a peer-review committee"].)

11. Evidence About Review Procedures in General.

(a) No California authority.

It is an open question in California whether discovery about a hospital's peer review process in general is precluded by section 1157.

(b) Other states' cases inconsistent.

- In a malpractice action, an Illinois appellate court held the trial court properly "preclud[ed] plaintiff's expert from testifying [at trial] regarding the hospital's review procedures and by-laws." (*Zajac v. St. Mary of Nazareth Hosp.* (Ill.App.Ct. 1991) 571 N.E.2d 840, 845 (*Zajac*).) Based on the Illinois statute, the court reasoned that "the nature and content of an internal review process is privileged and confidential information" and that, "[i]n order to determine whether the hospital properly conducted a review of [a particular physician] and thereby followed its review procedures, it would be necessary to obtain information on the content of the review procedures which falls within the scope of information protected" by the statute. (*Id.* at p. 846; see *Ekstrom*, *supra*, 553 N.E.2d at p. 429 [protecting committee guidelines from discovery].)

- As opposed to a *medical staff's* procedures, a *hospital's* rules and regulations may be discoverable. (See *Carroll*, *supra*, 524 N.Y.S.2d at p. 580.)

- A South Carolina court allowed discovery of "the general policies and procedures for staff monitoring." (*McGee*, *supra*, 439 S.E.2d at p. 260.)

- See *Tenet Healthsystem Hospitals, Inc. v. Taitel* (Fla.Dist.Ct.App. 2003) 855 So.2d 1257, 1258 (*Tenet*) (no discovery of blank hospital form used for testing nurses' competency; plaintiffs wanted form "to see what the hospital deemed important" in the testing) disapproved in *West Florida*, *supra*, 79 So.3d at page 11.

H. THE TYPES OF COMMITTEES PROTECTED BY SECTION 1157.

1. Not Only Hospital Committees Are Protected.

(a) Societies, groups, clinics, health care service plans also protected.

By its express terms, section 1157 can apply to more than just *hospital* committees of various health care professionals. It also applies to review committees of various health professional *societies*, to committees of large (i.e., having more than 25 professionals) *groups* and *clinics*, and to committees of *health care service plans*. Health care service plan reviews are also protected by Health and Safety Code section 1370. (See Section T.5, *post*.)

(b) Clinical social workers?

Construing a statute similar to section 1157, another state's court protected from discovery the investigation by a voluntary professional organization of a patient's charge of unethical behavior against a clinical social worker. (*Swatch v. Treat* (Mass.App.Ct. 1996) 671 N.E.2d 1004, 1008.)

(c) Minimum qualities of protected committees.

But, all committees must "hav[e] the responsibility of evaluation and improvement of the quality of care . . ." to be protected. (§ 1157, subd. (a).)

2. Not Only Committees That Review Physicians Are Protected.

(a) Committees reviewing residents.

"A committee evaluating resident surgical trainees at a teaching hospital is responsible for maintaining and improving the quality of care rendered at the hospital" and is thus covered by section 1157. (*University of Southern California*, *supra*, 45 Cal.App.4th at p. 1289.)

(b) Other state's case consistent.

One plaintiff's counsel argued that protection from discovery applied only to peer review of staff physicians, not to peer review of resident physicians. The court rejected the proposed distinction as without "principled basis." (*Burnett*, *supra*, 685 F.Supp. at p. 433.)

3. Not Only Peer Review Committees Are Protected.

(a) Medical staff committees do more than peer review.

Peer review is an important part of the "evaluation and improvement of the quality of care." However, peer review is not the only committee function in that category and section 1157 applies to protect these other functions as well.

(b) Section 1157 not limited to peer review functions.

In *Santa Rosa*, *supra*, 174 Cal.App.3d at pp. 719–721, the Court of Appeal specifically rejected an argument that section 1157 is limited to peer review of physicians. The court stated, "[w]hile physician peer review records and proceedings are certainly within the protection of section 1157, nothing in the case law or the language of section 1157 limits its applicability to peer review of physicians by other physicians." (*Id.* at p. 720.) The same result was reached in *Mt. Diablo II*, *supra*, 183 Cal.App.3d at page 34—"the contention here that the statute protects only evaluation of the past performance of human beings is untenable."

(c) Infection control; method of treatment review.

In *Santa Rosa*, *supra*, 174 Cal.App.3d 711 section 1157 was applied to protect the records and proceedings of a hospital infection control committee. In *Mt. Diablo II*, *supra*, 183 Cal.App.3d 30 it protected an ad hoc committee formed to evaluate and approve standards for granting privileges to use a certain treatment at the hospital.

(d) Obstetrics department in general.

In *County of Los Angeles I*, *supra*, 224 Cal.App.3d at pages 1452–1453, the Court of Appeal held section 1157 protected the records and proceedings of conferences of a hospital's

entire obstetrics department.

(e) Other states' case law mostly consistent.

(1) Cases giving broad protection.

Carolan v. Hill (Iowa 1996) 553 N.W.2d 882, 886 (periodic reviews of hospital anesthesia department; if committee records "were privileged only when directed at a specific licensee, hospitals would have difficulty conducting review of their health care departments"); *Trinity Medical Center, Inc. v. Holum* (N.D. 1996) 544 N.W.2d 148, 155 (*Trinity Medical Center*) (quality assurance committee, safety committee, infection committee; but, based on statute narrower than section 1157, no protection for participation in reviews "by departments, nurses, or other hospital employees"); *Brem*, *supra*, 162 F.R.D. at pages 99–100 (educational error management conferences); *State ex rel. Shroades v. Henry* (W.Va. 1992) 421 S.E.2d 264, 270 (*Shroades*) (quality assurance committee); *In re "K"*, *supra*, 561 A.2d at pages 1068–1069 (infection control committee); *Ekstrom*, *supra*, 553 N.E.2d at page 427 (infection control committees); *Spinks v. Children's Hosp. Nat. Medical Center* (D.D.C. 1989) 124 F.R.D. 9 (*Spinks*) (morbidity and mortality conference committee); *Poulnott v. Surgical Associates* (Ga.Ct.App. 1986) 345 S.E.2d 639, 641 (surgical conference); *Suwannee County Hosp. Corp. v. Meeks* (Fla.Dist.Ct.App. 1985) 472 So.2d 1305, 1306 (hospital medical staff meeting); *Palm Beach Gardens Community Hosp., Inc. v. Shaw* (Fla.Dist.Ct.App. 1984) 446 So.2d 1090 (*Palm Beach Gardens*) (reports of infectious control committee); *Kappas v. Chestnut Lodge, Inc.* (4th Cir. 1983) 709 F.2d 878, 880 (*Kappas*) (Maryland law; regular staff conferences of a private psychiatric care facility); *Murphy v. Wood* (Idaho 1983) 667 P.2d 859, 862–863 (*Murphy*) (hospital tumor board); see *In re University of Texas Health Center at Tyler* (Tex. 2000) 33 S.W.3d 822, 825 (*In re University of Texas*) (infection control committee); *Doe v. Illinois Masonic Medical Center* (Ill.App.Ct. 1998) 696 N.E.2d 707 (documents submitted to hospital's Institutional Review Board concerning experimental research

program); *Mulder*, *supra*, 637 N.E.2d at page 1339 (communications to executive committee about nurse's alleged marijuana use are protected because directly related to evaluation of patient care).

(2) Cases giving narrower protection.

State ex rel. Tennill v. Roper (Mo.Ct.App. 1998) 965 S.W.2d 945 (no protection for review materials of a company implementing cost containment measures for state retirement system in case where company denied benefits for further hospitalization of psychiatric patient who committed suicide); *Feig v. Lenox Hill Hospital* (Sup.Ct. 1995) 636 N.Y.S.2d 971, 973 (*Feig*) (no protection for materials from private agency that investigated breach of hospital security; statute does not "stretch . . . to embrace nonmedical areas"); *Kristen K.*, *supra*, 614 N.Y.S.2d at page 90 (no protection for minutes of Hospital Safety Committee in case concerning sexual assault of patient);[3] *Corrigan*, *supra*, 857 F.Supp. at pages 438–439 (based on statute arguably more restrictive than section 1157, discovery allowed of committee materialsconcerning the use of particular surgical hardware); *Roach v. Springfield Clinic* (Ill. 1993) 623 N.E.2d 246, 251 (*Roach*) (suggesting protection extends only to committees involved in the peer review process);[4] *Konrady v.*

[3] *Feig* and *Kristen K.* were disagreed with by *Katherine F. v. State* (App.Div. 1999) 684 N.Y.S.2d 243, 244 ["By the same token, we disagree with the holding of the Fourth Department in [*Kristen K.*] . . . [and *Feig*] to the effect that reports issued as part of a 'security' function do not fall within the definition of privileged documents set forth in Education Law § 6527(3). The types of incidents covered by Mental Hygiene Law § 29.29(1) necessarily include incidents resulting from breaches of hospital security whenever those incidents result in accidents or injuries affecting patient health and welfare."].

[4] The peer review statute at issue in *Roach* has been amended to include the phrase "or their designees." (735 Ill. Comp. Stat. 5 / 8-2101 (2003).) Accordingly, protection is no longer limited to documents initiated, created, prepared, or generated by a peer-review committee—but now extends to documents initiated, created, prepared, or generated by their designees as well.

Oesterling (D.Minn. 1993) 149 F.R.D. 592 (*Konrady*) (Investigational Review Board at hospital, required by federal law to monitor biomedical research involving human subjects, not protected); *Fostoria Daily Review v. Fostoria Hosp.* (Ohio 1989) 541 N.E.2d 587 (Joint Advisory and Quality Assurance Committee, which did not do reviews itself but which received reports from another quality assurance committee, not protected); *Davidson v. Light* (D.Colo. 1978) 79 F.R.D. 137, 140 (*Davidson*) (no protection for report of infection control committee).

4. Not Only Committees Comprised Solely of Physicians Are Protected.

(a) Non-physician members allowed.

In *Santa Rosa*, *supra*, 174 Cal.App.3d 711, the court held that a hospital staff committee does not lose the protections of section 1157 just because it includes non-physician members. (*Id.* at p. 718 ["Section 1157, by its express terms, is in no way limited to medical staff committees composed solely, or primarily, of physicians"]; accord, *Pomona Valley*, *supra*, 209 Cal.App.4th at p. 695 [a hospital's "inclusion of lay people who are not affiliated with the Hospital on the [peer review committee] as required by federal law does not void the protection of section 1157"]; *County of Los Angeles I*, *supra*, 224 Cal.App.3d at p. 1454 ["So long as the statutory purpose of peer professional evaluation and improvement of the quality of patient care is served, . . . the specific composition of the reviewing body is best left to the health care professionals"].)

(b) Other states' case law generally in accord.

In re "K", *supra*, 561 A.2d at page 1069 (protection for report of nurse epidemiologist, who was an infections committee member); *Lake Hosp. and Clinic, Inc. v. Silversmith* (Fla.Dist.Ct.App. 1989) 551 So.2d 538, 542 ("While some of these committees are not entirely made up of medical staff, it would make no sense to exclude them from the intent of the statute, since the proceedings of those committees would necessarily involve a review of the 'medical staff' actions as well as constitute an essential part of the overall peer review

process"); cf. *Trinity Medical Center*, *supra*, 544 N.W.2d at page 155 (based on statute narrower than section 1157, no protection for participation in reviews "by departments, nurses, or other hospital employees"); *Matter of Parkway Manor Healthcare Ctr.* (Minn.Ct.App. 1989) 448 N.W.2d 116, 119 (*Matter of Parkway Manor*) (statute expressly restricts protections to committees " 'whose membership is limited to professionals and administrative staff' ").

(c) *Hospital* committees not protected.

But the section 1157 definition of hospital staff committee cannot be stretched to include committees of the hospital administration, even though they, too, may be involved in the improvement of the quality of hospital care. Thus, meetings of the hospital governing body, which has ultimate authority over staff membership decisions, are not protected by section 1157. (See *Shelton*, *supra*, 347 S.E.2d at pp. 829–830; see also *Grandi v. Shah* (Ill.App.Ct. 1994) 633 N.E.2d 894, 898 (*Grandi*) [hospital administrator's conversations with defendant physician and with nurse after incident at issue in lawsuit not protected; "an investigation generally undertaken by hospital administration is not protected"]; *Mallon v. Campbell* (Wis.Ct.App. 1993) 504 N.W.2d 357 (*Mallon*) [discovery allowed of hospital administrator's investigation of plaintiff's care].)

(But see *Cohn v. Wilkes General Hosp.* (W.D.N.C. 1989) 127 F.R.D. 117, 119–121 (*Cohn*), affd. (4th Cir. 1991) 953 F.2d 154, 159 [no discovery of information discussed during executive sessions of hospital and city council].)

5. Informal Meetings and Investigations?

(a) Open question in California.

When investigations or discussions concerning the "evaluation and improvement of the quality of care" occur outside the formal professional review committee system, do section 1157's protections apply? There is no case law in California on the subject.

(b) Other states' case law conflicting.

(1) Cases giving broad protection.

In *Frank*, *supra*, 530 N.E.2d at page 137, the court held protected from discovery "private informal conversations" about the plaintiff physician by committee members. The court reasoned, "Any statements made concerning [the physician] during those conversations may have shaped the opinions of the participating physicians. Those opinions could very well have been carried into the various peer review meetings. Consequently, to permit discovery of those conversation[s] might indirectly allow [the physician] to discover the communications proceedings, and determinations made pursuant to the peer review process and thereby undermine the statute's confidentiality and privilege provisions." (*Ibid.*; see *Brem*, *supra*, 162 F.R.D. at p. 100 [statutory protection applied to educational error management conferences even though single physician decided which missed diagnoses would be presented; "[t]he statute . . . does not require that a formal committee identify the mistakes of health care providers"]; *Mulder*, *supra*, 637 N.E.2d at p. 1339; *Freeman v. Piedmont Hosp.* (Ga.Ct.App. 1993) 434 S.E.2d 764, 768, revd. on other grounds (Ga. 1994) 444 S.E.2d 796 ["purpose [of privilege] would not be served if the privilege were limited to only what occurred in formal hearings or meetings and did not apply to medical staff comments to committee members or other intraorganizational communications leading up to the initiation of a formal hearing or meeting"].)

(2) Cases giving narrower protection.

In *Roach*, *supra*, 623 N.E.2d at page 252, the Illinois Supreme Court held unprotected in a medical malpractice lawsuit informal conversations by the head of the anesthesia department concerning the incident that was the subject of the lawsuit. The court stated, "As generally understood, a 'committee' is comprised of a body or group of persons, not just a

single individual."[5] (*Roach*, at p. 252; see *Mong v. Children's Hospital of Buffalo* (App.Div. 1999) 688 N.Y.S.2d 353 [no protection for nurse's "conversations" with her nurse manager about an incident concerning the plaintiffs' daughter, because of no evidence "that the conversations were held within the confines of [the hospital's] formal quality review procedure"]; *Grandi*, *supra*, 633 N.E.2d 894 [hospital administrator's conversations with defendant physician and with nurse after incident at issue in lawsuit not protected]; *Mallon*, *supra*, 504 N.W.2d 357 [discovery allowed of hospital administrator's investigation of plaintiff's care]; *Ruiz v. Steiner* (Fla.Dist.Ct.App. 1992) 599 So.2d 196 [discovery permitted of informal meeting of physicians called to discuss an autopsy report]; *Pisel v. Stamford Hospital* (Conn. 1980) 430 A.2d 1, 8–9 [rejecting as "much too broad" a construction similar to that adopted in *Frank*].)

