

1-1-1985

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Recommended Citation

Judith A. Schneider, *Qualified Privilege for Peer Review: Physician, Reveal Thyself?*, 17 PAC. L. J. 499 (1986).

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A Qualified Privilege For Peer Review: Physician, Reveal Thyself!

"If a privilege to suppress the truth is to be recognized at all, its limits should be sharply determined so as to coincide with the limits of the benefits it creates."¹

Inherent in the concept of confidentiality is the danger that professionals will keep secrets to protect themselves rather than patients and clients.² Wrongdoings of professionals are obscured from view to avoid exposure of questionable and often dangerous practices.³ Confidentiality can be used as a shield to prevent outsiders, often prospective plaintiffs, from discovering negligence, overcharging, unnecessary surgery or institutionalization.⁴ For example, professionals invoke confidentiality shields to protect incompetent colleagues' negligence in hospitals as well as in non-medical industries.⁵

1. Professor Edmund M. Morgan, Preface to the American Law Institute's Model Code of Evidence at 7, (1942), *reprinted in* Cronin v. Strayer, 467 N.E.2d 143,148 (1984).

2. See S. Bok, SECRETS 131-135 (1982) (hereinafter referred to as SECRETS). Traditional professionals invoking confidentiality privileges include doctors, lawyers, and priests. *Id.* at 116. Accountants, bankers, social workers, and growing numbers of professionals now invoke a similar duty to guard confidences. *Id.* While a number of professional groups invoke confidentiality, the law recognizes the privilege only in limited circumstances. Confidentiality refers to the boundaries surrounding shared secrets and the duty to protect confidences under certain circumstances. *Id.* at 119. In practice, "confidentiality may even be stretched so far as to include what professionals hide from patients, clients, and the public at large." *Id.* at 133. S. Bok, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978) (hereinafter referred to as LYING). Colleagues are usually the first to know when one of their peers places patients at risk. *Id.* at 153-156. Hiding the truth to avoid exposure is a health risk to society. Professional loyalty is clearly outweighed by the duty to prevent grievous harm to patients. *Id.*

There can be no excuse for lying to protect anyone who places patients at such risk.

And only an overwhelming blindness to the suffering of those beyond one's immediate sphere can lead colleagues simply to oust an incompetent and dangerous surgeon

from their own hospital so quietly that he can continue his 'work' at another.

Id. at 155. The duty to keep secrets is enforced by many codes of professional ethics and the responsibility is often placed upon workers in private industry and government. Report from the Center for Philosophy & Public Policy, *To Tell or Not to Tell: Conflicts about Confidentiality* UNIVERSITY OF MD. Vol. 4 No. 2 Spring 1984 (discussing the balancing of the duty of confidentiality against the grave harm that can come from keeping secrets).

3. Bok, *Secrets*, *supra* note 2, at 133.

4. *Id.*

5. *Id.* See Boston Sunday Globe, Aug. 24, 1975, editorial *reprinted in* Bok, LYING, *SUPRA* note 2, at 155.

_____, a Sacramento, California orthopedist has millions of dollars in malpractice judgments against him, has admitted under oath that he performed complicated and dangerous spinal surgery when it was unnecessary, and still has numerous suits pend-

Recently, the privilege invoked in these settings has become known as the "privilege of self-critical analysis."⁶ The privilege of self-critical analysis shields certain institutional self-analysis from discovery.⁷ Objective commentators consider the privilege detrimental to the administration of justice and unwarranted by demands of public policy.⁸ Confidentiality privileges continue to exist because of public pressure from influential organizations concerned about self-interests rather than public interest.⁹

Statutes and court decisions have continued to recognize confidentiality privileges.¹⁰ Generally, courts emphasize that confidentiality is essential to the free flow of information which is necessary to promote important public interests.¹¹ The California Legislature has enacted several self-critical analysis privileges based upon confidentiality.¹² One controversial privilege is the privilege that shields hospital committee proceedings and records from discovery.¹³

ing against him involving patients left crippled or paralyzed. Several news reports confirm that colleagues lied for him, intervened at the operating table to keep him from botching delicate procedures, and, on occasion, performed follow-up operations to repair damage he caused, all without taking any action to restrict his further practice. When at long last his colleagues voted to restrict his hospital privileges, they did it so quietly that he simply continued to work at another hospital in the same town.

Id. at 155.

6. Comment, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1087-91 (1983). The three primary types of documents to which the privilege is applied are minutes of hospital committee meetings, disciplinary investigations, and title VII compliance forms. *Id.* at 1090. For the purposes of this comment, the privilege of self-critical analysis is used interchangeably with the "peer review privilege" and the "confidentiality privilege." This comment focuses on the application of the privilege as it applies to hospital peer review committee meetings.

7. *Id.* at 1083.

8. 3 JONES ON EVIDENCE §21:43 (Gard. ed. 1972), reprinted in L. DUNN, CRITICAL ISSUES IN HEALTH CARE, at 64 (1978).

9. *Id.*; see HOSPITAL LIABILITY, LAW AND TACTICS 288 (M. Bertolet & L. Goldsmith ed. 1980).

10. Comment, *supra* note 6, at 1087; see *infra* notes 170-286 and accompanying text.

11. *Bredice v. Doctors Hospital*, 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd* 479 F.2d 920 (D.C. Cir. 1973). The Court in *Bredice* put forth this classic statement in protecting the minutes of a hospital committee meeting in which doctors were asked their opinions of hospital procedures. *Id.* at 251.

12. See, e.g., CAL. EVID. CODE § 1040 (government confidentiality privilege); see *infra* notes 234-59 and accompanying text; CAL. EVID. CODE §1060 (trade secret privilege); *infra* notes 260-286 and accompanying text. See also, F. Haight & J. Cotchett, California Courtroom Evidence, at 303, 312 (2d ed. 1981, revised 1985); 8 J. WIGMORE, WIGMORE ON EVIDENCE, 527-37 (McNaughten, 1961) (confidential communications in general, sundry privileges).

13. Letter to Senator Torres from the California Trial Lawyers Association (May 16, 1985) (discussing the Association's opposition to SB 439 which was introduced by Senator Torres; "The discovery privilege is not without controversy") (on file at Pacific Law Journal). See also California Legislature Senate Committee on Judiciary, Senator B.D. Keene, *Interim Hearing on Utilization Review*, Sept. 12, 1984 (on file at Pacific Law Journal).

Hospital peer review committee records have been protected from public scrutiny by either statute or court decision since their inception. As a protection against legal scrutiny of records, the peer review privilege in California was enacted in 1968 and set forth in California Evidence Code section 1157.¹⁴ California Evidence Code section 1157 is based upon the theory that external access to peer review proceedings and records of medical staff committees inhibits effective

14. CAL. EVID. CODE §1157 states in pertinent part:

Neither the proceedings nor the records of organized committees . . . having the responsibility of evaluation and improvement of the quality of care rendered in the hospital . . . shall be subject to discovery. Except as hereinafter provided, no person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat. The prohibition relating to discovery or testimony shall not apply to the statements made by any person in attendance at such meeting who is a party to an action or proceeding the subject of which was reviewed at such meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith The prohibitions contained in this section shall not apply to . . . society committees that exceed 10% of the membership of the society, nor to any such committee if their own conduct is being reviewed. This section shall not exclude relevant evidence in a criminal action.

Id. See *Matchett v. Superior Court*, 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317, 319-322 (1974). In California, a patient suffered injuries resulting from negligent treatment by the doctor and from the hospital's negligence in retaining doctor and staff without inquiry into or control over the doctors competence. Hospital administrative files could be discovered, but pursuant to CAL. EVID. CODE §1157, the files of the various peer review committees could not be discovered. *Id.*; *Henry Mayo Newhall Memorial Hospital v. Superior Court*, 81 Cal. App. 3d 626, 634-636, 146 Cal. Rptr. 542, 547-548 (1978) (transcript of peer review committee staff hearings were immune from discovery under CAL. EVID. CODE §1157, and hospital had not waived the privilege by voluntarily filing the transcript in administrative mandamus proceedings); *Snell v. Superior Court*, 158 Cal. App. 3d 44, 50-52, 204 Cal. Rptr. 200, 204 (1984) (in alleging negligent retention of staff physicians, records of staff committee were absolutely immune from discovery, and information as to whether hospital required staff physicians to obtain malpractice insurance was irrelevant and not discoverable); *Mt. Diablo v. Pope*, 158 Cal. App. 3d 344, 347-348, 204 Cal. Rptr. 626, 627-628 (1984) (hospital not required to provide answers which could not be given without divulging "proceedings or records" of medical staff committees); *but see Brown v. Superior Court*, 168 Cal. App. 3d 489, 502-504, _____ Cal. Rptr. _____ (1985). The trial court erred in refusing to grant plaintiff discovery of whether the hospital had evaluated negligent physician, since the request did not include the *demand* for any "proceedings or records" connected to such evaluation. In addition, the trial court erred in denying discovery regarding hospital requirements of medical malpractice insurance coverage since the coverage information is relevant in any suit based upon hospital's negligence in screening and evaluating a physician). *Id.*