[5] As previously noted, their peer review statute at issue in *Roach* has been amended to include the phrase "or their designees," so protection is now expanded to documents initiated, created, prepared, or generated by a peer-review committee or its designees. (See *ante*, fn. 4.)

I. THE BURDEN OF ESTABLISHING AN ENTITLEMENT TO SECTION 1157'S PROTECTIONS.

1. Hostility to Applying Section 1157.

Despite the well-documented public policy underlying section 1157 (see *ante*, Section B.2), there remains in the judiciary a general hostility to the statute and a suspicion of hospital motives whenever its protections are invoked (see *ante*, Section D.1).

2. Burden Is on Party Seeking Statute's Protections.

Because of the hostility to the statute, courts will often strictly apply the established rule that "[t]he burden of establishing entitlement to nondisclosure rest[s] with the party resisting discovery, not the party seeking it." (*Matchett*, *supra*, 40 Cal.App.3d at p. 627; accord, *Santa Rosa*, *supra*, 174 Cal.App.3d at p. 727 ["a hospital cannot receive the benefit of section 1157 if it refuses to bear the associated burden of demonstrating why the information claimed to be immune should be deemed a record or proceeding of a medical staff committee"]; *Mt. Diablo I*, *supra*, 158 Cal.App.3d at pp. 347–348 [hospital must establish "that an answer cannot be given without divulging the 'proceedings [or] the records' of the medical staff committees to which section 1157 refers"]; see *Willits*, *supra*, 20 Cal.App.4th at p. 104.)

3. Twofold Burden.

The burden is generally a twofold one: it must not only be shown that the requested information is a "record" or "proceeding" but also that the committee involved is a hospital staff committee as defined in section 1157. (See *ante*, Section H; *Matchett*, *supra*, 40 Cal.App.3d at p. 627 ["a court must have before it facts which allow it to match the staff committee's mission and function against the specifications of the statute"].)

4. Examples of Insufficient Showings.

- In *Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 929, plaintiff's sole evidence of her counsel stating "of course" defendant conducted a peer review was insufficient to establish that a peer review was actually conducted.

- In *Brown*, *supra*, 168 Cal.App.3d at pages 500–501, a referee's finding that a request for admission *may* include committee-generated documents was held to be "not enough" to preclude discovery.

- See also *Tate v. Cate* (E.D.Cal., Oct. 25, 2011, No. 1:09-CV-00770 JLT PC) 2011 WL 5085568, at page *4 [nonpub opn.] ("There is no showing that the document was prepared for the purpose of quality control in the provision of medical care. The document itself is entitled 'Confidential Supplement to Appeal 'Appeal Inquiry.' The investigator was not a medical professional but a Correctional Counselor. Though the report contains some critique about how [the defendant] completed a document related to a request for medical care, there is no critique of any medical care that she-or anyone else-provided.")

- Other states' cases provide additional examples. (See *Trinity Medical Center*, *supra*, 544 N.W.2d at p. 156, fn. 3 ["We would strongly encourage future claimants of the privilege to provide a better record when attempting to meet their heavy burden of demonstrating that the materials sought to be protected fall within the statutory privilege"]; *Ex parte St. Vincent's Hospital v. Anesthesia Services of Birmingham* (Ala. 1994) 652 So.2d 225, 230 [hospital "produced no evidence that the Infection Control Committee served as a utilization review committee and no evidence that a function of that committee was accreditation or quality assurance"]; *Corrigan*, *supra*, 857 F.Supp. at p. 439 [hospital representative has burden of establishing "(1) the source of his or her knowledge, (2) whether the information and documents sought by the plaintiff derive solely from the proceedings and records of the hospital's peer review committee(s) and (3) that those records and proceedings arose out of matters which are the subject of evaluation and review by those committee(s)"]; *Adcox v. Children's Orthopedic Hospital and Medical Center* (Wash. 1993) 864 P.2d 921, 931–932 [no protection where hospital failed to establish the existence of a protected committee; "The Hospital never presented any of its bylaws or internal regulations; never referred to the standards and guidelines of relevant accreditation bodies; and never even identified the committee members or the procedures involved in reviewing hospital care [at the relevant time]"]; *Mallon*,

supra, 504 N.W.2d at p. 361 [lack of facts to establish investigation was conducted as part of a protected program or organization]; *Barnes v. Whittington* (Tex. 1988) 751 S.W.2d 493, 495 ["no evidence was presented by the mere global allegations that the documents come within the privilege. [Citation.] Affidavits . . . must contain something more than a global reiteration of facts ascertainable from the face of the documents themselves."], disapproved of on another ground in *Walker v. Packer* (Tex. 1992) 827 S.W.2d 833, 842; *Ekstrom*, *supra*, 553 N.E.2d at p. 428 ["the record is for the most part devoid of any information concerning the nature and content of documents being withheld, and the trial court, having no basis for determining the existence of any privilege, properly ordered compliance with the production request"]; *Mole v. Millard* (Tex.Ct.App. 1988) 762 S.W.2d 251, 254 ["although the hospital filed an affidavit by its executive director that discusses hospital committees, the affidavit does not show that the documents requested were generated by a hospital committee for an investigation or review, or constitute the result of a committee's deliberation process; therefore, they have not been shown to be within the privilege"]; *Wiener v. Memorial Hosp. For Cancer, etc.* (Sup.Ct. 1982) 453 N.Y.S.2d 142, 143 ["defendants have failed to define precisely what a 'complication report' is and, thus, have not sustained their burden to prevent discovery"].)

5. Sufficient Showings Often Dispositive.

If a sufficiently detailed showing is made and, as will normally be the case, is uncontradicted, the showing will often be dispositive:

- In *County of Los Angeles II*, *supra*, 139 Cal.App.4th at pages 15–16, the declarations of two individuals were prepared: (1) the chairperson of the Quality Assurance Committee who personally reviewed (and authored some) of the documents on the privilege log, and (2) a nurse "who coordinated and maintained the records" of the peer review committee. The declarations generally described the purpose of the committee, what the committee discusses, and what information the documents contain. In other words, the declarations verified that the committee qualified as a "peer review committee" as defined by section 1157, and thus, the committee's records were exempt from disclosure.

- In *Snell*, *supra*, 158 Cal.App.3d 44, the court denied discovery of two physicians' personnel files including all surgical privileges applications, noting that "the declaration of the hospital administrator clearly sets forth that the hospital administration did not maintain personnel files on the doctors. The only files maintained are those of a peer review committee" (*id.* at p. 49) and that "[t]he only evidence presented was that the hospital *did not* maintain administration files concerning the doctors and did not have in its possession applications for surgical privileges" (*id.* at p. 50).

- In *Fox*, *supra*, 22 Cal.4th at page 537, the Supreme Court affirmed the preclusion of the testimony and report of a Department of Health Services investigator based on the investigator's declaration that "he had 'relied substantially upon . . . peer review materials' in formulating his understanding of the facts and in reaching the opinions and conclusions in [his] report."

- Other states' cases provide additional examples. (See *Carr*, *supra*, 689 N.E.2d at pp. 1314–1315 [declarations explained relationship between incident reports and peer review committees]; *Memorial Hospital-The Woodlands v. McCown* (Tex. 1996) 927 S.W.2d 1, 11–12 (*McCown*) [detailed affidavits by hospital medical staff coordinators]; *Brem, supra*, 162 F.R.D. at p. 101 [testimony that physician's "opinion of [another physician's] competence . . . is based on what other physicians relayed to him in his capacity as administrator of the error management conferences"]; *Community Hospitals*, *supra*, 594 N.E.2d at pp. 451–453 [detailed affidavit of Director of Patient Care Evaluation "showed a process and a structure through which Community Hospitals addressed quality assurance," particularly about the handling of incident reports; burden shifted to party seeking discovery to "come forward with some evidence to show the incident report in question was not a peer review communication"]; *Hughes*, *supra*, 144 F.R.D. at p. 178 [hospital president's affidavit that decedent's death triggered a non-routine internal investigation by the medical staff's executive committee]; *Northeast Community Hosp. v. Gregg* (Tex.Ct.App. 1991) 815 S.W.2d 320, 326 [affidavits found sufficient that were "based upon the personal knowledge of the affiants" and that "specifically

describe[d] the nature of the sealed documents accompanying the affidavit so as to bring them within the protection of the privilege"]; *Maynard v. U.S.* (D.N.J. 1990) 133 F.R.D. 107, 108 (*Maynard*) [documents classified by army officer as medical quality assurance reports and "plaintiff has provided no basis to question this classification"]; *Flannery*, *supra*, 531 N.E.2d at p. 406 ["The uncontradicted affidavit of the hospital's manager of medical records described a code blue evaluation report as an internal document prepared for purposes of quality control and to reduce mortality and morbidity"]; *Palm Beach Gardens*, *supra*, 446 So.2d at p. 1091 [uncontradicted hospital administrator's declaration "that the foregoing items were reports of the Infectious Disease Control Committee and that the Committee was a medical review committee"]; *Robinson*, *supra*, 1984 WL 14129, at p. *1 [motion to compel discovery denied where hospital president "filed an affidavit stating that the only records in the files of the Hospital concerning [the physician in question] are maintained to determine his suitability for staff privileges and to review the quality of his work" and "the plaintiff has made no showing that any of the records he seeks were not generated in connection with this review process"].)

6. Establishing the Right to Section 1157's Protections.

(a) Declaration.

Submit a declaration by the hospital administrator, chief of staff, or other appropriate person establishing: (a) the hospital is accredited by the Joint Commission on Accreditation of Health Care Organizations (JCAHO); (b) the information plaintiff seeks relates to the proceedings or records of an organized medical staff committee; (c) the particular committee has the responsibility of evaluation and improvement of the quality of care rendered in the hospital; and (d) the proceedings and records of the committee are strictly confidential. The declaration should also refer to the hospital's medical staff bylaws if they contain pertinent information, such as a description of the functions of the staff committees. The statements in the declaration should be more than conclusory. The court should be educated about the functioning of the particular committee in issue and how the type of information sought fits into the committee

process.

(b) Judicial notice.

If the hospital is accredited by JCAHO, also ask the court "to take judicial notice of nationwide, generally accepted standards describing the organization and functions of medical staffs and medical staff committees in accredited hospitals." (*Matchett*, *supra*, 40 Cal.App.3d at p. 627.) An earlier version of the JCAH Accreditation Manual for Hospitals is cited and discussed in *Matchett*, at pages 630–631.

J. *IN CAMERA* HEARINGS SHOULD BE USED ONLY SPARINGLY.

1. *In Camera* Review Not Always Necessary.

Counsel should not agree too quickly to an *in camera* review of committee documents. For many discovery requests, upon a proper showing by the hospital, section 1157 can be found applicable without an *in camera* review.

2. Section 1157's Applicability "Facially Apparent"?

In *Santa Rosa*, *supra*, 174 Cal.App.3d at page 727, the court noted the distinction: "Certain types of information are so clearly within the exclusive sphere of a protected medical staff committee . . . that section 1157 can be found applicable without extensive judicial inquiry. On the other hand, when the information sought to be discovered relates to a matter that is not obviously within the sole purview of a protected committee . . . the burden of showing that it is protected by section 1157 cannot be sustained except upon particularized judicial inquiry. Thus, when application of the statute to disputed discovery is not facially apparent, as will often be the case, the burden on the party resisting discovery ordinarily cannot be sustained except upon judicial inquiry into the pertinent facts at an *in camera* hearing."

3. When *In Camera* Review Not Needed.

In *Mt. Diablo II*, *supra*, 183 Cal.App.3d at page 35, the court held no *in camera* review was necessary concerning the discoverability of committee minutes. (See *Carr*, *supra*, 689 N.E.2d at pp. 1311–1314; *Yuma*, *supra*, 852 P.2d at p. 1261; *Ollman v. Wisconsin Health Care Liability Insurance Plan* (Wis.Ct.App. 1993) 505 N.W.2d 399, 406 (*Ollman*); *Hughes*, *supra*, 144 F.R.D. at p. 179 [*in camera* review would violate statute]; *Palmer v. City of Rome* (Sup.Ct. 1983) 466 N.Y.S.2d 238, 240 [*in camera* review unnecessary]; *Mennes v. South Chicago Community Hospital* (Ill.App.Ct. 1981) 427 N.E.2d 952, 954 ["An evidentiary hearing or *in camera* inspection was unnecessary as the wording of the request to produce itself sufficiently established that the material sought was protected by the statutory privilege"].)

4. Committee Materials in Hospital Files.

An *in camera* review may be necessary to separate committee records from hospital administration files. (See *ante*, Section G.5.b.) The Supreme Court commented in dicta that, in those circumstances, "[i]t [is] arguable that compliance with [section 1157] require[s] *in camera* inspection regardless of whether it was requested by a party." (*Union Pacific R.R. Co. v. State Bd. of Equalization* (1989) 49 Cal.3d 138, 153, fn. 14.)

5. *In Camera* Review As a Last Resort.

A Massachusetts high court opinion strongly supports avoiding *in camera* reviews of committee materials. Stating that "[i]n camera review necessarily involves an invasion and dilution of a statutory privilege," the court said that "[i]n the medical peer review context, in camera review must be turned to only as a last resort, not as the first step in the discovery process." (*Carr*, *supra*, 689 N.E.2d at pp. 1312–1313.) The court explained that "[d]etermining whether the medical peer review privilege applies turns on the way in which a document was created and the purpose for which it was used, not on its content. Examining that content in camera will therefore do little to aid a judge in applying" the peer review protection statute. (*Id*. at p. 1314.)

6. *In Camera* Always Necessary?

Contrary to the case law above, some other states' cases indicate *in camera* reviews can always be required by plaintiffs. (See *Trinity Medical Center*, *supra*, 544 N.W.2d at p. 156, fn. 3 [suggesting *in camera* review should be held]; *Menoski v. Shih* (Ill.App.Ct. 1993) 612 N.E.2d 834, 838 [trial court properly ordered *in camera* review of credentials file; "[w]e cannot say that the phrase 'credentials file' by itself necessarily implies that all the material therein is privileged"]; *Shroades*, *supra*, 421 S.E.2d at pp. 268, 270 [*in camera* review necessary when privilege asserted]; *Smith v. Lincoln General Hosp.* (La. 1992) 605 So.2d 1347 [report by infection control committee of percentage of nosocomial infection rates per patients admitted is discoverable to the extent it does not contain evidence of policy making, remedial action, proposed courses of conduct, and self-critical analysis; *in camera* inspection ordered]; *State ex rel. Gradview Hosp. v. Gorman* (Ohio 1990) 554 N.E.2d 1297, 1298 [judge "has complete inherent authority to direct an *in camera* inspection of the disputed hospital records"];

Monty v. Warren Hosp. Corp. (Mich. 1985) 366 N.W.2d 198, 200–201 (*Monty*); *Gates v. Brewer* (Ohio Ct.App. 1981) 442 N.E.2d 72, 77 (*Gates*) [*in camera* review required].)