Segal v. Roberts, 380 So. 2d 1049, 1052 (1979) (held discovery of proceedings and records of a medical society committee examining alleged negligence of a physician should be *allowed only in the most necessary circumstances*), *cert. den.* 388 So. 2d 1117 (1980); *Dade County Medical Association v. Hlis* 372 So. 2d 117, 121 (1979) (the interests of the public in maintaining confidentiality of records sought greatly outweighed the grounds for discovery asserted by defendant in auto accident case); *Wesley Medical Center v. Clark*, 669 P.2d 209, 215- 220 (1983) (Kansas has no absolute privilege for medical staff committee meeting minutes, and when such documents are sought, a balancing test should be applied); *Nazareth Literary & Benevolent Inst. v. Stephenson*, 503 S.W. 2d 177, 179 (1973) (internal records of hospital staff committee were discoverable over hospital's claims that they should be regarded as privileged matter and remain confidential because of considerations of public policy).

physician participation in peer review activities.¹⁵ The rationale for providing confidentiality for records and proceedings is that otherwise physicians would be inhibited from free discussion during self-analysis meetings; these meetings are vital to the continued improvement in the medical care of patients.¹⁶ Discovery of hospital peer review proceedings is denied under section 1157 for malpractice actions against a hospital for corporate hospital negligence.¹⁷

In 1982, a California Court of Appeal in *Elam v. College Park Hospital*¹⁸ adopted the doctrine of corporate hospital negligence. The doctrine provides that a hospital may be held liable to a patient for the negligent conduct of independent physicians and surgeons.¹⁹ The Court in *Elam* found that a hospital owes a legal duty to exercise reasonable care in selecting and reviewing staff physicians.²⁰ Failure to use reasonable care creates an unreasonable risk of harm to patients in the hospital facility.²¹ To defend against a charge of corporate hospital negligence, the hospital must demonstrate reasonable care was taken in the selection of physicians allowed to use hospital facilities.²² The level of care is shown by proof of review committee effectiveness.²³ The plaintiff will then attempt to demonstrate review committee ineffectiveness. Records and testimony of committee members are relevant, if not indispensable, sources of information regarding whether the hospital properly reviewed the peer review proceedings.²⁴ However, California Evidence Code section 1157 prevents the discovery of peer review reports by patient litigants.²⁵ Lack of discovery of peer review

15. *Matchett*, 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320; see *infra* notes 45-69 and accompanying text.

16. *Matchett*, 40 Cal. App. 3d at 629, 115 Cal. App. 3d at 320; see *infra* notes 120-136 and accompanying text.

17. CAL. EVID. CODE §1157; see *supra* note 14 and accompanying text; see *infra* notes 137-158 and accompanying text.

18. 132 Cal. App. 3d 332, 183 Cal. Rptr. 156 (1982), modified 133 Cal. App. 3d 94(a) (1982).

19. *Elam*, 132 Cal. App. 3d at 346-347, 183 Cal. Rptr. at 157-158. Independent refers to physicians who are neither employees nor agents of the hospital. *Id.* at 336, 183 Cal. Rptr. at 159. Prior to *Elam*, corporate hospital negligence had not been recognized in any published decision in California. See, e.g., *Gonzales v. Nork*, Civil No. 228566 (Super. Ct. Sacramento County Cal., 1973) (unpublished opinion asserting that hospital owes duty to monitor quality assurance committee functions), *rev'd*, 60 Cal. App. 3d 728, 31 Cal. Rptr. 717 (1976), *rev'd*, 20 Cal. 3d 500, 143 Cal. Rptr. 240, 573 P.2d 458 (1978).

20. *Id.* at 341, 183 Cal. Rptr. at 161.

21. *Id.*

22. *Id.* at 346, 183 Cal. Rptr. 164.

23. *Id.*

24. See *infra* note 154 and accompanying text.

25. CAL. EVID. CODE §1157. Patient litigant refers to *patients* as litigants bringing an action under corporate hospital negligence. Patient litigants are distinguished from *physician* litigants who are not precluded from pretrial discovery of peer review committee proceedings due to the exception in CAL. EVID. CODE §1157. See A. B. Goldberg, *The Peer Review Privilege*:

reports in reality denies plaintiffs the opportunity to prove the evidence necessary to effectively undertake a corporate negligence action against the hospital for injury or death.²⁶ Furthermore, the absolute privilege granted peer review proceedings is unnecessary in light of other protections physicians receive under immunity statutes.²⁷ Under current law, a hospital may escape liability for culpable acts due to a patient's inability to obtain evidence necessary to bring a cause of action.²⁸ California law should be amended to bar application of the privilege when the potentially privileged information is necessary to ensure the proper administration of justice.²⁹

This comment proposes that the California Legislature amend the absolute protection of Evidence Code section 1157 in favor of a

A Law in Search of a Valid Policy, AM. J. L. MED. Vol. 10, No. 2, 151 (1984). The paradox created by the exception is illustrated in this article. The peer review privilege cannot promote confidentiality since the exception under CAL. EVID. CODE §1157 allows physician plaintiffs to obtain the records when seeking judicial review of proceedings leading to their exclusion or dismissal from hospital medical staffs. *Id.* at 155-156. See *Shulz v. Superior Court*, 66 Cal. App. 3d 440, 446-47, 136 Cal. Rptr. 67, 70-71 (1977); *West Covina v. Superior Court*, 153 Cal. App. 3d 134, 200 Cal. Rptr. 162 (1984), reh'g denied, 165 Cal. App. 3d 794, 211 Cal. Rptr. 677 (1985) (issue as to whether a physician may waive the peer review privilege and testify as to what transpired at the peer review committee meetings). See also *Ott v. St. Luke Hospital of Campbell County, Inc.*, 522 F. Supp. 706 (1981) (plaintiff physician sought discovery of peer review committee proceedings when denied staff privileges at defendant hospital).

26. See *infra* notes 142-169 and accompanying text.

27. D. deVires, *Medical Staff Peer Review Proceedings and Records Should Be Discoverable Following Adoption of Corporate Hospital Negligence in California*, 12 C.T.L.A. Forum 230, 237 (1982). "It is debatable that arming hospital medical staffs with absolute privilege in addition to absolute immunity fosters effective peer review." *Id.* See CAL. CIV. CODE §§ 43.7, 43.8, 47 (physician immunity statutes in California). See generally L. & Dunn, *Critical Issues in Health Care*, 36-37 (1978) (description of California immunity statutes protecting medical staff members from liability). As of 1975, at least thirty-two states had enacted statutes that provide either absolute or qualified immunity to physicians who participate in medical staff peer review committees. These states are Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming. *Id.* at 7. The scope of immunity statutes varies and, therefore, each must be consulted individually. Hall & Hyg, *Hospital Committee Proceedings and Reports: Their Legal Status*, 1 AM. J. L. MED. 245, 262 n.53. (1975). See also Langhenry, *Immunity of In-Hospital Committee Members and Confidentiality of Staff Committee Records*, 24 FEDERATION INSURANCE COUNSEL, SUMMER QUARTERLY, 3-13 (1975) (exploring the personal immunity from civil damages of in-hospital staff committee members, and the legal right to withhold committee communications and records from evidence and pretrial discovery); Gregory, *Immunity For Physicians in Peer Review Committees*, 31 MED. TRIAL TECH. Q. 193-202, (1984) (overview of immunity given to participants in hospital peer review committees).

28. Cuneo, *Disclosure v. Confidentiality of Hospital Peer Review Committee Records*, 31 MED. TRIAL TECH. Q. 172 (1984). The "wall" around minutes, documents and reports is unwarranted because of immunity statutes. The author notes that "bad physicians sometimes even get away with murder." *Id.* 172; see R. H. Hirsh, *Sanctity of Hospital Peer Review Committee Records Crumbling*, 31 MED. TRIAL TECH. Q. 184-192 (1984); see *infra* notes 298-311 and accompanying text.

29. See *infra* notes 287-290 and accompanying text.

qualified privilege.³⁰ The qualified privilege is in harmony with the law of the majority of states in which the privilege of self-critical analysis exists.³¹ In the majority of states, the privilege is applied on a case by case basis.³² Statutes and decisions have indicated that the privilege can be overcome by a showing of exceptional need by the party seeking discovery.³³ This comment will examine Evidence Code section 1157 and the underlying policies of the section.³⁴ This comment then will discuss the doctrine of corporate hospital negligence.³⁵ The competing interests of the plaintiff and hospital in the context of a civil proceeding will be examined to demonstrate a need for discovery of peer review committee proceedings and records.³⁶ Analogies to the psychotherapist-patient privilege,³⁷ the official information privilege,³⁸ and the trade secret privilege³⁹ will demonstrate that a qualified privilege for discovery would be the most effective method to assure the proper administration of justice.⁴⁰ This comment will propose legislative amendment of Evidence Code section 1157.⁴¹ This amendment would provide that the privilege be withheld to allow patients access to peer review records if the plaintiff makes a showing of extraordinary need.⁴² To understand the need for statutory amendment, an examination of Evidence Code section 1157 and judicial interpretation of the section is necessary.

CALIFORNIA EVIDENCE CODE SECTION 1157

Medical staff committees have the responsibility of evaluating and improving the quality of care rendered in hospitals.⁴³ California Evidence Code section 1157 provides that proceedings and records of organized medical staff committees are not subject to discovery.⁴⁴ Furthermore, no person in attendance at any medical staff review com-

30. *Id.*

31. Comment, *supra* note 6, at 1096; *see infra* notes 170-188 and accompanying text.

32. Comment, *supra* note 6, at 1096-1097.

33. *Id.* at 1097.

34. *See infra* notes 43-95 and accompanying text.

35. *See infra* notes 96-141 and accompanying text.

36. *See infra* notes 142-169 and accompanying text.

37. *See infra* notes 189-233 and accompanying text.

38. *See infra* notes 234-259 and accompanying text.

39. *See infra* notes 260-286 and accompanying text.

40. *See infra* notes 170-259 and accompanying text.

41. *See infra* notes 287-290 and accompanying text.

42. *Id.*

43. *See supra* notes 46-70 and accompanying text.

44. CAL. EVID. CODE §1157.

mittee meeting can be required to testify regarding the events of the meeting.⁴⁵ To understand the scope of section 1157, the role of peer review committees must be examined.

A. The Functions of Peer Review Committees

The establishment of peer review committees in hospitals was mandated by the Joint Commission on Accreditation of Hospitals (hereinafter referred to as JCAH) and federal regulation.⁴⁶ To acquire accreditation from the JCAH, a hospital must demonstrate an adequate method of assessment and control of the quality of patient care.⁴⁷ The acquisition of JCAH accreditation has been encouraged by federal regulation since 1965.⁴⁸ A hospital with JCAH accreditation automatically qualifies for federal Medicare reimbursements.⁴⁹ In addition, Congress created Professional Standard Review Organizations in 1972 to act as peer review groups and to promote the best delivery of health care.⁵⁰ Hospitals are required to establish peer review committees to receive accreditation from the JCAH.⁵¹ The peer review

45. *Id.*

46. See Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals*, Introduction at ix-xi (1983) (hereinafter referred to as JCAH Manual). The JCAH is an extension of the Hospital Standardization Program established by the American College of Surgeons in 1918 to encourage adoption of a uniform medical records format that would accurately describe the patient's clinical course. *Id.* at ix.

47. See *id.* at x (historical review of JCAH).

48. *Id.* See Comment, *Medical Peer Review Protection in the Health Care Industry*, 52 TEMP. L. Q. 552, 563 (1979) (overview of the structure and course of medical peer review protection, with historical review of JCAH); Cuneo, *supra* note 28, at 173 (briefly discussing standards of JCAH).

49. See JCAH Manual, *supra* note 46, at ix. Congress amended the Social Security Act in 1972 to create Professional Standard Review Organizations. *Id.* The provision that the hospitals participating in Medicare were to maintain a standard of patient care was written into the Medicare Act. *Id.* Hospitals accredited by JCAH were deemed to be in compliance with federal requirements for participation in Medicare. *Id.*; Cuneo, *supra* note 28, at 173; Comment, *supra* note 48, at 563.

50. Comment, *supra* note 48, at 563-564. See also *Interim Hearings on Utilization Review, 1984: Hearings on Utilization Review Before Senate Committee on Judiciary* (on file at Pacific Law Journal) (statement of Robert McCray, Legal Counsel of the California Hospital Association). Utilization and Quality Control Peer Review Organizations, (PRO's) are being established in each state to conduct utilization and quality review of hospital and health care activities under the Medicare program. The California PRO will replace the existing Professional Standards Review Organizations (PSRO's) which have heretofore fulfilled these functions. See generally Batavin, *Preferred Provider Organizations: Antitrust Aspects and Implications for the Hospital Industry* 10 AM. J. L. MED. 169, 175-187 (1984) (the Preferred Provider Organization is a recent development in the health care industry involving selection and contracting for health care services); S. TIBBETTS & A. MANZAND, *PREFERRED PROVIDER ORGANIZATIONS: AN EXECUTIVE GUIDE* (1984).

51. Comment, *supra* note 48, at 564 (accreditation differs from licensing, licensing connotes meeting the least of standards, while accrediting signifies positive achievements of high standards).

committees are responsible for monitoring and evaluating the quality of care provided within the hospital.⁵² Committees directly performing the reviews include the Credentials Committee, Medical Audit Committee, Tissue Committee, Utilization Committee and Executive Committee.⁵³

The role of the Credentials Committee is to screen applicants for staff perquisites.⁵⁴ The Credentials Committee collects information concerning a physician's competence and submits a recommendation to the staff executive committee and hospital board.⁵⁵ The Medical Audit Committee, sometimes called the Quality Assurance Committee, compares the quality of care in the hospital with the state of the art of existing medical knowledge.⁵⁶ The role of the Tissue Committee is to supervise the quality of surgery.⁵⁷ Since direct review of surgery is not practical, the medical audit is conducted by a review of the patient's medical record.⁵⁸

The Utilization Committee was established in response to the Social Security Amendment of 1965.⁵⁹ The Amendment requires participating hospitals to develop a utilization review plan. This plan must include committees to oversee the conformance of the plan to the Medi-Cal Act.⁶⁰ The Utilization Committee reviews the propriety of admissions to the hospital, length of stay, discharge procedures, and use of medical and hospital services.⁶¹

The Executive Committee is composed of the chiefs of each hospital department, officers of the medical staff, and members of the active staff.⁶² The Executive Committee receives and evaluates all other committee reports and makes recommendations to the hospital board.⁶³

52. *Id.*; see L. DUNN, *supra* note 27, at 54-60 (quality control maintained by hospital committee system).

53. L. DUNN, *supra* note 27, at 54-60; Comment, *supra* note 48, at 565. These committees are representative of those most commonly found required by JCAH and federal regulation. *Id.* at 565.

54. See Comment, *supra* note 48, at 564-565; L. DUNN, *supra* note 27, at 57; Hall & Hyg, *supra* note 27 at 266.

55. deVries, *supra* note 27, at 231, 237.

56. Comment, *supra* note 48, at 564; L. DUNN, *supra* note 27 at 58.

57. L. DUNN, *supra* note 27, at 58.

58. *Id.*

59. *Id.*

60. See L. DUNN, *supra* note 27 at 59. The Federal Medical Act requires hospitals to provide a "utilization review" plan of hospital facilities to ensure the implementation of utilization review in accordance with federal law. *Id.* See 42 U.S.C. §1395 (1965) (Health Insurance for Aged and Disabled).

61. See L. DUNN, *supra* note 27, at 59-60.

62. *Id.* at 57; Hall & Hyg, *supra* note 27, at 248.

63. L. DUNN, *supra* note 27, at 56.

Recommendations are made regarding discipline of staff members, extension or reduction of staff perquisites, and whether to grant or deny admission to the medical staff.⁶⁴

The records of the Credentials Committee generally include files for each applicant requesting staff perquisites.⁶⁵ Information regarding professional competence and previous disciplinary actions may be included in the files.⁶⁶ The records of the other four committees are similar. The files usually include minutes of peer review meetings and correspondence to particular physicians from the committee.⁶⁷ Thus, records of peer review committees performing quality assurance functions are indispensable sources of information for determining whether the medical staff has performed competently.⁶⁸ Discovery of the records, however, is prohibited by section 1157 of the California Evidence Code.⁶⁹ The rationale for the prohibition is based upon public policy considerations.⁷⁰

B. Policy Considerations for the Enactment of Section 1157

Evidence Code section 1157 was enacted in direct response to *Kenney v. Superior Court*.⁷¹ In *Kenney*, the plaintiff requested identification of physicians participating in disciplinary committee proceedings.⁷² The disciplinary proceedings contained reports of physicians whose staff perquisites had been terminated by the hospital.⁷³ Most of plaintiff's demands for pretrial discovery were permitted. The court in *Kenney* was not concerned with the admissibility of disciplinary proceeding reports.⁷⁴ The court reasoned that pretrial discovery only required that the evidence be related to the subject matter of the action.⁷⁵ Even

64. *Id.*

65. *Id.* at 57.

66. *Id.*

67. *Id.* at 56-60.

68. V. Nelson, *Corporate Hospital Liability; A Ship in Search of a Rudder*, CTLA Forum 23rd Annual State Convention Syllabus Nov. 1984 (copy on file at Pacific Law Journal); Loveridge and Kimball, *Hospital Corporate Negligence Comes to California: Questions in the Wake of Elam v. College Park Hospital*, 14 PAC. L.J. 803, 826 (1983).

69. CAL. CIV. CODE §1157; see *supra* note 14 and accompanying text (statute reprinted in part).

70. See *infra* notes 71-95 and accompanying text.

71. *Kenney v. Superior Court*, 255 Cal. App. 2d 106, 63 Cal. Rptr. 84 (1967). See, Loveridge and Kimball, *supra* note 68, at 826-27 (*Kenney* promulgated CAL. EVID. CODE §1157); Matchett v. Superior Court, 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317, 320 (1974).

72. See, Bernstein, *Law in Brief*, 45 HOSPITALS, J.A.H.A. 149-150 (1971) (discussion of *Kenney* decision).

73. *Id.* at 149.