K. IDENTIFICATION OF PEER REVIEW DOCUMENTS.

1. Listing Documents Discloses a Committee's Proceedings.

In a dispute concerning the applicability of section 1157, a hospital should not be required to list documents submitted to a committee. A list would "reveal[] that at least one participant in the proceeding considered this particular point of inquiry important. Such a list, therefore, by its very nature involves 'the internal workings and deliberative process' of the peer review proceeding." (*Yuma*, *supra*, 852 P.2d at p. 1260.) The California Supreme Court used similar reasoning in holding that the attorney-client privilege "covers the transmission of documents which are available to the public, and not merely information in the sole possession of the attorney or client." (*Mitchell*, *supra*, 37 Cal.3d at p. 600.) The Court explained that "it is the actual fact of the transmission which merits protection, since discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy." (*Ibid.*; cf. *Tenet*, *supra*, 855 So.2d at p. 1258 [no discovery of blank hospital form used for testing nurses' competency; plaintiffs wanted form "to see what the hospital deemed important" in the testing].)

2. No Waiver By Not Providing List.

In *Burnett*, *supra*, 685 F.Supp. at page 432, the court ruled there was no waiver by failing to provide an affidavit listing and describing each document that was claimed to be privileged. (See *Balk v. Dunlap* (D.Kan. 1995) 163 F.R.D. 360, 362–363.)

3. Some Other States' Cases Require Document Identification.

State ex rel. Wheeling Hosp., Inc. v. Wilson (W.Va. 2016) 782 S.E.2d 622, 636 ["[W]e hold that a party wishing to establish the applicability of the peer review privilege . . . should submit a privilege log which identifies each document for which the privilege is claimed by name, date, and custodian. The privilege log also should contain specific information regarding (1) the origin of each document, and whether it was created solely for or by a review committee, and (2) the use of each document, with disclosures as to whether or not the document was used exclusively by such committee. Finally, the privilege log should provide a description of each document and a recitation of the law supporting the claim of privilege."]; *Shroades*, *supra*, 421 S.E.2d at pages 268, 270 (*in*

camera review necessary when privilege asserted; party claiming privilege should identify contested documents "by name, date, custodian, source and reason for creation"); *Shelton*, *supra*, 347 S.E.2d at page 831; *Monty*, *supra*, 366 N.W.2d at pages 200–201.

L. WAIVER.

1. Assert Section 1157 Promptly.

There should never be a waiver of section 1157's protections by a disclosure of protected materials or by a failure to timely object to a demand for the materials. However, because case law is not clear in California on the issue, counsel should avoid the possibility of waiver by promptly asserting section 1157 whenever a discovery request or a question directed to a witness at a deposition or trial relates to staff committee proceedings or records.

2. Is Section 1157 an Immunity That Cannot Be Waived?

(a) There should be no possibility of waiver.

A strong argument can be made that section 1157 provides an immunity that cannot be waived rather than a privilege that can be.

(b) Other jurisdictions' case law supports a no-waiver argument.

- In *In re U.S.* (5th Cir. 1989) 864 F.2d 1153 (*In re U.S.*), the court dealt with an 1157-type statute making "quality assurance records" in military hospitals "confidential and privileged" and prohibiting disclosure or discovery of those records. (10 U.S.C. § 1102.) In a medical malpractice lawsuit, the government objected too late to the plaintiff's request for production of such records and the district court ordered production. The Court of Appeals granted a writ, holding that "[t]he district court's order compels the representatives of the government to do that which the Congress has specifically forbidden" and commenting that "[u]ntimely performance by counsel may invite sanctions by the court, but those sanctions do not include ordering conduct which constitutes a breach of the clear mandate of 10 U.S.C. § 1102." (*In re U.S.*, at p. 1156.)

- The Georgia Supreme Court held that "[b]ecause of this affirmative [statutory] prohibition [against discovery], the analysis of privileged communications

of individuals is inapplicable. [¶] A person who has nothing to waive can waive nothing." (*Emory Clinic v. Houston* (Ga. 1988) 369 S.E.2d 913, 913–914 (*Emory Clinic*) [prior newspaper reports of peer review information held not to affect the discovery prohibition].)

- The New Mexico Supreme Court held that state's statute does not "create[ ] an evidentiary privilege . . . [but rather] establishes an immunity from discovery" and stated that, "[u]nlike a privilege, the statute provides no waiver through voluntary disclosure." (*S.W. Community Health Serv. v. Smith* (N.M. 1988) 755 P.2d 40, 42–43 (*S.W. Community*).)

- See *Armstrong*, *supra*, 155 F.3d at page 221 (statutory protection for Medicare peer review "is not a common law privilege to which the traditional concept of waiver applies"); *Brem*, *supra,* 162 F.R.D. at page 101 (relying on the *Emory Clinic* case and ruling, "Permitting waiver of the statute by a single committee member or by the health care provider would contravene the policy underlying the statute"); *Ollman*, *supra*, 505 N.W.2d at page 407 (unlike other statutory privileges, statute protecting health care services reviews "contains no provision for waiver by disclosure"); *Todd v. South Jersey Hosp. System* (D.N.J. 1993) 152 F.R.D. 676, 688 (*Todd*) (materials "are not protected by a 'privilege' waivable by defendants, they are statutorily barred from production"); *Zajac*, *supra*, 571 N.E.2d at page 846 (since privilege "cannot be waived," no waiver of objection at trial even though no objection was made to evidence at deposition); see also *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation* (E.D.Pa., Dec. 22, 2009, No. 07-20156) 2009 WL 5195783, at page *3 [nonpub. opn.] (applying California's section 1157 to conclude "[t]he legislative act that the proceedings and records of a peer review body are not subject to discovery remains in effect and is simply not subject to waiver").

(c) The no-waiver issue more open in California.

- In *former* Business and Professions Code section 821.5, subdivision (f) (repealed by Stats. 2009, c. 307 (S.B. 821), § 3), the Legislature provided that a peer review body reporting about one of its investigations to the diversion program of the Medical Board of California (see *ante*, Section E.6.c) "shall not be deemed to have waived the protections of Section 1157 of the Evidence Code," which suggested that section 1157 *could* be waived. The Legislature's repeal of that statute could lead a court to reach the opposite conclusion, although the legislative history suggests that it was repealed because the reporting requirement concerned an obsolete diversion program.

- In *University of Southern California*, *supra*, 45 Cal.App.4th 1283, the court intimated, but did not hold, that section 1157 cannot be waived. It concluded that Evidence Code section 912, which concerns the waiver of privileges, is inapplicable because "section 1157 clearly does not create a 'privilege' . . . ." (*Id*. at p. 1292.) But, the court then explained why the plaintiff's waiver argument there was meritless "[a]ssuming that a waiver doctrine of some kind does apply." (*Ibid*.) The court rejected the plaintiff's claim that the hospital's production of certain committee records waived the right to object to demands for other committee records.

  The Supreme Court in *Fox*, *supra*, 22 Cal.4th 531 gave conflicting signals on the issue—it spoke alternatively of a discovery privilege, a discovery immunity, and a privilege. But, because the issue was not directly presented—the Court concluded that there had been no waiver and did not address whether there could be a waiver—and because the Court did not even mention the *University of Southern California* case, it is of limited value.

- In *West Covina Hospital*, *supra*, 41 Cal.3d at page 855, the Supreme Court held that a witness could voluntarily testify concerning what occurred at a staff committee meeting. Thus, it could be said that each

committee member has the power to "waive" section 1157's protections by agreeing to testify.

- *Henry Mayo*, *supra*, 81 Cal.App.3d 626, is ambiguous about waiver. The court held that a hospital's filing of a committee meeting transcript in a physician's writ of mandate proceeding (where section 1157 is inapplicable (see *ante*, Section E.3.c.3) did not waive the hospital's right to assert section 1157 when those same materials were sought in a malpractice action. (*Henry Mayo*, at pp. 635–636.) The court also held, however, that the hospital's failure to object to an interrogatory requesting identification of hospital records "constitutes a waiver." (*Id*. at p. 636.) Nonetheless, the court stated that if the plaintiff were subsequently to seek *production* of any identified documents, the hospital still had the opportunity to assert the section 1157 immunity. (*Ibid*.) Then again, the court said, if the hospital asserted section 1157 to prevent production, it would have to be "timely and in proper form." (*Ibid*.)

  The court in *California Eye Institute*, *supra*, 215 Cal.App.3d at page 1486, footnote 5, specifically left open the question whether evidence discovered in a mandamus proceeding could subsequently be used in a physician's damages actions. But, it did not discuss the *Henry Mayo* case. (See *ante*, Section E.3.c.10.b.)

- In *Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1391, the Court of Appeal stated, "Although participants in peer review evaluations cannot be *forced* to disclose review contents (Evid. Code, § 1157) those contents are not privileged." (Citing *West Covina Hospital*, *supra*, 41 Cal.3d 846.) Any attempts by plaintiffs to use this language to allow a waiver of the section 1157 protections should be strenuously resisted. *Amid* is not a discovery case and has little to do with section 1157. Moreover, it misstates the holding in *West Covina Hospital*. The Supreme Court there held that since subdivision (b) only prohibits "required" *testimony* about a committee meeting, voluntary testimony was not barred by the statute. However, the court did not

address in any way the subdivision (a) blanket prohibition of *discovery*.

3. If Section 1157 Is a Waivable Privilege, Who Can Waive It?

(a) Committee members, reviewers, and persons reviewed must consent.

In *University of Southern California*, *supra*, 45 Cal.App.4th at page 1292, the court said that many people would have to consent to disclosure for section 1157's protections to be waived—"Assuming that a waiver doctrine of some kind does apply, that doctrine would have to account in some manner for all those who are protected by the discovery exemption of section 1157." The court held the plaintiff had not established waiver because she had not shown that all those persons (in that case, "many committee members, physician reviewers, resident surgical trainees who were reviewed, etc.") had waived the discovery exemption. (*Ibid*.)

(b) Hospital alone can waive?

The Supreme Court suggested that only the hospital would have to consent. In *Fox*, *supra*, 22 Cal.4th at page 541, the Court said that "*the hospital, as the holder of the privilege under* . . . section 1157, subdivision (a), did not waive it by virtue of its mandatory cooperation with the DHS inquiry." (Emphasis added.)

(c) Other states' cases.

See *In re University of Texas*, *supra*, 33 S.W.3d at page 827 (statute expressly provided that only committee could waive privilege); *HCA Health Services of Virginia, Inc. v. Levin* (Va. 2000) 530 S.E.2d 417, 420 (*HCA Health Services*) (the subject of a peer review cannot waive the privilege); *Brem*, *supra*, 162 F.R.D. at page 101 (relying on the *Emory Clinic* case (see *ante*, Section L.2.b) and ruling, "Permitting waiver of the statute by a single committee member or by the health care provider would contravene the policy underlying the statute"); *Sistok*, *supra*, 823 P.2d at page 254 (each committee member holds the privilege and, thus, "the Hospital cannot waive the privilege for others"); *Terre Haute*

Regional Hosp., *supra*, 524 N.E.2d at page 1311 (construing express statutory language regarding waiver: "the peer review privilege is general in nature and if personal to anyone or anything is personal to the peer review committee and its proceedings").

4. No Waiver By Disclosure to Other Entity Involved in the Quality of Care.

(a) Disclosure to state agency.

In *Fox*, *supra*, 22 Cal.4th at pages 540–541, the Supreme Court held that permitting an official inspection of peer review materials by the Department of Health Services did not waive section 1157's protections for those materials in a subsequent negligence action by a patient.

(b) Disclosure to hospital administration.

The immunity for committee information is not waived by making the information available to the hospital administration. (See *ante*, Section G.5.b.)

(c) Disclosure to federal agency.

In *Pomona Valley*, the court held that "[t]he fact that certain [peer review committee] records are accessible by the FDA also does not negate the exemption of section 1157 as to discovery of those records in civil actions." (*Pomona Valley*, *supra*, 209 Cal.App.4th at p. 695.)

(d) Private organizations.

The same no-waiver result should apply when there is disclosure of committee proceedings or records to the Joint Commission on Accreditation of Health Care Organizations, the California Medical Association, or any other person or entity also responsible for evaluating and improving the quality of care rendered in the hospital. Thus, for example, section 1157's protections should not be lost because an infection control committee complies with the JCAHO standard of reporting its findings and recommendations and making its meetings' minutes available to the hospital chief executive officer and to the director of nursing. (Concerning

protections for the records and proceedings *of* organizations such as JCAHO and CMA, see Section T.2, *post*.)

(e) No waiver rule furthers the policy of section 1157.

In addition to the *Fox v. Kramer* precedent, there should be no waiver by disclosure to other qualified entities because the section 1157 disclosure immunity is not based on the need for *confidentiality* of committee proceedings and records, but rather the need to encourage frank communication by preventing a *particular use* of such proceedings and records, e.g., in a malpractice action against a colleague or hospital or in a defamation action against a committee member. (See *ante*, Section B.3.c.)

(f) Other states' cases generally supportive.

See *Emory*, *supra*, 469 S.E.2d at page 775 (peer review committee findings protected even though medical malpractice plaintiff had obtained a government agency report that stated those findings; "To permit a plaintiff to use privileged material simply because it is subsequently included in a government agency report would frustrate the statute's policy of encouraging candor among medical review committees. Fearing that incriminating information discovered in the peer review process could be incorporated into a[n agency] report that could later form the basis of a malpractice lawsuit, hospital and medical professionals might be tempted not to conduct such reviews as often or as thoroughly as may be warranted"); see generally *Hillsborough County Hospital Authority v. Lopez* (Fla.Dist.Ct.App. 1996) 678 So.2d 408, 409 ("The issue is not 'confidentiality' of the records but immunity from use"); *Straube*, *supra*, 600 P.2d at page 376 ("the privilege . . . is based not on confidentiality but on the need to encourage frank communication. It is not to preserve the privacy of the communication but to prevent the participants from incurring legal liability for what they say").

(g) Statutorily mandated disclosures should not be a waiver.

(1) Business and Professions Code section 805, subdivision (b) requires a report to the State whenever staff

privileges are denied, revoked, or restricted "as a result of an action of a peer review body." The report must include "a description of the facts and circumstances of the medical disciplinary cause or reason, and any other relevant information deemed appropriate by the reporter." (§ 805, subd. (f).) Section 805, subdivision (g) expressly provides, however, that "[t]he reporting required by this section shall not act as a waiver of confidentiality of medical records and committee reports."

(2) Federal law has a similar reporting requirement. (See 42 U.S.C. § 11133; see generally Note, *The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?* (1988) 74 Va. L.Rev. 1115, 1125–1139.) Such disclosures should not be considered waivers. (See *Hendrickson v. Leipzig* (E.D.Ark. 1989) 715 F.Supp. 1443 [no discovery of documents sent by hospital to state medical board regarding revocation of a physician's staff privileges]; *Cole v. McNaughton* (W.D.Okla. 1990) 742 F.Supp. 587, 590–591 (*Cole*) [similar]. But see *Konrady*, *supra*, 149 F.R.D. at pp. 597–598 [finding statute inapplicable because records of Investigational Review Board at hospital subject to disclosure to Food and Drug Administration].)