74. *Id.*

75. *Id.*

if inadmissible, the court noted the evidence would be valuable to the plaintiff if discovery would lead to properly admissible evidence.⁷⁶ Powerful medical lobbying organizations considered the *Kenney* decision a threat to the effectiveness of peer review.⁷⁷ As a result of public pressure from these influential organizations, section 1157 was enacted by the California Legislature one year after the *Kenney* decision.⁷⁸

The first court decision to construe section 1157 was the California Court of Appeal in *Matchett v. Superior Court*.⁷⁹ *Matchett* involved a malpractice action in which negligent treatment of a patient by a doctor and a hospital was alleged.⁸⁰ The plaintiff contended that the doctor was granted staff perquisites without adequate inquiry into or control over the doctor's competence.⁸¹ The court denied plaintiff's request for pretrial discovery of hospital committee files.⁸² The rationale cited in support of the denial was in essence the public policy underlying the enactment of section 1157.⁸³

The California Legislature's intent in passing section 1157 is best expressed by the *Matchett* court. The court discerned that Evidence Code section 1157 was enacted to serve a public interest in encouraging frankness, candor and objectivity in staff committee investigations.⁸⁴ Consequently, the quality of in-hospital medical practice is enhanced by providing staff with a measure of *confidentiality*.⁸⁵ Hence, the privilege is justified by the need for confidentiality in promoting complete and candid peer review.⁸⁶

The purpose of the peer review privilege is to attain higher quality health care within hospitals.⁸⁷ This goal is achieved by doctors evaluating each other's professional competence based upon the evaluator's own specialized expertise.⁸⁸ Hospital committee confidentiality is designed to encourage self-regulation of physician

76. *Id.* at 150.

77. *Id.*

78. See HOSPITAL LIABILITY, LAW AND TACTICS, *supra* note 9, at 288.

79. *Matchett v. Superior Court*, 40 Cal. App. 3d 623, 115 Cal. Rptr. 317 (1974).

80. *Id.* at 626, 115 Cal. Rptr. 318.

81. *Id.*

82. *Id.* at 631-32, 115 Cal. Rptr. at 321-22.

83. *Id.* at 628-29, 115 Cal. Rptr. at 319-320.

84. *Id.* at 629, 115 Cal. Rptr. at 320-321.

85. *Id.*

86. *Id.*

87. *Id.*

88. See JCAH, *supra* note 46, at 106. "The medical staff shall provide . . . review, evaluation and monitoring of medical staff practice and functions to maintain higher professional standards of care within the hospital." *Id.*

competence.⁸⁹ Specifically, the legislature recognized that, absent statutory peer review privileges, physicians would be reluctant to sit on peer review committees and engage in frank evaluations of their colleagues.⁹⁰ In the absence of a statute, courts were reluctant to create a peer review privilege.⁹¹ Therefore, peer review proceedings have not been subject to any significant "judicial surveillance."⁹²

Recently, courts and commentators have noted that self-regulatory means of ensuring competence of physicians are deficient.⁹³ As a result, the negligence and incompetence of staff physicians remain undetected.⁹⁴ The doctrine of corporate hospital liability developed in response to the failure of physician self-regulation to detect physician incompetence.⁹⁵

THE DOCTRINE OF CORPORATE HOSPITAL LIABILITY

The doctrine of corporate hospital liability developed because traditional regulatory means failed to detect and discipline incompetent physicians.⁹⁶ The doctrine provides that a hospital is liable for breach of a duty to ensure the competence of its medical staff through careful selection and review.⁹⁷ An understanding of the reasons why regulatory

89. Note, *Reallocating Liability to Medical Staff Review Committee Members: A Response to the Hospital Corporate Liability Doctrine*, 10 AM. J. L. & MED. 115 (1984).

90. *Matchett*, 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320.

91. See, e.g., *Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981); *Ott v. St. Luke Hospital of Campbell County, Inc.*, 522 F. Supp. 706 (1981); *Wesley Medical Center v. Clark*, 234 Kan. 13 (1983); *Davison v. St. Paul Fire & Marine Ins. Co.*, 75 Wis. 2d 190 (1977); *Nazareth Library & Benevolent Inst. v. Stephenson*, 503 S.W.2d 177, n.9 (Ky. Ct. App. 1973).

92. See *Franko v. Dist. Court in and for City and Cty. of Denver*, 641 P.2d 922, 927 (1982) (records shielded from discovery except in connection with judicial review proceeding).

93. See Note, *supra* note 89, at 115. Traditional regulatory mechanisms to police physician incompetence include self-regulation, state licensure, malpractice systems, and Professional Standards Review Organizations. *Id.* Corporate hospital liability developed in response to the failure of these regulatory mechanisms. *Id.* Courts should recognize a cause of action in negligence against medical staff review committees. *Id.* at 115-117.

94. *Id.* at 117-120. See also, R. DERBYSHIRE, *MEDICAL LICENSURE AND DISCIPLINE IN THE UNITED STATES*, 17-28 (1968). "One can find many instances of miscreants who have gone unpunished because of failure of the board to follow the letter of the law." The "board" refers to physicians who police themselves for disciplinary purposes. *Id.* at 17. California has seen improvement in the safeguarding of citizens against incompetent physicians due to improvements in Medical Practice Act. *Id.* at 27.

95. Note, *supra* note 89, at 117; Note, *Hospital Corporate Liability: An Effective Solution for Controlling Private Physician Incompetence*, 32 RUTGERS L. REV. 342 (1979); Strodel, *The Impaired Physician-Hospital Corporate Liability*, 24 TRIAL LAW. GUIDE 488 (1981); Comment, *Hospital May Be Held Liable for Permitting Incompetent Independent Physicians to Operate*, 8 RUT.-CAM. L.J. 177 (1976).

96. Note, *supra* note 89, at 115.

97. *Elam*, 132 Cal. App. 3d at 347, 183 Cal. Rptr. at 165. See Southwick, *The Hospital as an Institution-Expanding Responsibilities Change Its Relationship with the Staff Physicians*,

mechanisms failed provides insight into the purpose behind corporate hospital liability.

A. *The Failings of Self-Regulation*

Commentators perceive that self-regulation of physicians in the medical field has been unsuccessful.⁹⁸ One primary reason is that the most severe sanction available is expulsion.⁹⁹ Expulsion, however, has no effect on the legal right of a physician to practice medicine in another hospital.¹⁰⁰ Therefore, a possibility exists that a physician dismissed from one hospital can practice at another.

In addition, self-regulatory mechanisms fail because of dependence upon physicians to report the misconduct of their peers.¹⁰¹ Physicians do not have sufficient incentive to report the incompetence of their peers and, consequently, reports of physician misconduct are rarely filed.¹⁰² Few states require physicians to report peer misconduct to a disciplinary body.¹⁰³ Even fewer states designate failure by physi-

9 CAL. W. L. REV. 429, 443 (1973) (hospital corporate negligence as a new cause of action); Comment, *Hospital Corporate Negligence Comes to California: Questions in the Wake of Elam*, 14 PAC. L.J. 803 (1983) (hereinafter cited as *Elam Questions*) (discussing the advent of corporate hospital negligence in California with an exploration of issues raised by plaintiff and hospital lawyers); Comment, *The Hospital Physician Relationship: Hospital Responsibility for the Malpractice of Physicians*, 50 WASH. L. REV. 385 (1975) (hereinafter cited as *Hospital Physician Relationship*) (responsibility of hospitals to monitor physicians practice within hospital facilities); Slawkowski, *Do the Courts Understand the Realities of Hospital Practices?*, 22 ST. LOUIS U.L.J. 452 (1978); A. Goldberg, *The Duty of Hospitals and Hospital Medical Staffs to Regulate the Quality of Patient Care: A Legal Perspective*, 14 PAC. L.J. 55, 56 n.3 (1982) (hereinafter referred to as *A Legal Perspective*).

98. See Note, *supra* note 95 at 343-56.

99. See Brook, Brutoco and Williams, *The Relationship Between Medical Malpractice and Quality of Care*, 1975 DUKE L.J. 1197, 1215 (1975). State medical societies are not significantly involved in physician discipline. The actions taken against a physician for incompetence are not public, and only rarely are the consequences severe. The author's propose that the "ultimate punishment would be expulsion from the society." *Id.* at 1216; Note, *supra* note 89, at 118. (quoting Quirin, *Physician Licensing and Educational Obsolescence: A Medical Legal Dilemma* 36 ALB. L. REV. 503, 510 (1972)).

100. Note, *supra* note 89, at 118. See F. GRAD & N. MARTI, *PHYSICIANS LICENSURE AND DISCIPLINE*, 37-41 (1979). Medical societies are not under an obligation to report complaints against a physician in which the society did not act. In 16 states, hospitals are required to report a physician's loss of or limitation of privileges because of medical misconduct, but are not required by law to keep records of disciplinary matters that patients, hospital employees, or other physicians report. *Id.* at 37-38. Reporting the violations of state Medical Practice Acts is designed to trigger disciplinary proceedings against physicians due to medical misconduct. *Id.* at 37-38. In California, the definition of unprofessional conduct includes "gross negligence, gross incompetence and gross immorality." R. DERBYSHIRE, *supra* note 94, at 26.

101. See F. GRAD & N. MARTI, *supra* note 100, at 37 (the author catalogues the various methods used by different states to report violations of state Medical Practice Acts, and whether individual states require reports of physician disciplinary actions).

102. *Id.*

103. *Id.*

cians to report misconduct as unprofessional and subject to disciplinary action.¹⁰⁴ Physicians avoid reporting peer misconduct to protect one another from expulsion from the medical society or loss of license.¹⁰⁵ Additionally, doctors fear the label of "informer".¹⁰⁶ The result is a phenomenon known as "conspiracy of silence."¹⁰⁷ Thus, self-regulation of physicians as a control for hospital incompetence is ineffective. The doctrine of corporate hospital liability was developed in response to this failure of individual self-regulation.

B. Corporate Negligence

The doctrine of corporate hospital negligence is recognized in other jurisdictions in the United States.¹⁰⁸ Under the doctrine, a hospital is accountable for negligently reviewing the competence of the medical staff.¹⁰⁹ This accountability ensures that adequate medical care is administered to patients at the hospital facility.¹¹⁰ The doctrine of corporate hospital negligence was developed for two major reasons. The first reason was the changing role of the hospital from a charitable institution to a "business."¹¹¹ The second reason was the hospital's superior position to police physician incompetence.¹¹² The infamous *Nork* case provided impetus for development of the doctrine.¹¹³

104. *Id.* at 38-39. See Brook, Brutoco, and Williams, *supra* note 99, at 1215-16 (disciplinary actions against physicians past and present).

105. F. GRAD & N. MARTI, *supra* note 100, at 38-39.

106. F. GRAD & N. MARTI, *supra* note 100, at 39. The widespread feeling that "informing" is wrong would not be overcome by a mandatory reporting requirement because a physician's failure to report another physician is not easy to prove. *Id.*

107. See Dunn, *Peer Review: A Secret Affair?*, 31 TRUSTEE 10 (1978) ("...the universally denied conspiracy of silence still exists"); Keeher, *The Medical Conspiracy of Silence*, 87 CASE & COM. 10 (1982); United States v. Kubrick, 444 U.S. 111, 128-29 n.4 (1979) (dissenting opinion by Justice Stevens comments on the continuing "conspiracy of silence"); Goldberg, *supra* note 25, at 160 n. 48 (physicians are reluctant to report misconduct of their peers, as part of the conspiracy of silence).

108. See *Elam*, 132 Cal. App. 3d. at 346, 183 Cal. Rptr. at 164. From the inception of the doctrine of corporate hospital liability, the doctrine has been utilized and expanded by the courts of several jurisdictions. *Id.* *Elam* cites several jurisdictions utilizing and expanding the doctrine of corporate hospital liability. *Id.* at 346-347, 183 Cal. Rptr. at 164-165. See generally, Comment, *Piercing the Doctrine of Corporate Hospital Liability*, 17 SAN DIEGO L. REV. 383, 384-385 (1980) (examining the significance and development of the doctrine of corporate hospital liability).

109. See Southwick, *supra* note 97 at 443.

110. See *infra* notes 126-141 and accompanying text.

111. *Elam*, 132 Cal. App. 3d, at 340, 183 Cal. Rptr. at 160 (court describes California health care industry as truly "big business"); Relman, *The New Medical Industrial Complex*, 303 NEW. ENG. J. MED. 963 (1980); Note, *supra*, note 89 at 121. California has abolished the doctrine giving hospitals charitable immunity. *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951). Most other states have also rejected charitable immunity for hospitals. Hanson and Stromberg, *Hospital Liability for Negligence*, 21 HASTINGS L.J. 1, 4 (1969).

112. See *supra* notes 97-106 and accompanying text.

113. *Gonzales v. Nork*, Civ. No. 228566 (Super Ct. Sacramento County, Cal. Nov. 27,

1. *Gonzales v. Nork*

Sixty lawsuits were filed against Dr. John Nork between the years of 1965 and 1977.¹¹⁴ Although Dr. Nork was not a board certified¹¹⁵ orthopedic surgeon, he was allowed to perform orthopedic surgery at Mercy Hospitals.¹¹⁶ The evidence established that Dr. Nork negligently or unnecessarily performed more than three dozen operations.¹¹⁷ In addition, evidence showed falsifications of patient progress reports and diagnostic findings.¹¹⁸ Dr. Nork's accountant testified that the doctor needed money to pay creditors.¹¹⁹ Further, Dr. Nork admitted in testimony to an addiction to drugs which affected his judgment.¹²⁰ The court noted that the hospital's peer review committee had not reported the gross incompetence of Dr. Nork to the hospital administration.¹²¹ Although the administration had no actual knowledge of Dr. Nork's incompetence, the court found that hospitals should be responsible for their quality assurance programs.¹²² Therefore, the hospital had a responsibility to oversee the effectiveness of hospital quality assurance programs. Commentators have noted that the *Nork* case spearheaded the movement towards corporate hospital liability in California.¹²³ In 1982, a California Appellate Court in *Elam v. College Park Hospital*¹²⁴ defined and applied the doctrine of corporate hospital negligence for the first time on an appellate level.¹²⁵

1973), *rev'd*, 60 Cal. App. 3d 728, 31 Cal. Rptr. 717 (1976), *rev'd*, 20 Cal. 3d. 500, 573 P.2d 458, 143 Cal. Rptr. 240 (1978).

114. *Nork*, Civ. No. 228566, Memorandum of Opinion, reprinted in *Elam Questions*, *supra* note 98, at 810-811.

115. Board certification refers to a doctor who has been certified by a specialty board for practice in orthopedics. (notes on file at the Pacific Law Journal).

116. *Elam Questions*, *supra* note 98, at 810-811.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* "Quality control" or "quality assurance" refers to the process used to police physician incompetence in the hospital. This process includes credentials screening, which involves reviewing applicants for staff privileges, and peer review, which involves the evaluation of the staff physician's performance. JCAH Manual, *supra* note 46, at ix.

123. Note, *supra* note 89, at 116 n.7. See also *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 211 NE. 2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966) (first case in the U.S. to establish the direct duty of a hospital to furnish competent medical care or be held liable for failure to do so, thereby establishing the doctrine of corporate hospital negligence); *Hanson & Stromberg*, *supra* note 111, at 12-14; *Goldberg, A Legal Perspective*, *supra* note 97, at 56.

124. *Elam*, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156.

125. *Id.* at 337, 183 Cal. Rptr. at 159. The California Supreme Court sets forth "stare decisis" in California. An intermediate appellate decision is not binding in any other tribunal across the state. Thus, courts may choose not to accept *Elam*. See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County*, 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P.2d 937 (stare decisis in California).

2. *Elam v. College Park Hospital*

In 1982, Sophia Elam filed a medical malpractice action against a podiatrist and College Park Hospital.¹²⁶ The podiatrist was neither an agent nor employee of the hospital, but was granted surgical privileges by the governing board of the hospital.¹²⁷ The podiatrist was negligent in performing orthopedic surgery and, as a result, Sophia Elam was injured.¹²⁸

The appellate court overturned the trial court's determination that a hospital does not have a duty to protect patients from harm.¹²⁹ On the contrary, the court reasoned that the failure by the hospital to ensure the competence of the medical staff through careful selection and review created an unreasonable risk of harm to hospital patients.¹³⁰ In reaching this conclusion, the court considered the changing role of the hospital in recent years.¹³¹ The court observed that the modern hospital has evolved from a charitable institution to a corporate business.¹³² The modern hospital is a multi-faceted health care facility responsible for the quality of medical care and treatment rendered to hospital clients.¹³³

Public policy concerns motivating the development of the doctrine of corporate negligence were contrary to the interests asserted by the California Hospital Association.¹³⁴ The Hospital Association and various medical lobbyists were concerned about the effect corporate negligence would have upon the medical malpractice structure in California.¹³⁵ The appellate court in *Elam* held that the duty of the hospital to the public outweighed the adverse effect that corporate hospital liability might have on the medical malpractice insurance structure in California.¹³⁶ The court recognized that large numbers of plaintiffs would be able to establish a cause of action based on the new duty.¹³⁷ The court, however, was not concerned by the increase in cases as a result of the new cause of action.¹³⁸ Public health care

126. *Elam*, 132 Cal. App. 3d at 335-366 n.1, 183 Cal. Rptr. at 158 n.1.

127. *Id.*

128. *Id.*

129. *Id.* at 346-48, 183 Cal. Rptr. at 164-66.

130. *Id.* at 341-4, 183 Cal. Rptr. at 160-3.

131. *Id.* at 340, 183 Cal. Rptr. at 160.

132. *Id.* at 344, 183 Cal. Rptr. at 163.

133. *Id.*

134. *Id.* at 346-7, 183 Cal. Rptr. at 164-5.

135. *Id.* at 346-47, 183 Cal. Rptr. at 164-65.

136. *Id.* at 346-347, 183 Cal. Rptr. at 164-165.

137. *Id.*

138. *Id.*

interests were held to outweigh the increase in potential liability as a result of corporate hospital negligence.¹³⁹ The court in *Elam* determined that protection of the public would be ensured by holding the corporate hospital liable for the negligent evaluation of peer review proceedings.¹⁴⁰ In addition, the court intended to provide persons who are injured because of medical staff incompetence with an "additional avenue of relief"¹⁴¹ by establishing this new cause of action for corporate hospital negligence.

THE IMPACT OF *ELAM V. COLLEGE PARK HOSPITAL*
UPON DISCOVERY OF PEER REVIEW PROCEEDINGS

The *Elam* case did not directly address whether a plaintiff in a medical malpractice action, suing under the doctrine of corporate hospital negligence, could obtain peer review records and proceedings necessary to establish a cause of action. The records of medical staff peer review committees are relevant and material to the issue of corporate hospital negligence.¹⁴² The appellate court in *Elam*, however, did provide guidance regarding the triable issues of fact in a cause of action for corporate hospital negligence.¹⁴³

The court in *Elam* set forth four examples of triable issues. The first example is whether a hospital should conduct an investigation through the peer review committee upon notice of a doctor's potential negligence.¹⁴⁴ A second issue is whether the committee conducted periodic reviews of the doctor in a non-negligent manner.¹⁴⁵ Third, assuming a review was made following notice, the issue focused upon whether the review was performed in a non-negligent manner.¹⁴⁶ Finally, if review was conducted in a careful and proper manner, would the committee have recommended revocation or suspension of the doctor's staff perquisites.¹⁴⁷

The court in *Elam* contemplated that a jury would have sufficient evidence to determine whether peer review committees were negligently monitored.¹⁴⁸ The court indicated that the jury would decide if a peer

139. *Id.*

140. *Id.*; deVries, *supra* note 27, at 231.