(3) Welfare and Institutions Code section 14087.31, subdivision (u) protects from disclosure peer review body records and proceedings that are revealed in the records of commissions in Tulare and San Joaquin Counties that negotiate primary care case management contracts and arrange for the provision of primary care case management services.

(4) Under *former* Business and Professions Code section 821.5, subdivision (f) (repealed by Stats. 2009, c. 307 (S.B. 821), § 3), when a peer review body investigated whether a physician was "suffering from a disabling mental or physical condition that poses a threat to patient care," the body was required to report the physician's name and "the general nature of the investigation" to the diversion program of the Medical Board and the diversion program administrator will then monitor the investigation. (Former Bus. & Prof.

Code, § 821.5, subds. (a), (b); see *ante*, Section E.6.c.) However, a peer review body making such a report "shall not be deemed to have waived the protections of Section 1157 of the Evidence Code." (*Id.*, § 821.5, subd. (f).) While a court might construe the repeal of section 821.5 as endorsing waiver of the provilege from compliance with a disclosure statute, the Legislative history suggests it was repealed because the reporting requirement concerned an obsolete diversion program.

(5) A private agency for the protection and advocacy of the rights of developmentally disabled and mentally ill persons is authorized by statute to investigate the abuse and neglect of those persons. The agency's investigative powers include access to a wide range of records, but the Legislature has expressly provided that the powers "do[] not supersede any prohibition on discovery specified in Sections 1157 and 1157.6 of the Evidence Code." (Welf. & Inst. Code, § 4903, subd. (d).) That protection might be preempted by federal law, however. (See Section O.3.h., *post*.)

M. THE POLICY OF CALIFORNIA HOSPITALS IS TO NEVER WAIVE THE PROTECTIONS OF SECTION 1157.

1. Committee Materials Often Are Favorable to the *Defense*.

There probably will be occasions when a *defendant* will seek to discover or want to rely upon the proceedings and records of a professional review committee in litigation. (See *Toth v. Jensen* (Ill.App.Ct. 1995) 649 N.E.2d 484, 486 [although defendant objected to discovery of documents, trial court commented, " 'If I were the defendant, I would rush to have them disclosed They have him walking on water almost' "].)

2. Section 1157 Should Prevent Disclosure to Defendant.

There is no California case law on the issue, but section 1157 should be considered to preclude discovery and evidentiary use of committee proceedings and records by a defendant as well as by a plaintiff. (See *HCA Health Services*, *supra*, 530 S.E.2d 417 [discovery from non-party denied to defendant television station in physician's defamation action]; *Brem*, *supra,* 162 F.R.D. at p. 99 [discovery from non-party denied to defendant in employment discrimination suit]; *Miami Heart Institute v. Reis* (Fla.Dist.Ct.App. 1994) 638 So.2d 530, 531–532 [discovery from non-party hospital denied to defendants in physician's action for defamation, breach of contract, and tortious interference with business relationship]; *Murphy*, *supra*, 667 P.2d 859 [two defendant physicians denied discovery in malpractice case]; see also *Aga v. Hundahl* (Hawaii 1995) 891 P.2d 1022, 1031–1032 [defense expert in malpractice action who participated in peer review committee and whose opinion relies at least in part on committee records can be precluded from testifying if *in camera* review of protected records indicates plaintiff would be prejudiced by not having those records for impeachment purposes]; *Jackson v. Scott* (D.C.Ct.App. 1995) 667 A.2d 1365, 1370 ["a question of basic fairness might arise if a defendant's medical expert were affirmatively to use portions of a peer review report in reaching his or her conclusion, yet could not be confronted with those or other parts on cross-examination"]; cf. *Wheeler v. Central Vt. Medical Center* (Vt. 1990) 582 A.2d 165, 167, fn. 3 [where statute provided, unlike section 1157, that no person at a committee meeting shall be *permitted* to testify, "[a] strong argument could be made that the Hospital was not empowered to waive the peer-review privilege"].)

3. Even if Section 1157 Can Be Waived, Hospitals Shouldn't.

It may be that the protections afforded by section 1157 can be waived by a hospital, a committee, or a committee member (see *ante*, Section L.3), permitting a defendant to use the committee's proceedings and records. Allowing such a waiver in favor of a defendant would not conflict with the legislative purpose to encourage self-policing by professionals because it is unlikely that candid deliberations would be curtailed by the possibility that committee proceedings and records will be used to *help* a colleague or the hospital. Nevertheless, the policy of California hospitals is never to seek or agree to waivers. Waiver when it is advantageous to defendants, but refusal to waive at the behest of plaintiffs, would give an appearance of expediency which could be used to support curtailment or repeal of the protection section 1157 affords review committees.

N. COMMITTEE RECORDS SHOULD NOT BE SUBJECT TO SUBPOENA FOR PRODUCTION AT TRIAL NOR BE ADMISSIBLE IN EVIDENCE.

1. Section 1157's Terms Do Not Expressly Exclude Evidence.

" 'Literally, section 1157 establishes an immunity from discovery but not an evidentiary privilege in the sense that medical staff records are excluded from evidence.' " (*Fox*, *supra*, 22 Cal.4th at p. 539, quoting *Matchett*, *supra*, 40 Cal.App.3d at p. 629, fn. 3; see *Alexander*, *supra*, 5 Cal.4th at p. 1223, fn. 4.) "There is no special rule against the admissibility of peer review committee material." (*Fox*, at p. 548.)

2. No Trial Subpoena Allowed.

Despite the absence from section 1157 of an express prohibition against subpoenaing committee records or proceedings for production at trial, the Supreme Court recognized that such a subpoena would violate the statute. The court rejected a "distinction . . . between the pretrial exchange of information and trial evidence." (*Fox*, *supra*, 22 Cal.4th at p. 542.) The Court held that "the purpose of [section 1157]—preserving the confidentiality of hospital peer review proceedings—would clearly be undermined if a party in a civil action could obtain through a trial subpoena the same evidence that it was *prohibited* from obtaining through a pretrial discovery request, i.e., otherwise privileged materials. The Legislature could not have intended such an absurd result. The evidence at issue herein was not subject to compulsory process by a party to a civil action *at any time*." (*Ibid.*; see Comment, *Anatomy of the Conflict Between Hospital Medical Staff Peer Review Confidentiality and Medical Malpractice Plaintiff Recovery: A Case for Legislative Amendment* (1984) 24 Santa Clara L.Rev. 661, 679 (hereafter *Conflict Between Hospital Medical Staff Peer Review*) ["The absurdity of making a discovery distinction between production *before* trial and production *at* trial is clear. The production of information to opposing counsel at anytime is 'discovery,' a definition which is consistent with common sense"]; *American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 Cal.App.3d 579, 589 ["we view the disclosure of the files in the matter before us, although occurring *at trial*, as discovery in a larger sense"].)

3. Committee Records and Proceedings Obtained By Plaintiffs.

(a) Arguments for inadmissibility.

(1) Actual use of committee materials is the harm section 1157 is designed to prevent.

If a plaintiff obtains committee records in spite of section 1157 and seeks to use the records as evidence at trial, section 1157 should be construed to exclude these records from evidence. Refusal to allow *discovery* of committee records is justified by the chilling effect on committee members' candor and objectivity posed by the *potential* use of such records in an action against a colleague, a hospital, or themselves. (See *Weekoty v. U.S.* (D.N.M. 1998) 30 F.Supp.2d 1343, 1346 (*Weekoty*); *Morse v. Gerity* (D.Conn. 1981) 520 F.Supp. 470, 472, superseded by statute on another ground as stated in *Syposs*, *supra*, 179 F.R.D. at p. 410.) Obviously, the chilling effect of allowing *actual* use of such records by admitting them in evidence in such suits would be even greater.

(2) *Henry Mayo* case as helpful precedent.

Henry Mayo, *supra*, 81 Cal.App.3d 626 is also supportive of precluding a plaintiff in possession of committee records from using those records at trial. The court there held that a hospital's filing of a committee meeting transcript in a physician's writ of mandate proceeding (where section 1157 is inapplicable (see *ante*, Section E.3.c.3) did not waive the hospital's right to assert section 1157 when those same materials were sought in a malpractice action. (*Henry Mayo*, at pp. 635–636.) This holding demonstrates that it is the adverse *use* of committee records in litigation that section 1157 seeks to prevent, regardless of whether the records have already been disclosed.

(3) Possible violation of the testimonial prohibition.

To argue against admissibility, counsel can also rely on the subdivision (b) testimonial immunity ("no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting"), as well as the subdivision (a) discovery immunity. In order to lay the necessary foundation to admit committee records into evidence, some person in attendance at the committee meeting would probably have to testify (Jefferson, Cal. Evidence Benchbook (4th ed. 2019) § 4.6 [for the business-records exception to the hearsay rule to apply, the writing must be authenticated by the testimony of the custodian of the writing or some other qualified witness]; see *Cameron v. New Hanover Memorial Hosp., Inc.* (N.C.Ct.App. 1982) 293 S.E.2d 901, 912 (*Cameron*) [proper foundation must be laid for introduction of committee records under "business records" exception]) and thereby reveal a portion of "what transpired" at the meeting, which subdivision (b) does not permit.

(4) Comparison to Evidence Code section 1156 favoring inadmissibility.

Counsel can point out that Evidence Code section 1156, enacted three years before section 1157, provides the written records of hospital medical and medical-dental staff committees relating to research and medical or dental study for the purpose of reducing morbidity or mortality are discoverable but "shall not be admitted as evidence in any action." It can be argued that it would make little sense to exclude from evidence relatively innocuous staff committee records relating to research and medical or dental study, but permit the admission in evidence of highly sensitive committee records relating to the peer review process. The Legislature could not have intended such an anomalous result. (Cf. Section T.2, *post*.)

(5) See Also.

In *Public Citizen, Inc. v. U. S. Dept. of H. H. S.* (D.C.Cir. 2003) 332 F.3d 654 (*Public Citizen*), the Court of Appeals held that, despite a discovery prohibition for Medicare peer review organizations (see Section T.9, *post*), the organization must inform a complainant of at least the results of its review. The court noted, however, that "the fact that the results of a PRO's reviews must be disclosed to a beneficiary . . . does not necessarily mean that they are admissible against a practitioner in civil litigation." (*Public Citizen*, at p. 667, fn. 20.)

(b) Arguments for admissibility.

(1) *West Covina Hospital.*

Plaintiffs' counsel can rely on the Supreme Court's decision in *West Covina Hospital*, *supra*, 41 Cal.3d 846. Just as counsel might argue that the purpose of section 1157 requires committee records not be admissible in evidence even though the statute, read literally, only immunizes them from discovery, West Covina Hospital argued that voluntary testimony about committee meetings needed to be barred even though the statute only expressly precludes compelled testimony. The Supreme Court rejected the argument, relying on the statute's clear meaning and the principle that privileges should be construed narrowly. (*Id.* at pp. 850–851; see *ante,* Section E.2.a.)

(2) *Fox.*

In *Fox*, *supra*, 22 Cal.4th 531, the Supreme Court held that committee records and proceedings were not subject to subpoena at trial even though section 1157 does not expressly prohibit trial subpoenas. (See *ante*, Section N.2.) However, the Court also noted that other states' statutes "expressly and unequivocally" restricted the admissibility into evidence of committee records and proceedings and said that "[w]e assume that if our Legislature intended to enact a similar restriction regarding admissibility, it, too, would have

done so directly." (*Fox*, at p. 545.) It also said in dicta that section 1157, subdivision (a) "does not bar introduction of evidence . . . voluntarily produced in the course of discovery." (*Id*. at p. 542.)

(3) Nevada case.

In *Ashokan v. State, Dept. of Ins.* (Nev. 1993) 856 P.2d 244, 248, the Nevada Supreme Court relied in large part on the *West Covina Hospital* opinion in holding the Nevada statute, which the court said was "almost identical" to section 1157, did not preclude evidentiary use of a peer review committee report. The court reasoned that since the statute only protected committee records and proceedings from being "subject to discovery proceedings" and since the medical malpractice plaintiff there obtained the report through means other than discovery proceedings, the plaintiff was entitled to submit the report to Nevada's Medical-Legal Screening Panel. Noting other states' statutes that expressly bar the admission of committee materials as evidence, the court stated, "The legislatures of other jurisdictions obviously struck a balance between frank committee discussion and concern for malpractice plaintiffs which differs from the balance which the Nevada legislature, *and the California legislature*, deemed appropriate." (*Id*. at p. 249, emphasis added.)

(4) Comparison to section 1156 favoring admissibility.

A plaintiff's counsel could point to section 1156 and argue that statute shows the Legislature knows how to specifically make evidence inadmissible when it wants to and that it did not want to in section 1157.

(5) See Also.

Another state's appellate court ruled, similar to *Henry Mayo*, *supra*, 81 Cal.App.3d 626, that plaintiffs in a medical malpractice lawsuit could not use peer review materials they had obtained from the publicly accessible court file of a case the defendant physician had filed

against a hospital regarding the suspension of his staff privileges. (*In re Tollison* (Tex.Ct.App. 2002) 92 S.W.3d 632.) The court commented, however, that "it seems unfair and illogical that [the peer review privilege] could prevent plaintiffs from using information available to, and publishable by, any newspaper reporter. Common sense dictates there must be some point at which privilege ceases to serve its intended purpose. We reserve judgment as to when that point is reached." (*Id.* at p. 635.)

O. SECTION 1157 IN FEDERAL ACTIONS.

1. Federal Rules of Evidence Controlling.

Application of section 1157 in cases in federal court is governed by Federal Rules of Evidence, rule 501, which provides in pertinent part:

> The common law—as interpreted by the United States courts in the light of reason and experience—governs a claim of privilege unless [the United States Constitution, a federal statute, or rules prescribed by the Supreme Court] provides otherwise . . . . But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

2. Diversity Cases.

(a) Section 1157 should apply.

In cases in federal court based on diversity of citizenship jurisdiction, state law will normally "suppl[y] the rule of decision" (Fed. Rules Evid., rule 501) and state law thus should also "govern" privilege issues (*ibid.*). Therefore, section 1157 should be applied. Although there is no case law on the subject concerning section 1157 specifically, federal cases applying other states' similar statutes are supportive. (See, e.g., *Kappas*, *supra*, 709 F.2d 878; *Somer v. Johnson* (11th Cir. 1983) 704 F.2d 1473, 1478–1479; *Samuelson v. Susen* (3d Cir. 1978) 576 F.2d 546, 549–551 (*Samuelson*); *Karp v. Cooley* (5th Cir. 1974) 493 F.2d 408, 425; *Corrigan*, *supra*, 857 F.Supp. at pp. 436–437; *Todd*, *supra*, 152 F.R.D. at p. 681.)

(b) But, federal law controls procedure for invoking protection.