141. *Elam*, 132 Cal. App. 3d at 347, 183 Cal. Rptr. at 165; deVries, *supra* note 27, at 231, 237.

142. Comment, *infra* note 151, at 678-684; Nelson, *supra* note 68, at 305.

143. *Elam*, 132 Cal. App. 3d at 347-8, 183 Cal. Rptr. at 165-166.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. deVries, *supra* note 27, at 231.

review system had conducted reviews effectively.¹⁴⁹ In addition, the manner in which the reviews were conducted and the reasonableness of the conclusions are decided by a jury.¹⁵⁰ Therefore, since *Elam* has created a cause of action for corporate hospital liability, a need exists for discovery of peer review committee records and proceedings by plaintiffs.¹⁵¹

The court in *Elam* established that a hospital has a duty to protect the public from the incompetence of the hospital medical staff.¹⁵² The records and proceedings of hospital peer review committees are an indispensable part of the plaintiff's attempt to prove corporate hospital negligence.¹⁵³ Current law, however, prevents discovery of these matters by patient litigants in medical malpractice actions.¹⁵⁴ Discovery is denied under section 1157 of the California Evidence Code due to policy interests envisioned by the legislature *fifteen years before* corporate hospital negligence became a viable cause of action in California.¹⁵⁵ The incongruity between the cause of action for corporate liability and the limits upon discovery in accordance with Evidence Code section 1157 is an example of the development of law when faced with competing policy considerations.¹⁵⁶ *Elam* and section 1157 each represent an attempt by a different branch of the legal system to promote the same general goal, namely, the administration of quality health care in the hospital setting.¹⁵⁷ The public has an expectation of protection from medical staff incompetence.¹⁵⁸ This protection, as established by *Elam*, can be assured by imposition of a duty on the part of the hospital to police its medical staff.¹⁵⁹ The use of peer review as a policing device depends upon physicians reporting the malpractice of colleagues.¹⁶⁰ Section 1157 allows for the con-

149. *Id.*

150. *Id.*

151. See Comment, *Anatomy of the Conflict Between Hospital Medical Staff Peer Review Confidentiality and Medical Malpractice Plaintiff Recovery: A Case for Legislative Amendment*, 24 SANTA CLARA L. REV. 661, 677 (1984) (*Elam* questions the viability of CAL. EVID. CODE §1157); deVries, *supra* note 27, at 231 ("Elam evinces a clear indication for discovery of peer review committee records and proceedings").

152. *Elam*, 132 Cal. App. at 347, 103 Cal. Rptr. at 165; see *supra* notes 126-141 and accompanying text.

153. See *supra* note 143 and accompanying text.

154. CAL. EVID. CODE §1157. The statute contains an exception for plaintiff *physicians* who are permitted to obtain records when seeking judicial review of proceedings leading to their dismissal from hospital medical staffs. See *supra* note 25 and accompanying text.

155. deVries, *supra* note 27, at 231, 237.

156. See Comment, *supra* note 151, at 684-685.

157. *Id.*

158. *Elam*, 132 Cal. App. 3d at 347, 183 Cal. Rptr. at 165.

159. *Id.*

160. See *supra* notes 98-113 and accompanying text.

fidentiality of peer review committee meetings to promote uninhibited reporting of staff incompetence in an effort to upgrade the quality of medical care in hospitals.¹⁶¹

The finding of the *Elam* court that a hospital is liable for the negligence of physicians represents a judicial effort to encourage hospitals to actively evaluate medical staff competence to ensure the quality of medical treatment delivered within hospitals.¹⁶² Section 1157, however, represents a legislative effort to create an atmosphere of confidentiality in which candid professional criticism can occur.¹⁶³ This process of self-evaluation fulfills the supervisory responsibilities of the hospital.¹⁶⁴ Legislative amendment could heal the apparent incompatibility between section 1157 and the recent decisions creating corporate hospital liability.¹⁶⁵

Several confidentiality privileges in California as well as in a number of other states are theoretically similar to the peer review privilege.¹⁶⁶ Confidentiality privileges other than the peer review privilege, however, are qualified rather than absolute.¹⁶⁷ A review of confidentiality privileges both in California and in other states provides support for the adoption of a qualified privilege for peer review proceedings.¹⁶⁸ The adoption of a qualified privilege containing certain allowances for discovery, while assuring confidentiality of peer review activities, would best serve the ultimate interests of the state in improving the quality of medical care.¹⁶⁹

DEVELOPMENT OF PRIVILEGES

Privileges that protect, to varying degrees, the confidential communications between doctor and patient, employer and employee, priest and penitent, therapist and patient, and attorney and client are the result of a delicate balancing between competing public interests.¹⁷⁰

161. *Matchett*, 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320; see *supra* notes 71-95 and accompanying text.

162. *Elam*, 132 Cal. App. 3d at 347, 183 Cal. Rptr. at 165. The judicial effort was to expand the common law to duty of liability. The hospital owes a duty directly to the patient. *Id.* at 340-341, 160-161.

163. Comment, *supra* note 151, at 677-78.

164. *Id.*

165. *Id.* see *infra* notes 287-290 and accompanying text.

166. See *infra* notes 170-286 and accompanying text.

167. *Id.*

168. *Id.*

169. See *infra* notes 181-225 and accompanying text.

170. J. WIGMORE, *supra* note 12, at §2285 (McNaughten Rev. 1961).

With the exception of the clergyman-penitent privilege,¹⁷¹ these privileges are subject to statutory exceptions in which public safety interests, judicial requirements, or other compelling societal interests are considered to outweigh the need for confidentiality.¹⁷² Even the attorney-client privilege, perhaps the oldest and most sedulously fostered privilege, is subject to several exceptions.¹⁷³

Four conditions have been established for a communication to merit a privileged status:¹⁷⁴ (1) the communication must originate in confidence; (2) confidentiality must be essential to satisfactory maintenance of the parties' relationship; (3) the relationship must be one the community sedulously fosters; and (4) the injury to the relationship that would result from disclosure of the communication must outweigh the benefits of the disclosure for purposes of litigation.¹⁷⁵

In California, limits are placed upon confidentiality privileges.¹⁷⁶ The principle that the public "has a right to every man's evidence" has usually outweighed countervailing interests.¹⁷⁷ Therefore, most privileges are qualified rather than absolute.¹⁷⁸ The privilege that expressly protects confidential communications between peer review committee members is relatively new in most states.¹⁷⁹ Originally, the only legal protection of confidentiality possessed by physicians existed under

171. CAL. EVID. CODE §§1030-34; J. WIGMORE, *supra* note 12 at §2394-96.

172. Comment, *Untangling Tarasoff: Tarasoff v. Regents of the University of California*, 29 HASTINGS L.J. 179, 194 (1977). The fact that the legislature expressly allows disclosure in certain circumstances indicates that interests other than confidentiality can be paramount. *Id.*; see also CAL. EVID. CODE §1024.

173. See CAL. EVID. CODE §956 (crime or fraud), CAL. EVID. CODE §857 (parties claiming through deceased client); CAL. EVID. CODE §958 (breach of duty arising out of lawyer-client relationship); CAL. EVID. CODE §§959-61 (deceased client); CAL. EVID. CODE §962 (joint clients).

174. J. WIGMORE, *supra* note 12, at §2285.

175. *Id.*

176. See *Hallendorf v. Superior Court*, 85 Cal. App. 3d 553, 558-59, 149 Cal. Rptr. 564, 567 (Kane, J. dissenting). During 1952 the following general rules were set forth by the court to determine the proper exercise of discretion in discovery cases:

To constitute a proper exercise of discretion, the factual determination of the trial court should clearly and unequivocally be based upon the following legal concepts: The legislative purpose is to give greater assistance to the parties in ascertaining the truth and checking and preventing perjury; provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; make available in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; expedite litigation; simplify and narrow the issues; and expedite and facilitate both preparation and trial are not to be subverted under the guise of the exercise of discretion.

Id.

177. J. WIGMORE, *supra* note 12, at §2285.

178. *Id.*

179. *Franko v. District Court in & for City & Cty. of Denver*, 641 P.2d 922, 925 (peer review statutes enacted with increasing frequency in the last few years).

the doctor-patient privilege.¹⁸⁰ Today, several states by statute or common law recognize some form of a peer review privilege.¹⁸¹ In California, the peer-review privilege is absolute.¹⁸² The absolute privilege is effective in protecting hospital committee proceedings and reports from discovery.¹⁸³ This protection, however, has been a hindrance to public access to certain information.¹⁸⁴ This hindrance has been especially critical in litigation in which the privilege bars the most crucial evidence in a corporate negligence case.¹⁸⁵ A study of other confidentiality statutes supports the application of a qualified privilege to peer review proceedings.¹⁸⁶ The California legislature for example, has recognized that confidentiality is vitally important to the successful operation of psychotherapy.¹⁸⁷ The courts, however, have held the privilege is not absolute.¹⁸⁸ An analogy of the psychotherapist-patient privilege to the peer review privilege demonstrates the need for a qualified privilege in peer review.