Although the state law of privilege may be applicable in diversity cases, the method of invoking the privilege is governed by federal procedural law. In *Fretz*, *supra*, 109 F.R.D. at page 309, the district court ruled that the state discovery immunity statute *would have* applied had the defendants "correctly and timely responded" to a discovery

request, but that they had waived any objection by failing to respond within the time limits set by the federal rules. (See also *Pagano v. Oroville Hosp.* (E.D.Cal. 1993) 145 F.R.D. 683, 695, fn. 13 (*Pagano*) [applying federal law regarding which party has the burden of establishing the right to discovery *vel non*].)

3. Federal Question Cases.

(a) Federal common law applies to federal claims.

In cases in federal court based on federal question jurisdiction with only federal claims, section 1157 would not be controlling. Rather, as required by Federal Rules of Evidence rule 501, the issue whether committee records and proceedings are protected would be determined according to federal common law. (*Leon v. County of San Diego* (S.D.Cal. 2001) 202 F.R.D. 631, 636 (*Leon*); *Burrows v. Redbud Community Hosp. Dist.* (N.D.Cal. 1998) 187 F.R.D. 606, 608 (*Burrows*), app. dism. and writ pet. den. (9th Cir. 1998) 165 F.3d 36, cert. den. 526 U.S. 1166 [119 S.Ct. 2036, 144 L.Ed.2d 228]; *Pagano*, *supra*, 145 F.R.D. at pp. 687, 694–695; see, e.g., *Memorial Hospital for McHenry County v. Shadur* (7th Cir. 1981) 664 F.2d 1058, 1061 (*Shadur*); *Price v. Howard County General Hosp.* (D.Md. 1996) 950 F.Supp. 141, 142 (*Price*); see generally *Dowling v. American Hawaii Cruises, Inc.* (9th Cir. 1992) 971 F.2d 423 (*Dowling*) [regarding federal common law privilege of self-critical analysis].)

(b) Pendent state claims also governed by federal common law?

(1) Some lower courts: federal common law governs.

Some trial courts analyzing the impact of section 1157 or similar state statutes protecting peer review have flatly stated that the federal common law also applies to claims based on state law that are pendent to federal question cases. (*Burrows*, *supra*, 187 F.R.D. at pp. 610–611; *Pagano*, *supra*, 145 F.R.D. at p. 687; see, e.g., *Robertson*, *supra*, 169 F.R.D. at pp. 81–83. But see *Freeman v. Fairman* (N.D.Ill. 1996) 917 F.Supp. 586,

588 (*Freeman*) [where discovery is relevant only to state law claim, rule 501 requires application of state privilege law].)

Some circuit courts of appeals have also ruled that the federal common law of privileges governs cases with both state and federal claims. (*Agster v. Maricopa County* (9th Cir. 2005) 422 F.3d 836, 839 [refusing to recognize federal privilege for medical peer review and holding that, "[w]here there are federal question claims and pendent state law claims present, the federal law of privilege applies"]; *Virmani*, *supra*, 259 F.3d at p. 286, fn. 3; *Wm. T. Thompson Co. v. General Nutrition Corp., Inc.* (3d Cir. 1982) 671 F.2d 100, 104 ["We hold that when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule"].)

See *Nilavar v. Mercy Health System-Western Ohio* (S.D. Ohio 2002) 210 F.R.D. 597, 600–601 (*Nilavar*). See also *Folb v. Motion Picture Industry Pension & Health* (C.D.Cal. 1998) 16 F.Supp.2d 1164, 1169 (*Folb*) (in a non-peer review case, court ruled federal common law of privileges applied to pendent state law claims, even though it is "a difficult question regarding which law shall apply").

(2) Supreme Court: open question.

The Supreme Court has said "*there is disagreement* concerning the proper rule in cases . . . in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law." (*Jaffe*, *supra*, 518 U.S. at p. 15, fn. 15, emphasis added.)

(3) Ad hoc balancing test?

The treatise cited by the Supreme Court (*Jaffe*, *supra*, 518 U.S. at p. 15, fn. 15) to show there is disagreement about the appropriate rule recommends a case-by-case balancing test to determine the applicability of a state privilege in mixed-claim cases. (23A Wright & Miller,

Federal Practice and Procedure: Federal Rules of Evidence (2020) § 5434.)

(c) Do comity principles require federal courts to enforce state statutes when possible?

(1) Looking to state law is appropriate.

Even if section 1157 or a similar state statute would not be controlling in federal question cases, in deciding whether the federal common law provides a privilege, a number of courts have said they may be influenced by an otherwise applicable state law privilege as a matter of comity. (*Burrows*, *supra*, 187 F.R.D. at pp. 608, 611; *Pagano*, *supra*, 145 F.R.D. at pp. 687–688; see, e.g., *Shadur*, *supra*, 664 F.2d at p. 1061 [" 'A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy' "]; *Price*, *supra*, 950 F.Supp. at p. 143 ["the Court must bear in mind the interests protected by any state law privileges and protect those interests to the extent they are consistent with the federal policies implicated in a case"]; *Brem*, *supra,* 162 F.R.D. at pp. 101–102 [discovery barred, in part because of strong public policy behind state statute]; see also *Leon*, *supra*, 202 F.R.D. at pp. 634–635.) One such court expressed concern about unnecessarily "subject[ing] the citizens of [a] jurisdiction to a double standard of confidentiality and privacy depending on [whether a state or federal court] hears a particular case." (*United States v. Illinois* (N.D.Ill. 1993) 148 F.R.D. 587, 590 (*Illinois*).)

(2) Looking to state law is *not* appropriate.

Other courts reject comity as a factor in federal privilege law, worrying not about inconsistencies between state and federal privilege law, but about the potential for inconsistencies in federal privilege law across the country. In *Johnson v. Nyack Hosp.* (S.D.N.Y. 1996) 169 F.R.D. 550 (*Nyack Hosp.*), the court stressed the need for an "informed determination of a

single, uniform federal law of evidentiary privileges" (*id.* at p. 558) and criticized using principles of comity because "parties similarly situated in all respects save the location of the federal court in which they happen to be litigating would be faced with a real possibility of different outcomes based purely on that geographical happenstance" (*id.* at p. 559). (See generally *Folb*, *supra*, 16 F.Supp.2d at page 1170 (authority "suggest[ing] federal courts should look to the law of the forum state as a matter of comity in determining the contours of federal privilege law [has been] disapproved by *Jaffee*[, *supra*, 518 U.S. 1]", disagreed with by *Dadagan v. City of Vallejo* (E.D.Cal. 2009) 263 F.R.D. 632, 634 & fn. 2.)

(d) Is there a federal common law hospital peer review privilege?

(1) Qualified privilege exists.

Some courts have stated that the federal common law recognizes a privilege for hospital peer review records and proceedings, but that the privilege is a qualified one, not absolute. (See *Adkins v. Hospital Authority of Houston County* (M.D.Ga., Nov. 10, 2004, No. 5:04-CV-80-2) 2004 U.S.Dist. LEXIS 23010 (*Adkins*) [nonpub. opn.] [peer review privilege recognized and applied]; see also *Robbins v. Provena Saint Joseph Medical Center* (N.D.Ill., Mar. 11, 2004, No. 03-C-1371) 2004 WL 502327, pp. *1–*3 (*Robbins*) [nonpub. opn.] [self-critical analysis privilege applied to preclude discovery of hospital documents regarding nurses' complaints about nurse understaffing]; *Whitman by Whitman v. United States* (D.N.H. 1985) 108 F.R.D. 5, 7 (*Whitman*) ["the federal law now recognizes a privilege protecting hospital peer review records from disclosure during discovery. However, federal law does not extend unlimited protection."], superseded by statute on another ground as stated in *Syposs*, *supra*, 179 F.R.D. at p. 410; see also *Weekoty*, *supra*, 30 F.Supp.2d at p. 1345 ["self-critical analysis privilege . . . has been repeatedly recognized in the context of morbidity and mortality conferences conducted by physicians"]; *Brem*, *supra*, 162 F.R.D. at pp. 101–102; *Bredice v. Doctors*

Hospital, Inc. (D.D.C. 1970) 50 F.R.D. 249 (*Bredice*), affd. (D.C. Cir. 1973) 479 F.2d 920, superseded by statute on another ground as stated in *Syposs*, at p. 410.)

(2) No federal privilege.

Other courts have said there is no federal privilege for hospital peer review materials. In *Syposs*, *supra*, 179 F.R.D. at pages 411–412, the court stated, "Medical peer reviews do not enjoy the historical or statutory support upon which other privileges have been recognized in federal law, and the Hospitals have failed to provide any reason to believe some physicians would not provide candid appraisals of their peers absent the asserted privilege." (See *Virmani*, *supra*, 259 F.3d 284; *U.S. v. Aurora Health Care, Inc.* (E.D.Wis. 2015) 91 F.Supp.3d 1066, 1069 (*Aurora Health Care*); *Roberts v. Legacy Meridian Park Hosp., Inc.* (D.Or. 2014) 299 F.R.D. 669, 673–674 (*Roberts*); *Jenkins v. DeKalb County, Georgia* (N.D.Ga. 2007) 242 F.R.D. 652, 659; *Zoom Imaging, L.P. v. St. Luke's Hosp. and Health Network* (E.D.Pa. 2007) 513 F.Supp.2d 411, 417; *Nilavar*, *supra*, 210 F.R.D. at pp. 600–609; *Leon*, *supra*, 202 F.R.D. at p. 637 ["this Court rejects the idea that a peer review privilege exists in federal common law"]; *Marshall v. Spectrum Medical Group* (D.Me. 2000) 198 F.R.D. 1, 5 (*Marshall*); *Patt v. Family Health Systems, Inc.* (E.D.Wis. 1999) 189 F.R.D. 518, 523 (*Patt*); *Nyack Hosp.*, *supra*, 169 F.R.D. at pp. 559–561; *Robertson*, *supra*, 169 F.R.D. at pp. 83–84.)

(3) Compare: uncertainty whether to recognize self-critical analysis privilege.

The hospital peer review privilege is a specific type of self-critical analysis privilege. The validity of that broader category of privilege, too, is uncertain. (See *Dowling*, *supra*, 971 F.2d at p. 425, fn. 1 ["The Supreme Court and the circuit courts have neither definitively denied the existence of such a privilege, nor accepted it and defined its scope"]; *Robbins*, *supra*, 2004 WL 502327, pp. *1–*3 [self-critical analysis privilege applied to preclude discovery of hospital

documents regarding nurses' complaints about nurse understaffing]; *Holland v. Muscatine General Hosp.* (S.D.Iowa 1997) 971 F.Supp. 385, 390 (*Holland*) ["The self-critical analysis privilege has had an ambiguous existence, neither uniformly adopted nor rejected"]; *Spencer Sav. Bank, SLA v. Excell Mortg. Corp.* (D.N.J. 1997) 960 F.Supp. 835, 840 ["The federal courts are . . . divided on whether to recognize a self-critical analysis privilege"]; see also *Leon*, *supra*, 202 F.R.D. at p. 637 [finding "limited privilege" not applicable because the peer review documents sought had "nothing to do with the death of [plaintiffs' decedent]"].)

(4) An argument for a privilege: all states recognize it.

All 50 states and the District of Columbia recognize some form of hospital peer review privilege. This is a strong factor in favor of recognizing a similar privilege under federal common law. In adopting a federal psychotherapist privilege, the Supreme Court was influenced by the states having enacted such a privilege by statute—"the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." (*Jaffe*, *supra*, 518 U.S. at pp. 12–13.) The Court also noted that "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." (*Id*. at p. 13; see *Adkins*, *supra*, 2004 U.S.Dist. LEXIS at p. *12 [following *Jaffee* analysis in recognizing and applying peer review privilege; "defendants established a consensus among the States that the privilege should be recognized"]; *Weekoty*, *supra*, 30 F.Supp.2d at pp. 1346–1347.)

In a federal discrimination case, a court of appeals did *not* find the states' legislation persuasive because those statutes were concerned mostly with confidentiality of peer review materials in medical malpractice and defamation actions. (*Virmani*, *supra*, 259 F.3d at

pp. 290–291.) The court concluded that "[t]here is no evidence that state legislatures considered the potential impact on discrimination cases of a privilege for medical peer review proceedings." (*Id*. at p. 291; see also *Nilavar*, *supra*, 210 F.R.D. at p. 607 [no privilege even though "the states are substantially, if not completely, in harmony in recognizing a physician peer review privilege"].)

(5) An argument against a privilege: no privilege for *academic* peer review.

The Supreme Court has held there is no federal privilege for *academic* peer review. (*University of Pennsylvania*, *supra*, 493 U.S. 182.) This has convinced some courts not to recognize a federal *hospital* peer review privilege. (See *Roberts*, *supra*, 299 F.R.D. at pp. 673–674; *Syposs*, *supra*, 179 F.R.D. 406; *Nyack Hosp.*, *supra*, 169 F.R.D. at p. 559; see also *Patt*, *supra*, 189 F.R.D. at pp. 524–525 [*University of Pennsylvania* does not imply rejection of medical peer review privilege, but it does show that peer review confidentiality can be outweighed by the need to vindicate federal civil rights].) Others, however, have said that hospital peer review is special and deserves greater protection. (See *Weekoty*, *supra*, 30 F.Supp.2d at p. 1345 ["Because of [their] unique role in preserving the public health, medical morbidity and mortality reviews must be distinguished from other peer review cases"]; see also *Virmani*, *supra*, 259 F.3d at pp. 288–289 [holding *University of Pennsylvania* more instructive than *Jaffee* regarding whether a federal peer review privilege exists in a federal discrimination case]; *Nilavar*, *supra*, 210 F.R.D. at p. 601; *Leon*, *supra*, 202 F.R.D. at p. 637; *United States v. Harris Methodist Fort Worth* (5th Cir. 1992) 970 F.2d 94, 103 ["Unlike the privilege claim for faculty tenure decisions rejected in *University of Pennsylvania v. EEOC* . . . the medical peer review process 'is a *sine qua non* of adequate hospital care' "].)

(e) HCQIA does not provide a privilege.

The Health Care Quality Improvement Act of 1986 (HCQIA)

is not likely to provide protection from discovery in federal actions. A California district court stated that, "[w]hile the Act . . . comes close to according a blanket immunity and privilege from disclosure of all medical professional review activities, it intentionally stops short of this." (*Pagano*, *supra*, 145 F.R.D. at pp. 692–693; see *Aurora Health Care*, *supra*, 91 F.Supp.3d at p. 1068; *Teasdale v. Marin General Hosp.* (N.D.Cal. 1991) 138 F.R.D. 691, 694 (*Teasdale*) ["Congress spoke loudly with its silence in *not* including a privilege against discovery of peer review materials in the HCQIA"]; see also *Virmani*, *supra*, 259 F.3d at p. 291 ["Although we cannot conclude that Congress actually considered and rejected a privilege for medical review materials when enacting the HCQIA, it is clear that Congress considered the relevant competing interests—providing incentive and protection to physicians who would serve on review committees versus allowing putative victims of discrimination to pursue their claims—and decided to give greater weight to the latter"]; *In re Administrative Subpoena Blue Cross Blue Shield of Massachusetts, Inc.* (D.Mass. 2005) 400 F.Supp.2d 386, 389–393; *Nilavar*, *supra*, 210 F.R.D. at p. 602 [disagreeing with *Cohn*, *supra*, 127 F.R.D. at p. 121]; *Robertson*, *supra*, 169 F.R.D. at pp. 83–84; *LeMasters*, *supra*, 791 F.Supp. at p. 191. But see *Cohn*, at p. 121 [discovery precluded based on "a state privilege" and the "federal immunity principle" of HCQIA].) Indeed, some courts have said that the absence of a privilege in HCQIA shows Congressional intent to protect peer review materials to a lesser extent than the states and, for this reason, have not recognized a federal common law privilege. (See, e.g., *Syposs v. United States* (W.D.N.Y. 1999) 63 F.Supp.2d 301, 306–307; *Patt*, *supra*, 189 F.R.D. at pp. 524–525.)

(f) California constitutional privacy right as possible source of protection.

In one case, although the court refused to apply section 1157 to preclude discovery, it did apply the California constitutional right to privacy in limiting the discovery that was allowed. (*Pagano*, *supra*, 145 F.R.D. at pp. 697–699; see Section S, *post*, for more about constitutional protections.)

(g) In practice, confidentiality respected when federal interests not unduly compromised.

Whether applying comity principles or determining the parameters of a federal hospital peer review privilege, federal courts that have found a possible right to confidentiality have in practice balanced the state interest in confidentiality against the amount of harm that would be done to federal interests by protecting committee matters from disclosure. Those courts normally tip the balance towards disclosure in cases where the peer review process *itself* has been used for improper purposes, as opposed to those cases where some allegedly improper conduct was merely *reviewed* by a committee. The distinction was well-summarized in *Wei v. Bodner* (D.N.J. 1989) 127 F.R.D. 91, 101:

> In malpractice actions . . ., the issue is not what transpired during the evaluative process. Rather, it is whether there was negligence. [Citation.] In contrast, in an antitrust action where a physician is suing a hospital and others for anticompetitive actions, the claim arises directly from that process. [Citation.] In the former type of situation, where the evaluative process is the source of information to support a claim independent of the review process, the privilege should prevail and disclosure should not be ordered. Where . . . the party seeking discovery seeks redress from the evaluative process itself, the privilege must fall in favor of greater interests.

(See *Virmani*, *supra*, 259 F.3d at pp. 288–291 [noting the difference between a federal discrimination case, where it is alleged that "the peer review proceedings themselves were conducted in a discriminatory manner" and where the discovery sought is "crucial" and "perhaps the only evidence," and a malpractice case, which "arises from actions that occurred independently of the review proceedings"]; *Burrows*, *supra*, 187 F.R.D. at p. 611 [noting that "[c]ourts have held that there is no federal common law or statutory privilege . . . when the plaintiff's claim arises out of the disciplinary proceedings themselves"]; *Shadur*, *supra*, 664

F.2d at pp. 1062–1063. But see *Nilavar*, *supra*, 210 F.R.D. at p. 606 [a privilege's "application should not turn on whether . . . the claim, which appears later in time to the occurrence of the so-called confidential communication, is one arising under malpractice law, discrimination law, or antitrust law"]; *Leon*, *supra*, 202 F.R.D. at p. 637 ["Nothing in [the *University of Pennsylvania*, *supra*, 493 U.S. 182] case seems to limit this holding [rejecting claim of academic peer review privilege] to cases where the peer review meetings themselves are the alleged cause of the plaintiff's injuries"].)

(1) Disclosure usually barred in medical malpractice cases.

Using the balancing of interests analysis, disclosure usually is barred in medical malpractice cases. (See *Weekoty*, *supra*, 30 F.Supp.2d 1343; *Laws*, *supra*, 656 F.Supp. 824; *Mewborn v. Heckler* (D.D.C. 1984) 101 F.R.D. 691; *Gillman v. United States* (S.D.N.Y. 1971) 53 F.R.D. 316; *Bredice*, *supra,* 50 F.R.D. 249; see also *Burrows*, *supra*, 187 F.R.D. at p. 611 [noting that "[c]ourts have . . . recognized a peer review privilege in medical malpractice cases"]; *Hughes*, *supra*, 144 F.R.D. 177 [discovery barred in products liability case]; *Whitman*, *supra*, 108 F.R.D. 5 [privilege found to have been waived].)

(But see *Tucker v. U.S.* (S.D.W.Va. 2001) 143 F.Supp.2d 619 [no protection for peer review materials in Federal Tort Claims Act case alleging medical malpractice by a physician and negligence by a hospital in granting staff privileges]; *Leon*, *supra*, 202 F.R.D. 631 [no protection of peer review materials in 42 U.S.C. § 1983 civil rights case with pendent state law medical malpractice claim]; *Syposs*, *supra*, 179 F.R.D. 406 [privilege not recognized]; *Todd*, *supra*, 152 F.R.D. at pp. 682–684 [plaintiffs' need for discovery outweighed the harm from disclosure]; *Davidson*, *supra*, 79 F.R.D. 137 [discovery ordered].)

(2) Disclosure usually allowed in antitrust, discrimination, and other similar federal-rights cases.

When barring disclosure would severely interfere with a plaintiff's ability to enforce a federal right, courts usually do not recognize a privilege. (See *Pagano*, *supra*, 145 F.R.D. at pp. 690–692, 694–695 [antitrust case]; cf. *Teasdale*, *supra*, 138 F.R.D. at p. 695 [in antitrust action, Evidence Code section 1157 held inapplicable because the plaintiff physician was requesting reinstatement of his privileges and, by its terms, section 1157 does not apply to " 'any person requesting hospital staff privileges' "]; see also *Virmani*, *supra*, 259 F.3d 284 [employment discrimination]; *Nilavar*, *supra*, 210 F.R.D. 597 [antitrust case]; *Mattice v. Memorial Hosp. of South Bend* (N.D.Ind. 2001) 203 F.R.D. 381, 385 (*Mattice*) ["Nearly all of the cases that have weighed the state-law medical peer review privilege against the interests advanced by the federal antidiscrimination laws have concluded that the privilege does not preclude discovery of peer review materials"]; cf. *University of Pennsylvania*, *supra*, 493 U.S. at pp. 188–195 [no common law privilege protects faculty peer review materials in federal civil rights action]; *Shadur*, *supra*, 664 F.2d 1058 [antitrust case]; *Leon*, *supra*, 202 F.R.D. at p. 636 [42 U.S.C. § 1983 civil rights action arising from county's alleged deliberate indifference to plaintiffs' decedent's medical condition; "particularly inappropriate" to use Evidence Code section 1157 state law privilege concerning "federal constitutional claims against a non-federal government agency"]; *Patt*, *supra*, 189 F.R.D. at pp. 523–525 [gender/employment discrimination case]; *Holland*, *supra*, 971 F.Supp. 385 [employment discrimination]; *Robertson*, *supra*, 169 F.R.D. at pp. 83–84 [action under Americans With Disabilities Act]; *Illinois*, *supra*, 148 F.R.D. 587 [action by U.S. under the Civil Rights of Institutionalized Persons Act]; *Smith v. Alice Peck Day Memorial Hosp.* (D.N.H. 1993) 148 F.R.D. 51, 55–56 [civil rights and employment discrimination case]; *Vakharia v. Swedish Covenant Hosp.* (N.D.Ill. 1991) 765 F.Supp.

461, 473 [civil rights and age discrimination case].)

(But see *Adkins*, *supra*, 2004 U.S.Dist. LEXIS 23010 [peer review privilege recognized and applied in action alleging that suspension of hospital privileges violated 42 U.S.C. §§ 1981, 1983, and 1985]; *Freeman*, *supra*, 917 F.Supp. 586 [civil rights claim]; *Sklaroff v. Allegheny Health Education Research Foundation* (E.D.Pa. 1996) 1996 WL 665519 [nonpub. opn.] [RICO action]; *Brem*, *supra*, 162 F.R.D. at pp. 101–102 [employment discrimination case]; *Cohn*, *supra*, 127 F.R.D. 117 [antitrust case]; see *Robbins*, *supra*, 2004 WL 502327, at pp. *1–*3 [in wrongful employment termination case, self-critical analysis privilege applied to preclude discovery of hospital documents regarding nurses' complaints about nurse understaffing]; *ante*, Section C.1 [Evidence Code section 1157 applies in *state* actions regardless of the harm to the plaintiff's case].)

(3) Disclosure in EMTALA cases?

It is an open question whether a hospital peer review privilege should be recognized in cases under the federal anti-patient dumping law, the Emergency Medical Treatment and Active Labor Act (EMTALA) (42 U.S.C. § 1395dd). In one case, the district court ordered disclosure of committee matters. (*Burrows*, *supra*, 187 F.R.D. at p. 613.) In another case, however, the district court ruled that the defendants likely would be able to meet the criteria for applying the self-critical analysis privilege. (*Baker v. Adventist Health, Inc.* (N.D.Cal., Apr. 21, 1999, No. 4:97-CV-03536) Order re Protective Orders, pp. 6–7.) The latter view is the better reasoned one. As with medical malpractice cases, an EMTALA action normally will not be based on an alleged wrong committed in the medical staff committee process itself, but rather in some treatment (or lack of treatment) that may be reviewed by a committee. (See *Stringfellow v. Oakwood Hospital and Medical Center* (E.D.Mich., Oct. 21, 2005, No. 03 CV 75188 DT) 2005 WL 8154517, at pp. *2–*3 [nonpub. opn.] [court denied an EMTALA plaintiffs motion to compel discovery of peer review documents, concluding that evidence about "[a]ny post-mortem

conference" was irrelevant to the EMTALA claim and that the facts pertinent to the claim could be established "by looking at the medical record and taking depositions of the persons on the scene"].)

(h) Preemption when federal law expressly requires disclosure.

One court found a federal law preempted a state peer review protection statute. The federal law, the Protection and Advocacy for Mentally Ill Individuals Act (42 U.S.C. § 10801 et seq.), specifically gives independent monitoring organizations access to the records of an individual whose care is being investigated. After concluding that the records-access provision covered peer review documents and invalidating a federal regulation that attempted to preserve the primacy of state peer review protection statutes, the court held the federal law "preempts any state law that gives a healthcare facility the right to withhold [peer review] records." (*Pennsylvania Protection & Advocacy v. Houstoun* (3d Cir. 2000) 228 F.3d 423, 428 (*Pennsylvania Protection*); accord, *Center for Legal Advocacy v. Hammons* (10th Cir. 2003) 323 F.3d 1262, 1272 (*Center for Legal Advocacy*). But see *Disabilities Rights Ctr., Inc. v. Commissioner* (N.H. 1999) 732 A.2d 1021, 1024.)

California statutory law protects medical staff committee matters from disclosure to an agency for the protection and advocacy of the rights of developmentally disabled and mentally ill persons. (Welf. & Inst. Code, § 4903, subd. (d); see *ante*, Section L.4.g.5.) That protection could be found preempted by federal law under the reasoning of the opinions in *Center for Legal Advocacy*, *supra*, 323 F.3d 1262 and *Pennsylvania Protection*, *supra*, 228 F.3d 423.

(i) Limits on discovery when disclosure ordered.

When discovery is ordered in federal question cases, the courts are often receptive to requests for protective orders to narrow the scope of discovery and minimize the intrusion into the review committee process. Thus, the courts have imposed the following limitations:

(1) ***In camera reviews.***

See *Marrese*, *supra*, 726 F.2d at page 1160; *Shadur*, *supra*, 664 F.2d at page 1063, footnote 6; see also *Wesley Medical Center*, *supra*, 669 P.2d at pages 220–221.

(2) Redaction.

See *Marrese*, *supra*, 726 F.2d at page 1160; *Patt*, *supra*, 189 F.R.D. at page 525; *Holland*, *supra*, 971 F.Supp. at page 393; *Swarthmore Radiation Oncology, Inc. v. Lapes* (E.D.Pa., Dec. 1, 1993, No. CIV. A. 92–3055) 1993 WL 517722, at page *4, footnote 2 [nonpub. opn.]; *Pagano*, *supra*, 145 F.R.D. at pages 698–699 (protecting identities of physicians and patients); *Teasdale*, *supra*, 138 F.R.D. at page 700 (patient names redacted); *Morgenstern v. Wilson* (D.Neb. 1990) 133 F.R.D. 139, 142–143; *Schafer v. Parkview Memorial Hosp., Inc.* (N.D.Ind. 1984) 593 F.Supp. 61, 65–66 (*Schafer*); see also *In re Department of Justice Subpoena Duces Tecum* (W.D.Tenn., June 22, 2004, No. 04-MC-018-DV) 2004 WL 2905391, at page *3 [nonpub. opn.]; *Virmani*, *supra*, 259 F.3d at page 287, footnote 4; *Mattice*, *supra*, 203 F.R.D. at pages 386–387; *Marshall*, *supra*, 198 F.R.D. at page 5.

(3) Precluding discovery of documents that primarily concern patient care issues.

See *Holland*, *supra*, 971 F.Supp. at pages 391–392.

(4) Ordering discovery of committee records to be scheduled last.

See *Marrese*, *supra*, 726 F.2d at page 1161; see also *Deukmejian*, *supra*, 1988 WL 92568 [order requiring production ruled premature].

(5) Requiring stronger allegations of committee wrongdoing as a prerequisite to discovery.

See *Doe v. St. Joseph's Hosp. of Ft. Wayne* (N.D.Ind. 1987) 113 F.R.D. 677, 680; cf. *Nilavar*, *supra*, 210

F.R.D. at page 600 (before addressing discovery issue, court noted earlier unsuccessful defense motion to dismiss and rejected contention that the plaintiff had asserted a federal antitrust claim to circumvent state peer review privilege).

(6) Limiting discovery to use in the instant litigation.

See *Price*, *supra*, 950 F.Supp. at page 144; *Teasdale*, *supra*, 138 F.R.D. at page 700; *Schafer*, *supra*, 593 F.Supp. at page 66; see also *Rdzanek v. Hospital Service Dist. # 3* (E.D.La., Oct. 29, 2003, No. Civ.A. 03-2585) 2003 WL 22466232, at page *4 [nonpub. opn.]; *Virmani*, *supra*, 259 F.3d at page 287, footnote 4; *Mattice*, *supra*, 203 F.R.D. at page 386; *Marshall*, *supra*, 198 F.R.D. at page 5.

(7) Limiting the dissemination of information disclosed.

See *Teasdale*, *supra*, 138 F.R.D. at page 700; see also *Krolikowski v. University of Massachusetts* (D.Mass. 2001) 150 F.Supp.2d 246, 249 (documents to be labeled " 'Attorney's Eyes Only' "); *Marshall*, *supra*, 198 F.R.D. at page 5 ("information may be disclosed only to the parties, their attorneys, and their designated expert witnesses").

P. SECTION 1157 IS CONSTITUTIONAL.

1. California Case Law.

Section 1157 was upheld against a constitutional attack on due process and equal protection grounds in *Mt. Diablo I*, *supra*, 158 Cal.App.3d at page 347 ("The protection provided by section 1157 is no more burdensome to litigants than are many of the statutory privileges the Legislature has enacted"). No other California opinion has discussed constitutional challenges.