A. Psychotherapist-Patient Privilege

The significance of confidentiality in the psychotherapist-patient relationship has been recognized by both the California legislature and judiciary.¹⁸⁹ The psychotherapist-patient privilege, however, is not absolute and is withdrawn in the presence of compelling public interests.¹⁹⁰ Several California courts have disallowed the use of the psychotherapist-patient privilege.¹⁹¹ The privilege is withheld in deference to the compelling need of the state to ascertain the truth,¹⁹²

180. J. WIGMORE, *supra* note 12, at §2285.

181. Goldberg, *supra* note 25, at 153-54.

182. See *supra* notes 43-95 and accompanying text.

183. *Id.*

184. See *supra* notes 142-165 and accompanying text; see *infra* notes 287-304 and accompanying text.

185. *Id.*

186. *Id.*

187. See *infra* notes 189-233 and accompanying text.

188. See *infra* notes 190-281 and accompanying text; see also, T. GUTHEIL & P. APPELBAUM, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 11 (1982) (essence of treatment rests on inviolate confidentiality); R. ALLEN, E. FERSTER, & J. RUBIN, READING IN LAW AND PSYCHIATRY 154 (1968); see *infra* notes 190-233 and accompanying text.

189. See *infra* notes 190-233 and accompanying text.

190. CAL. EVID. CODE §§1010-1028.

191. *In re Lifschutz*, 2 Cal. 3d 415, 438-439, 85 Cal. Rptr. 829, 845, 467 P.2d. 557, 572 (1970); *Britt v. Superior Court*, 20 Cal. 3d 844, 864, 143 Cal. Rptr. 695, 702, 574 P.2d 766, 782 (1978); *Hallendorf v. Superior Court*, 85 Cal. App. 3d 553, 558-560, 149 Cal.Rptr. 564, 567-568 (1978); *Jones v. Superior Court*, 119 Cal. App. 3d 534, 548, 174 Cal. Rptr. 148, 157 (1981).

192. See *infra* notes 195-204 and accompanying text.

the interest of the state in detecting fraud,¹⁹³ and the interest of the state in protecting the public from bodily harm.¹⁹⁴

1. California State Interest In Ascertaining Truth For Just Resolution of Legal Claims

In 1970, the California Supreme Court in *In re Lifschutz*, rejected an absolute privilege of confidentiality for communications between a patient and psychotherapist.¹⁹⁵ Generally, patients have the privilege to refuse disclosure of confidential communications between the patient and the psychotherapist.¹⁹⁶ California Evidence Code section 1016, however, establishes an exception to the general rule.¹⁹⁷ The patient litigant exception provides that communications relevant to the patient's medical condition and disclosed by the patient, are discoverable when the plaintiff institutes the action.¹⁹⁸ The California Supreme Court in *Britt v. Superior Court* concluded that the scope of inquiry into confidential communications depends upon the nature of the injuries the patient litigant has brought before the court.¹⁹⁹ Application of the privilege requires balancing of the litigants' rights with competing state interests.²⁰⁰ If state interests are not compelling, the confidential communications must be disclosed.²⁰¹ The California Supreme Court has determined that the interest of the state in facilitating the discovery of truth in connection with legal proceedings is sufficient to compel disclosure of confidential material.²⁰² Another example of an interest that California courts have held to outweigh the psychotherapist-patient privilege is the compelling interest of the state in detecting and prosecuting suspected fraud.²⁰³

2. State Interest in Detecting and Prosecuting Fraud

In *McKirdy v. Superior Court for the City and County of San Francisco*, defendant McKirdy fraudulently billed the Medi-Cal Program

193. See *infra* notes 205-222 and accompanying text.

194. See *infra* notes 223-233 and accompanying text.

195. *In Re Lifschutz*, 2 Cal. 3d at 438, 85 Cal. Rptr. at 836, 467 P.2d at 564-573.

196. *Britt*, 20 Cal. 3d at 862-863, 574 P.2d at 778, 43 Cal. Rptr. at 706-707.

197. CAL. EVID. CODE §1016.

198. *Britt*, 20 Cal. 3d at 863-864, 143 Cal. Rptr. at 707-708, 574 P.2d. at 777-779.

199. *Id.* at 864, 143 Cal. Rptr. at 707-708, 574 P.2d at 766.

200. *Lifschutz*, 2 Cal. 3d at 432-433, 85 Cal. Rptr. at 839-840, 467 P.2d at 564-569.

201. *Id.* at 423, 85 Cal. Rptr. at 833-834, 467 P.2d at 564-567.

202. *Jones v. Superior Court*, 119 Cal. App. 3d 534, 550, 174 Cal. Rptr. 148, 158 (1981); *Board of Medical Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 681, 156 Cal. Rptr. 55, 62 (1979); *Britt*, 20 Cal. 3d at 857, 143 Cal. Rptr. at 703, 574 P.2d at 773-777; *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 657, 542 P.2d 977, 980, 125 Cal. Rptr. 553, 558 (1975).

203. See *infra* notes 204-221 and accompanying text.

for psychotherapy treatment totalling over \$76,000.²⁰⁴ Files labeled with the names of forty-nine patients were seized by the Medi-Cal Fraud Unit Investigators.²⁰⁵ The files contained information regarding services actually rendered by the psychiatrist and additional evidence that enabled the Fraud Unit to interview other victims.²⁰⁶ The court determined that compelling disclosure did not violate the patients' constitutional privacy interests.²⁰⁷ In addition, the court found that the patients' privacy interests were outweighed by the need of the state to prosecute suspected fraud.²⁰⁸ The court reasoned that the patients themselves, "as short-changed recipients of health care" were the victims.²⁰⁹ Therefore, pretrial discovery of the files was permitted.²¹⁰

The compelling state interest in detecting fraud also exists in the hospital setting.²¹¹ Unnecessary surgery or treatment is essentially fraud of services.²¹² For example, if a physician tells a patient that a specified treatment is essential when in actuality the treatment is neither necessary nor beneficial, the physician may be legally liable for fraud.²¹³

The fraud perpetrated in *McKirdy* is analogous to the fraud of services by a physician who renders unnecessary treatment.²¹⁴ A situation could arise in which a hospital knew that a physician was performing unnecessary surgery and the peer review committee had not taken disciplinary measures to control the fraudulent conduct.²¹⁵ Peer

204. *McKirdy v. Superior Court*, 138 Cal. App. 3d 12, 22, 188 Cal. Rptr. 143, 149-150 (1982).

205. *See id.* at 17, 188 Cal. Rptr. at 146.

206. *Id.* at 16, 188 Cal. Rptr. at 145.

207. *See id.* at 23, 188 Cal. Rptr. at 152.

208. *Id.*

209. *See id.* at 23, 188 Cal. Rptr. at 151.

210. *Id.* at 28, 188 Cal. Rptr. at 154.

211. L. HAROLDS & M. BLOCK, *MEDICAL MALPRACTICE - THE ATLA SEMINAR 443*; Comment, *Unnecessary Surgery: Doctor and Hospital Liability*, 61 GEO. L.J. 807, 808-814 (1973) (exploration of physician and hospital liability for unnecessary surgery); *See infra* notes 212-221 and accompanying text.

212. HAROLDS & BLOCK, *supra* note 211 at 443.

213. *Id.*

214. *See McKirdy*, 138 Cal. App. 3d at 23, 188 Cal. Rptr. at 150. The records of services McKirdy performed for each of his patients supplemented the information the investigators received from other patients about the fraud. *Id.* Similarly, the peer review records of the hospital would disclose evidence of unnecessary surgery.

215. *See e.g.*, *Gonzales v. Nork*, Civ. No. 228566 (Super Ct. Sacramento County, Cal., Nov. 27, 1973) *rev'd*, 60 Cal. App. 3d 728, 31 Cal. Rptr. 717 (1976), *rev'd and remanded*, 20 Cal. 3d 500, 573 P.2d 458, 143 Cal. Rptr. 240 (1978) (In *Nork* the physician had committed fraud and malpractice); The controversy that surrounds open bypass surgery is the result of unnecessary treatment by physicians. The Sacramento Bee, September 16, 1985, at 1, col. 1. An estimated 190,000 open-heart bypass surgeries were performed in 1983, and studies indicate that between one-third and four-fifths of these procedures were performed too soon or were inappropriate for patients who could have been treated more effectively with drugs. *Id.* col. 1, at 1. Dr. Eugene Passamani, head cardiologist at the National Heart, Lung, and Blood Institute sponsored the study. *Id.* Stanford Heart transplant surgeon Norman Shumway

review records are as relevant to investigation of the fraud as were the files in *McKirdy*.²¹⁶ The situations are parallel. Yet, unlike records of peer review proceedings, files of the defendant psychiatrist are discoverable.²¹⁷

As demonstrated, the state has a compelling interest in ascertaining the truth and achieving the just resolution of legal claims.²¹⁸ In addition, the state has a compelling interest in investigating and detecting fraud by physicians.²¹⁹ The psychotherapist-patient privilege is withheld when necessary to obtain these goals.²²⁰ Therefore, the peer review privilege should not be absolute if discovery is necessary to facilitate the ascertainment of truth and achieve just resolution of legal claims.²²¹

3. *The State Interest In Protecting the Public From Harm*

In the landmark case of *Tarasoff v. Regents of the University of California*, the California Supreme Court identified a compelling state interest in protecting the public from foreseeable risks of harm.²²² The court allowed an exception to the common law rule that a person has no duty to warn persons who might foreseeably be endangered by the conduct of others.²²³ The *Tarasoff* exception occurs in two types of relationships. The first exception occurs when the defendant stands in a special relationship to a person whose conduct needs to

believes "economic self-interest will compel surgeons to continue doing the bypass procedure: they can't [stop]. They have these big house payments, and they're driving Ferraris. They'll be operating on each other soon I'm afraid." *Id.* col. 1, at A 10 ; see *supra* notes 113-125 and accompanying text.