2. Other States' Case Law.

Other states' courts have addressed an assortment of attacks on similar statutes. Most constitutional attacks have failed. (See *Virmani v. Presbyterian Health Services Corp.* (N.C. 1999) 515 S.E.2d 675, 691–697, cert. den. *sub. nom. Knight Pub. Co. v. Presbyterian Health Services Corp.* (2000) 529 U.S. 1033 [120 S.Ct. 1452, 146 L.Ed.2d 337] [rejecting newspaper's request to inspect peer review materials submitted to trial judge; no right to inspect under state constitutional open courts provision which gives public a qualified right of access to civil court proceedings nor under First Amendment of the federal constitution]; *Claypool*, *supra*, 724 So.2d at pp. 377–381 [legislature did not impede judiciary's power over procedural rules and thus did not violate separation of powers principles]; *McCown*, *supra*, 927 S.W.2d at pp. 11–12 [denial of discovery of peer review materials which assertedly would show truth of broadcast that was the basis for defamation action by physician did not violate media defendant's constitutional rights to gather and broadcast news; no due process or equal protection violation by allowing only peer review participants to use otherwise confidential peer review materials to defend against a civil lawsuit]; *S.W. Community*, *supra*, 755 P.2d at p. 42 [statute did not usurp Supreme Court's rule-making power and thus did not violate separation of powers provision]; *Humana Hospital*, *supra*, 742 P.2d at pp. 1385–1388 [no violation of provision prohibiting abrogation of right of action to recover damages or of provision giving state Supreme Court power to make rules on procedural matters]; *Daily Gazette Co. v. West Va. Bd. of Medicine* (W.Va. 1986) 352 S.E.2d 66, 71–72 [no violation of "open courts" provision]; *Niven v. Siqueira* (Ill. 1985) 487 N.E.2d 937, 943 (*Niven*) [no separation of powers violation in legislative grant of confidentiality]; *Lilly*, *supra*, 492 N.Y.S.2d 286 [no due process violation]; *Jenkins v. Wu* (Ill. 1984) 468 N.E.2d 1162 [no violation

of federal or state equal protection or of state special legislation prohibition in denying malpractice plaintiffs access to information available to physicians in staff privileges cases]; *Gates*, *supra*, 442 N.E.2d at pp. 74–76 [no violation of equal protection or due process provisions or of provision giving Supreme Court rule-making power]; *Eubanks v. Ferrier* (Ga. 1980) 267 S.E.2d 230, 232–233 [no violation of due process, equal protection, or access to the courts provisions]; *Samuelson*, *supra*, 576 F.2d at pp. 552–553 [no due process violation]; see also *Scott v. McDonald* (N.D.Ga. 1976) 70 F.R.D. 568, 570, fn. 1 [plaintiffs lack standing to challenge statute on grounds it violates the First Amendment as a prior restraint of speech].)

(But see *Adams v. St. Francis Regional Medical Center* (Kan. 1998) 955 P.2d 1169, 1183–1188 [application of privilege to deny medical malpractice plaintiffs access to all relevant facts violated their due process rights]; *Sweasy v. King's Daughters Memorial Hosp.* (Ky. 1989) 771 S.W.2d 812, 815–816 (*Sweasy*) [violation of single-subject provision of state constitution].)

Q. THE ABSENCE OF A CALIFORNIA COMMON LAW PRIVILEGE.

1. Privileges Only By Statute.

Enactment of section 1157 was necessary because, prior to the statute, committee records had been held discoverable (see *Kenney v. Superior Court* (1967) 255 Cal.App.2d 106, 109–110 (*Kenney*)). Generally, there is no common law self-critical analysis privilege in California; " '[T]he privileges contained in the Evidence Code are *exclusive* and the courts are not free to create new privileges as a matter of judicial policy.' " (*Cloud v. Superior Court* (1996) 50 Cal.App.4th 1552, 1558–1559 (*Cloud*).)

2. Some Other States' Case Law in Accord.

Some state courts, like California, have refused to recognize a privilege where the Legislature has not. (See *Lomano v. CIGNA Healthplan of Columbus* (Ohio Ct.App. 1992) 613 N.E.2d 1075, 1078 (*Lomano*); *State v. Larson* (Minn. 1990) 453 N.W.2d 42, 46, fn. 3, cert. granted, judgment vacated (1990) 498 U.S. 801 [111 S.Ct. 29, 112 L.Ed.2d 7] ["We disagree with dictum contained in opinions of the court of appeals deferring to the legislature as the primary regulator of evidentiary matters"]; *Matter of Parkway Manor*, *supra*, 448 N.W.2d at pp. 120–121; *Sweasy*, *supra*, 771 S.W.2d at p. 814; *Hutchinson v. Smith Laboratories, Inc.* (Iowa 1986) 392 N.W.2d 139; *Mercy Hosp. v. Dept. of Professional Reg.* (Fla.Dist.Ct.App. 1985) 467 So.2d 1058, 1060; *Chandra*, *supra*, 678 S.W.2d at pp. 806–808, superseded by Mo. Rev. Stat., § 537.035; *Cronin v. Strayer* (Mass. 1984) 467 N.E.2d 143, 147–148; *Wesley Medical Center*, *supra*, 669 P.2d at pp. 215–220, superseded by Kan. Stat. Ann., § 65-4915; *Sherman v. District Court* (Colo. 1981) 637 P.2d 378, 383–384 (*Sherman*); *Nazareth Literary & Benevolent Inst. v. Stephenson* (Ky. 1973) 503 S.W.2d 177, 178–179, superseded by statute as stated in *Basham v. Com* (Ky. 1984) 675 S.W.2d 376, 380–381.)

3. Common Law Privileges Recognized in Some Other Jurisdictions.

Some other state's courts *have* applied a common law privilege absent any statutory protection, or even when the Legislature had enacted a limited statutory protection which did not extend to the particular discovery sought. (See *Estate of Hussain v. Gardner*

(N.J.Super.Ct. 1993) 624 A.2d 99 [applying "self-evaluation privilege"]; *Bundy*, *supra*, 580 A.2d 1101 [same]; *Spinks*, *supra*, 124 F.R.D. at pp. 11–12 [no discovery of certain documents even though those documents were outside the protection of an existing statutory discovery immunity]; *Cameron*, *supra*, 293 S.E.2d at pp. 914–915 [common law qualified privilege applied]; *Segal v. Roberts* (Fla.Dist.Ct.App. 1979) 380 So.2d 1049, 1052 [no discovery]; *Dade County Med. Ass'n v. Hlis* (Fla.Dist.Ct.App. 1979) 372 So.2d 117, 121 [no discovery]; see also *Plough Inc. v. National Academy of Sciences* (D.C.Ct.App. 1987) 530 A.2d 1152, 1157–1158 (*Plough Inc.*) [no discovery of National Academy of Sciences documents in products liability action against drug maker]. But see *Reyes v. Meadowlands Hosp. Medical Center* (N.J.Super.Ct. 2001) 809 A.2d 875, 879–882 [declining to follow the holdings in *Estate of Hussain* and *Bundy*].)

4. Compare Federal Common Law Privilege.

Regarding a federal common law privilege, see *ante*, Section O.3.d.

R. LEGISLATIVE HISTORY.

1. Response to Court of Appeal Opinion.

In *Matchett*, *supra*, 40 Cal.App.3d at page 629, the court explained section 1157 was enacted "in apparent response to . . . *Kenney* . . . [where the court] sustained a malpractice plaintiff's claim to discovery of hospital staff records which might reveal information bearing upon the competence of the defendant doctor."

2. Scope of Coverage Expanded.

As originally enacted in 1968, section 1157 applied only to organized committees of hospital medical staffs and medical review committees of local medical societies. The Legislature has since amended section 1157 fifteen times, adding to its protection: (1) hospital medical-dental, podiatric, registered dietitian, psychological, veterinary, marriage and family therapist, and licensed clinical social worker staff committees; (2) dental, dental hygienist, chiropractic, podiatric, registered dietitian, veterinary review, and acupuncturist review committees of local professional societies; (3) psychological, marriage and family therapist, and licensed clinical social worker review committees of state or local psychological, marriage and family therapist, and licensed clinical social worker associations or societies; (4) committees of large groups and clinics; (5) committees of health care service plans and nonprofit hospital service plans; (6) state or local licensed professional clinical counselors; (7) pharmacists, pharmacist societies, and pharmacist review committees; and (8) licensed midwife review committees, associations, and societies.

3. Presumed Legislative Approval of Court Interpretation of Section 1157.

Significantly, the 15 amendments expanding section 1157's scope all came after the seminal *Matchett* decision and some of the amendments came after numerous other section 1157 Court of Appeal opinions. The Supreme Court has stated, "The discussion [of the policies underlying section 1157] in *Matchett* and the subsequent cases takes on added importance because of the well-established rule that when, as here, the Legislature amends a statute without altering portions of the provision that have been judicially construed, the Legislature is presumed to have been aware of and acquiesced in the prior judicial construction." (*West*

Covina Hospital, *supra*, 41 Cal.3d at p. 852.) In *Cedars-Sinai*, *supra*, 12 Cal.App.4th at page 588, the Court of Appeal stated that "the overriding consideration in construing any statute is the ascertainment of the legislative intent" and that, for section 1157, "[t]hat intent has been established by the *Matchett* decision." (See *Willits*, *supra*, 20 Cal.App.4th at p. 96 [noting *Matchett* is the seminal and leading case on section 1157].)

4. Actual Legislative Knowledge of *Matchett*.

There is evidence that the Legislature was *actually* aware of the *Matchett* interpretation when it amended section 1157 in 1985 and in 1990. Various committee reports, expressly citing *Matchett*, state both the arguments in favor of *and against* section 1157. Presumably aware of the contents of these reports (see *Curtis v. County of Los Angeles* (1985) 172 Cal.App.3d 1243, 1250; *California Teachers' Assn. v. Governing Board* (1983) 141 Cal.App.3d 606, 613; *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 427, disapproved on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617), the Legislature passed the amendments extending the scope of section 1157. This is important evidence of legislative intent. (See *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 675 ["When the Legislature enacts language that has received definitive judicial construction, we presume that the Legislature was aware of the relevant judicial decisions and intended to adopt that construction. [Citation.] This presumption gains further strength when . . . it is clear that the Legislature was explicitly informed of the prior construction"].)

5. 1968 Lobbyist's Letter Irrelevant.

Attempting to dilute section 1157's protections, some parties have relied on one paragraph in a 1968 letter from counsel for the California Hospital Association to the governor requesting the signing of the bill which enacted section 1157. The paragraph stated: "We have recognized the fact that in protecting [medical staff] proceedings we must in no way adversely affect the rights of a plaintiff in a professional liability action. The amendments which were made to the bill as it evolved carefully protected these rights." There are two responses to such an argument. First, the letter has specifically been held inadmissible as evidence of legislative intent. (*Santa Rosa*, *supra*, 174 Cal.App.3d at p. 721, fn. 7.) Second, the language from the letter on which plaintiffs rely refers not to section 1157, but to section 1158 which requires hospitals to

promptly disclose a patient's records to an attorney presenting a written authorization signed by the patient and which was enacted by the same bill that enacted section 1157. (See *Conflict Between Hospital Medical Staff Peer Review*, *supra*, 24 Santa Clara L.Rev. at p. 673, fn. 55 [letter's author quoted as stating, " 'CTLA approval of Evidence Code section 1157 (as amended) was a quid pro quo for CHA support of Evidence Code section 1158' "].)

S. THE STATE CONSTITUTIONAL RIGHT TO PRIVACY AS AN ALTERNATIVE GROUND FOR PROTECTION OF COMMITTEE INFORMATION.

1. Inalienable Right to Privacy.

Under some circumstances, it may be worth arguing that information sought by plaintiffs is protected not only by section 1157, but also by the California constitutional right to privacy. Article 1, section 1 of the State Constitution lists privacy as one of but a few "inalienable rights." (Concerning the application of the privacy right, see *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 (*Hill*).)

2. Hospital Standing to Raise Privacy Rights of Others.

In *Saddleback*, *supra*, 158 Cal.App.3d at page 209, the court held that, in addition to the section 1157's protections, the hospital was "entitled to raise the privacy interests of its non physician medical staff" in response to the plaintiffs' broad request for personnel files. (See *Pagano*, *supra*, 145 F.R.D. at p. 696 [hospital has standing to raise California constitutional privacy rights of patients and physicians].) The *Saddleback* and *Pagano* courts so ruled without mentioning the holding in *County of Kern*, *supra*, 82 Cal.App.3d at page 401, that a hospital did "not have any standing to assert any right to privacy of the doctors" in response to a request for production of the hospital's records on a doctor. The *County of Kern* court stated that "[t]he right of privacy is personal and cannot be asserted by anyone other than the person whose privacy has been invaded [citations]." (*Ibid.*; accord, *North Fla. Regional Hosp., Inc. v. Douglas* (Fla.Dist.Ct.App. 1984) 454 So.2d 759, 760.)

3. Privacy and Faculty Peer Review.

The constitutional right to privacy has been held to provide confidentiality in the analogous context of faculty peer review. In *Kahn v. Superior Court* (1987) 188 Cal.App.3d 752 (*Kahn*), the court held that a plaintiff professor in a defamation action could not depose the defendant professor who had served on the faculty committee which had denied the plaintiff's application for appointment to the faculty. The court ruled the plaintiff could not discover "the votes cast, the underlying motivation and the comments made during the meeting" at which the application was considered "unless the [plaintiff] can demonstrate some compelling

state or national interest which requires disclosure." (*Id.* at p. 755.) Balancing the interests of the plaintiff and the defendant, the court found "the right of a faculty member to discuss with his colleagues the candidate's qualifications thoroughly and candidly, in confidence and without fear of compelled disclosure, is of such paramount value that it ought not to be impaired." (*Id.* at p. 770; see *Garstang v. Superior Court* (1995) 39 Cal.App.4th 526 (*Garstang*) [despite lack of statutory ombudsperson privilege, balancing of interests required no discovery in slander and intentional infliction of emotional distress case of communications during mediation sessions before ombudsperson of private university]; *King v. Regents of University of California* (1982) 138 Cal.App.3d 812, 818–820 [no disclosure allowed of names of persons who evaluated the plaintiff professor for tenure]; see generally *Harding Lawson Associates v. Superior Court* (1992) 10 Cal.App.4th 7, 9–10 (*Harding Lawson Associates*) [constitutional privacy right prevented plaintiff in wrongful discharge case from discovering personnel files of employees other than the plaintiff].)[6]

4. Privacy Arguments and *Hill* and *University of Pennsylvania*.

An argument based on *Kahn* must be carefully structured not only because of the new privacy standard stated in *Hill* but also because of the United States Supreme Court's opinion in *University of Pennsylvania*, *supra*, 493 U.S. 182. The Court there held universities do not have either a common law or constitutional privilege against disclosure of peer review materials relevant to charges of racial or sexual discrimination in tenure decisions. But, with *University of Pennsylvania*, two important distinctions must be kept in mind. First, the Supreme Court was obviously not

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[6] *Kahn*, *Garstang*, and *Harding Lawson Associates* all held that every case involving a constitutional right to privacy required application of the strict compelling interest test, which was disapproved by *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557 & fn. 8. *Hill*, *supra*, 7 Cal.4th at pages 34–40, articulated certain considerations that must be taken into account before a compelling interests is required. *Williams*, at page 557 held that, "[t]o the extent prior cases [e.g., *Kahn*, *Garstang*, and *Harding Lawson Associates*] require a party seeking discovery of private information to always establish a compelling interest or compelling need, without regard to the other considerations articulated in *Hill*, they are disapproved."

analyzing the California constitutional right to privacy. (Indeed, the Court did not even discuss a federal privacy right, instead discussing a First Amendment claim of " 'academic freedom.' " (*Id.* at pp. 195–202.)) (See *Cloud*, *supra*, 50 Cal.App.4th 1552 [constitutional privacy right not in issue; no common law self-critical analysis privilege to protect proceedings of federally required self-critical discussions of affirmative action hiring policies].) Second, in balancing interests, the importance of disclosure was far greater in the *University of Pennsylvania* case, where a government agency was seeking critical information to further its enforcement of civil rights laws (see *University of Pennsylvania*, at p. 193 ["Few would deny that ferreting out [racial and sexual] discrimination is a great if not compelling governmental interest"]), than in the usual malpractice or hospital peer review case, where the plaintiff is seeking to vindicate strictly private rights. (See *Scharf v. Regents of University of California* (1991) 234 Cal.App.3d 1393, 1409–1411 [noting strong policy in favor of disclosure when academic peer review materials are sought in actions under federal or state anti-discrimination statutes, but suggesting the need for confidentiality would prevail when those statutes were not involved].)

T. OTHER RELATED STATUTORY PROTECTIONS.

1. Code of Civil Procedure Section 425.16: Peer Review Procedure Qualifies as an Official Proceeding Authorized by Law, Thus Capable of Anti-SLAPP Protection

(a) The California Supreme Court's *Kibler* decision.

A hospital's peer review procedure qualifies as an "official proceeding authorized by law," as defined by California's anti-SLAPP statute, because the procedure is required under Business and Professions Code section 805 et seq. and the "hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate." (*Kibler*, *supra*, 39 Cal.4th at p. 200.)

The Supreme Court explained that "the Business and Professions Code sets out a comprehensive scheme that incorporates the peer review process into the overall process for the licensure of California physicians," and because "a hospital's disciplinary action may lead to restrictions on the disciplined physician's license to practice or to the loss of that license, its peer review procedure plays a significant role in protecting the public against incompetent, impaired, or negligent physicians." (*Kibler*, *supra*, 39 Cal.4th at pp. 199–200.) To hold otherwise "would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by the available means of a petition for administrative mandate." (*Id.* at p. 201.)

In *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1070, the Court clarified *Kibler*, explaining that it "does not stand for the proposition that disciplinary decisions reached in a peer review process, as opposed to statements in connection with that process, are protected." In holding so, the court disapproved of *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65, 82–84, and *DeCambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1, 14–16, which held that all aspects of the peer review process are considered

protected activity.[7]

In *Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203, 218, the court affirmed a denial of an anti-SLAPP motion and rejected defendant's argument that plaintiffs' action could have been based on peer review activities (which is protected), since "peer review is not only not referred to in [plaintiffs'] complaint, it is expressly not involved."

See also *Marchioli v. Pre-employ.com, Inc.* (C.D.Cal., June 30, 2017, No. CV171566JGBDTBX) 2017 WL 8186761, at page *7 [nonpub. opn.] [applying *Kibler* to find hospital's credentialing process was a protected activity for anti-SLAPP purposes since it fell under the definition of a peer review body in Business and Professions Code section 805].

2. Evidence Code Section 1156: Records of Staff Committee Research and Study For the Purpose of Reducing Morbidity or Mortality Are Discoverable, But Are Not Admissible in Evidence.

(a) Statutory protection precedes section 1157.

Evidence Code section 1156, enacted three years prior to section 1157, provides in pertinent part:

> (a) In-hospital medical or medical-dental staff committees of a licensed hospital may engage in research and medical or dental study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. . . . [T]he written records of interviews, reports, statements, or memoranda of such in-hospital medical or medical-dental staff committees relating to such

[7] *Bonni v. St. Joseph Health System* (S244148), which was argued May 5, 2021, will decide the following issue: "In deciding whether an employee's claims for discrimination, retaliation, wrongful termination, and defamation arise from protected activity for purposes of a special motion to strike (Code of Civ. Proc., § 425.16), what is the relevance of an allegation that the employer acted with a discriminatory or retaliatory motive?" The Supreme Court's decision, which is due by early August 2021, will likely refine its earlier decisions in *Kibler* and *Park*.

> medical or dental studies are subject to . . . [discovery,] but . . . shall not be admitted as evidence in any action.

(b) Protection for studies regarding disease and death rates.

The word "morbidity" means disease rate (i.e., the number of sick persons or cases of disease in relationship to a specific population). The word "mortality" means death rate. (Taber's Cyclopedic Medical Dict. (23d ed. 2017) pp. 1998–1999.) Therefore, the records discoverable under section 1156 are staff committee records relating to research or studies for the purpose of reducing the disease rate or the death rate. (Cf. *Babcock v. Bridgeport Hospital* (Conn. 1999) 742 A.2d 322, 349–352; *Murphy*, *supra*, 667 P.2d at p. 863.)

(c) Statute should be narrowly construed.

In order to avoid undercutting the legislative policy behind section 1157, section 1156 should be narrowly construed. Thus, it should be argued that it encompasses research and studies for the purpose of reducing the disease or death rate in general, as opposed to in the hospital. In other words, records of a hospital medical staff infection control committee study of infection control policies, procedures, and practices in the hospital should *not* be discoverable under section 1156 because such records relate to "evaluation and improvement of the quality of care rendered in the hospital" and thus are rendered non-discoverable by section 1157. (*Santa Rosa*, *supra*, 174 Cal.App.3d at p. 715.) On the other hand, records of a committee study on the prevalence of a particular form of cancer in the community serviced by the hospital would be discoverable under section 1156, because such records are not encompassed by section 1157.

3. Evidence Code Section 1157.5: JCAHO and CMA Reports Also Should Be Protected From Disclosure.

(a) Protection for professional standards review organizations.

Evidence Code section 1157.5 specifically protects the proceedings and records of professional standards review organizations. (See *Humana Hospital Corporation v. Spears-Petersen* (Tex.Ct.App. 1993) 867 S.W.2d 858, 861–862 [JCAHO accreditation reports protected]; *Zion v. New York Hospital* (App.Div. 1992) 590 N.Y.S.2d 188, 189 [no discovery from hospital of JCAH records pertaining to hospital]; *Salaymeh v. St. Vincent Memorial Hosp. Corp.* (C.D.Ill. 1989) 706 F.Supp. 643, 648–649 [no discovery of report of independent medical review entity commissioned by hospital]; *Plough Inc.*, *supra*, 530 A.2d at pp. 1160–1161 [no discovery of documents of the National Academy of Sciences]; *Utterback v. U.S.* (W.D.Ky. 1987) 121 F.R.D. 297, 299–300 (*Utterback*); *Niven*, *supra*, 487 N.E.2d at pp. 942–943 [no discovery of documents relating to JCAH accreditation of defendant hospital]; *Fretz*, *supra*, 109 F.R.D. at p. 311 [JCAH accreditation documents held not discoverable]; *Sherman*, *supra*, 637 P.2d at pp. 381–382 [documents relating to JCAH on-site inspection protected from discovery on proper showing]; cf. *Variety Children's Hospital v. Mishler* (Fla.Dist.Ct.App. 1996) 670 So.2d 184, 186 [JCAHO surveys protected from discovery under section 1157-type statute concerning *hospital* committees; discovery prohibited "to give broad effect to the policy and intent of the statute"].)

(But see *Georgia Hospital Association v. Ledbetter* (Ga. 1990) 396 S.E.2d 488, 489–490 [JCAHO accreditation reports are discoverable]; *Ekstrom*, *supra*, 553 N.E.2d at p. 429 [discovery allowed of hospital infection control records regarding compliance with JCAH guidelines, because records sought from hospital, not from JCAH].)

(b) Protection for reports derived from peer review records.

Even without section 1157.5, the same rationale which protects portions of hospital administration files derived

from review committee proceedings and records (see *ante*, Section G.5.b) should also protect those portions of JCAHO and CMA reports which are derived from a review of such proceedings and records. (See also *ante*, Section L.4.a.)

4. Evidence Code Sections 1156.1 and 1157.6: Mental Health Quality Assurance Committees.

Sections 1156.1 and 1157.6 apply protections like those in sections 1156 and 1157 to specified mental health quality assurance committees. Section 1156.1, subdivision (a) permits discovery but prohibits admissibility into evidence of various documents and information of those committees' studies "for the purpose of reducing morbidity or mortality." Section 1157.6 prohibits discovery of "proceedings" and "records" of those committees if they "hav[e] the responsibility of evaluation and improvement of the quality of mental health care rendered in county operated and contracted mental health facilities." (See *County of Los Angeles II*, *supra*, 139 Cal.App.4th at pp. 18–19 [since discovery of information available under Evidence Code section 1156.1 is limited to only "research" or "medical or psychiatric" studies conducted by a quality assurance committee, the court rejected the plaintiff's overly broad interpretation that any information disclosed to a quality insurance committee is discoverable so long as the patient identity is not disclosed]; see also *id.* at p. 12 ["There is no exception in sections 1157 and 1157.6 for discovery requests merely because the request is 'narrowly drawn' or relevant to the 'issue of notice' "].)

5. Evidence Code Section 1157.7: Local Government Specialty Health Care Quality Assurance Committees.

Section 1157.7 applies "[t]he prohibition relating to discovery or testimony provided in Section 1157" to "proceedings and records" of local government quality assurance committees evaluating specialty health care services such as trauma care services. (See *County of San Diego v. Superior Court* (1986) 176 Cal.App.3d 1009.)

6. Health and Safety Code Section 1370: Health Care Service Plans.

Health and Safety Code section 1370 provides that the same discovery and testimony prohibition stated in section 1157 applies to reviews by health care service plans of "the quality of care,

performance of medical personnel, utilization of services and facilities, and costs." In 1990, subsequent to the enactment of this protection, section 1157 itself was amended to extend that statute's protections to health care service plans. They appear to be doubly protected. (See *Lomano*, *supra*, 613 N.E.2d at p. 1076 [Ohio statute amended to protect peer review committees of HMOs after court ruling that such committees were not protected by earlier statute]; see also *Armenia v. Blue Cross of Western New York, Inc.* (App.Div. 1993) 593 N.Y.S.2d 648 [discovery prohibited in action against HMO concerning reimbursement for provider services]; cf. *McClellan v. Health Maintenance Org. of Pa.* (Pa.Super.Ct. 1995) 660 A.2d 97 [Pennsylvania statute generally protecting discovery of review committee records and proceedings in actions against a "professional health care provider" does not apply in action against IP model HMO], affd. by an equally divided ct. (1996) 686 A.2d 801.)

7. Insurance Code Section 10133, subdivision (d): Group Medical Insurance Reviews.

Insurance Code section 10133, subdivision (d) applies "[a]ll provisions of the laws of the state relating to . . . discovery privileges for medical, psychological, and dental peer review" to licensed providers reviewing for group medical insurance plans "the quality of care, performance of medical or psychological personnel included in the plan, utilization of services and facilities, and costs."

8. Welfare and Institutions Code Sections 14087.31, 14087.35, and 14087.38: Tulare and San Joaquin County Commissions, and County Health Authorities.

Welfare and Institutions Code section 14087.31, subdivision (v)(1) provides confidentiality for peer review activities of commissions in Tulare and San Joaquin Counties that negotiate primary care case management contracts and arrange for the provision of primary care case management services. Welfare and Institutions Code sections 14087.35, subdivision (w)(1) and 14087.38, subdivisions (o) and (q) protect peer review activities of special county health authorities for the delivery of health services, including specifically the health authority for Alameda County.

9. 42 U.S.C. Section 1320c-9: Medicare Peer Review Organizations.

Title 42 of the United States Code section 1320c-9(a) makes confidential and prohibits the disclosure of "[a]ny data or information acquired by" a peer review organization operating under a contract with the Medicare program. Section 1320c-9(b) specifies exceptions to the nondisclosure rule. (See *Armstrong*, *supra*, 155 F.3d at pp. 216–219; *Todd*, *supra*, 152 F.R.D. at pp. 685–687;[8] *General Care Corp. v. Mid-South Foundation* (W.D.Tenn. 1991) 778 F.Supp. 405; see also *Public Citizen*, *supra*, 332 F.3d at pp. 664–667 & fn. 20, 671–672 [regardless of discovery prohibition, Medicare peer review organization must inform complainant of at least the results of its review; leaving undecided questions whether results disclosed to beneficiary are admissible against a practitioner in civil litigation and whether organization must also inform of the corrective action it has taken].)

10. 42 U.S.C. Sections 1395i-3(b)(1)(B), 1396r(b)(1)(B): Nursing Home Quality Assessment and Assurance Committees Required by Medicare and Medicaid.

Title 42 of the United States Code sections 1395i-3(b)(1)(B) and 1396r(b)(1)(B) require that nursing facilities receiving Medicare or Medicaid funds must "maintain a quality assessment and assurance committee" meeting certain specifications, but provide that "[a] State or the Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph." (See *Jane Doe*, *supra*, 787 N.E.2d 618; *State ex rel. Boone Retirement Center, Inc. v. Hamilton* (Mo. 1997) 946 S.W.2d 740; see also *Bielewicz v. Maplewood Nursing Home, Inc.* (Sup.Ct. 2004) 778 N.Y.S.2d 666; *Centennial Healthcare*, *supra*, 657 N.W.2d 746; *Hale v. Odd Fellow & Rebekah Health Care Facility* (Sup.Ct. 2001) 728 N.Y.S.2d 649.)

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[8] *Todd* also held that documents in possession of the peer review organization are protected. (*Todd*, *supra*, 152 F.R.D. at p. 686.) However, *Armstrong* disagreed with this aspect of *Todd*, explaining that "[t]he bar against discovery runs with the documents or information, not with the organization or individuals who happen to possess the documents or information at any given time." (*Armstrong*, *supra*, 155 F.3d at p. 220.)

11. 10 U.S.C. Section 1102: Defense Department Quality Assurance Records.

Title 10 of the United States Code section 1102(a) makes "confidential and privileged" and immune from discovery or admission into evidence "[m]edical quality assurance records created by or for the Department of Defense as part of a medical quality assurance program." (See *In re U.S.*, *supra*, 864 F.2d 1153; *Cole*, *supra*, 742 F.Supp. 587; *Maynard*, *supra*, 133 F.R.D. 107; Woodruff, *The Confidentiality of Medical Quality Assurance Records* (May 1987) The Army Lawyer, at pp. 5–12.)

12. 38 U.S.C. Section 5705: Veterans Affairs Quality Assurance Records.

Title 38 of the United States Code section 5705(a) generally makes confidential and privileged "[r]ecords and documents created by the Department [of Veterans Affairs] as part of a medical quality-assurance program." Section 5705(b)(1) specifies exceptions to the nondisclosure rule. (See *Utterback*, *supra*, 121 F.R.D. 297.)

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