216. See *McKirdy*, 138 Cal. App. 3d at 23, 188 Cal. Rptr. at 150-151 (specific state need to obtain files that may contain contemporaneous records of fraudulent services).

217. *Id.*

218. *Lifschutz*, 2 Cal. 3d at 423, 85 Cal. Rptr. at 833-834, 467 P.2d at 564-573; see *supra* notes 195-203 and accompanying text.

219. *McKirdy*, 138 Cal. App. 3d at 21-24, 188 Cal. Rptr. at 148-51; see *supra* notes 204-221 and accompanying text.

220. *Id.*

221. See *infra* notes 287-304 and accompanying text.

222. *Tarasoff v. Regents of the University of California*, 13 Cal. 3d 177, 186, 529 P.2d 553, 561-562, 118 Cal. Rptr. 129, 135 (1974) *modified on rehearing*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

223. CAL. EVID. CODE §1024 (exception: patient dangerous to himself or others); see, HAIGHT & COTCHETT, CALIFORNIA COURTROOM EVIDENCE, *supra* note 12, at 297; see also, Ayers Jr. & Holbrook, *Law, Psychotherapy, and the Duty to Warn: a Tragic Trilogy*; in HEALTH RECORDS AND CONFIDENTIALITY (R. Aldrich ed. 1977) (annotated bibliography with abstracts prepared for the National Commission on Confidentiality of Health Records; supporting the imposition of a duty to warn on psychotherapists, right of the public to be protected such as the more important social interest).

be controlled.²²⁴ The second exception occurs when the defendant has a relationship with the foreseeable victim of the conduct.²²⁵ Specifically, the Supreme Court determined that the duty of the psychotherapist to protect society from certain individuals who pose a threat to public safety outweighs the resulting breach of confidence between doctor and patient.²²⁶ The court also recognized the duty of the hospital to exercise reasonable care to protect persons that may be harmed by a patient within hospital facilities.²²⁷

The duty of a corporate hospital is analogous to that of a psychotherapist.²²⁸ Hospitals as well as psychotherapists have an affirmative duty to protect the public from persons who foreseeably may pose a threat to bodily safety.²²⁹ Incompetent physicians pose a threat of bodily harm to patients.²³⁰ A hospital has an affirmative duty, as established by *Elam*, to protect the public from the negligence and danger posed by incompetent physicians.²³¹ Justice Tobriner in *Tarasoff* announced that the confidentiality of "the protective privilege ends where the public peril begins."²³² Thus, the protective privilege of section 1157 should end when public safety is threatened.

B. Privilege For Official Information

The privilege to withhold official information of the government is similar to the peer review privilege.²³³ In California, the government generally claims privilege under specific nondisclosure statutes or under the general statute giving the judge discretion to bar disclosure on the facts of a particular case.²³⁴ The most important statute regarding the privilege for official information in California is section 1040

224. *Tarasoff*, 13 Cal. 3d at 186-187, 529 P.2d at 553, 118 Cal. Rptr. at 129. See Slovenko, *Psychotherapy and Confidentiality*, 24 CLEV. ST. L. REV. 375, 391 (1975); Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358, 370 (1976); Comment, *Tarasoff and the Psychotherapist's Duty to Warn*, 12 SAN DIEGO L. REV. 932, 940 (1974) (all discussing duties imposed by *Tarasoff*).

225. *Tarasoff*, 13 Cal. 3d at 186-187, 529 P.2d at 561-562, 118 Cal. Rptr. at 135.

226. *Id.* at 192-193, 529 P.2d at 557; 118 Cal. Rptr. at 135-136.

227. *Id.* at 187-188, 529 P. 2d at 553, 118 Cal. Rptr. at 134-135. See *Vistica v. Presbyterian Hospital*, 67 Cal. 2d 465, 468, 62 Cal. Rptr. 577, 580, 432 P.2d 193, 195-197 (1967).

228. See *infra* notes 229-234 and accompanying text.

229. *Vistica*, 67 Cal. 2d at 469, 62 Cal. Rptr. at 580, 432 P.2d. at 195-197.

230. See *supra* notes 98-107 and accompanying text.

231. *Elam*, 132 Cal. App. 3d at 332-48, 183 Cal. Rptr. at 156-65; see *supra* notes 126-141 and accompanying text.

232. *Tarasoff*, 13 Cal. 3d at 177, at 551 P.2d at 347, 131 Cal. Rptr. at 27.

233. See *infra* notes 234-259 and accompanying text.

234. See CAL. EVID. CODE §1040; CAL. PENAL CODE §§290, 1203.10 (specific nondisclosure statute); Comment, *Governmental Privileges: Roadblock to Effective Discovery*, 7 U.S.F.L. REV. 282, 283 (1973).

of the Evidence Code.²³⁵ This section establishes a governmental privilege against disclosure of official information when disclosure is against the public interest.²³⁶ The statute defines "official information" as information acquired in confidence by an employee in the course of duty and not officially disclosed.²³⁷

Unlike the peer review privilege, California Evidence Code section 1040(b)(2) provides a conditional privilege for official information.²³⁸ The judge has the discretion to decide whether or not the official information is privileged from discovery.²³⁹ The decision whether information should be made public or remain confidential requires a balancing of the relative interests of the parties.²⁴⁰ If confidentiality is necessary to protect legitimate governmental functions that would be impaired by disclosure, discovery is denied.²⁴¹ This balancing process is determined on a case by case basis by the trial judge.²⁴²

In *Environmental Protection Services v. Mink*,²⁴³ the United States Supreme Court distilled a flexible rule concerning the privilege of executive agencies to withhold official information from the public.²⁴⁴ The holding of the Court in *Mink* required the disclosure of purely factual, investigative matters.²⁴⁵ Personal opinions drawn from the facts, however, could not be exposed.²⁴⁶ Furthermore, the Court would not permit the withholding of factual material otherwise available during discovery merely because the facts were placed in a memorandum with the opinions of the executives.²⁴⁷ The Court concluded that there should be practical, common sense application of discovery rules.²⁴⁸

235. *Id.* at 285. See Comment, *Access to Government Information in California*, 54 CAL. L. REV. 1650, 1665 (1966) (confidentiality of governmental records).

236. CAL. EVID. CODE §1040(b); see Comment, *Public Inspection of State and Municipal Executive Documents: Everybody, Practically Everything, Anytime, Except*, 45 FORDHAM L. REV. 1105, 1105-1143 (1977) (assessment of statutory right to public inspection of information and data in 48 states noting the trend toward liberalization in public inspection).

237. CAL. EVID. CODE §1040(a).

238. *Id.* §1040(b)(2).

239. See CAL. EVID. CODE §1040 (privilege exists only if the interest in maintaining the secrecy of the information outweighs the interest in seeing that justice is done); see also *People v. Glen Arms Estate, Inc.*, 230 Cal. App. 2d 841, 846 n. 1, 41 Cal. Rptr. 303, 305 n.1 (1964); J. WIGMORE, *supra* note 12, at 812 n.6. (necessary for the judge to examine the information claimed to be privileged in order to balance competing considerations intelligently).

240. See CAL. EVID. CODE §1040(b)(2).

241. *Id.*

242. *Id.*

243. 410 U.S. 73 (1982).

244. *Id.*

245. *Id.* at 87-89.

246. *Id.*

247. *Id.*

248. *Id.*

Specifically, the Court concluded that a balancing process must be utilized to focus upon the relative interests of the parties in relation to materials sought.²⁴⁹

In *Shepard v. Superior Court*, the California Supreme Court enunciated guidelines for trial court balancing to determine whether disclosure would be against the public interest.²⁵⁰ The court stated:

Implicit in each assessment is a consideration of consequences ie. . . the consequences to the litigant of non-disclosure, and the consequences to the public of disclosure. The consideration of consequences to the litigant will involve matters including the importance of the material sought to the fair presentation of the litigant's case, the availability of the material to the litigant by other means, and the effectiveness and relative difficulty of such other means.²⁵¹

This balancing process, however, has been described as requiring an "exquisite" weighing process by the trial judge.²⁵² Courts and commentators have noted that as considerations justifying confidentiality become less convincing, the party seeking discovery will have an easier burden to meet.²⁵³ If the reasons for maintaining confidentiality do not apply in a given situation, or apply only to an insignificant degree,

249. *Id.* See *Moore-McCormack Lines Inc. v. I.T.O. Corp. of Baltimore*, 508 F.2d 945, 948 (4th Cir. 1974) (U.S. Supreme Court discussion of "balancing" process).

250. *Shepard v. Superior Court*; 17 Cal. 3d 107, 126, 130 Cal. Rptr. 257, 267-269, 550 P. 2d 161, 171-172 (1976).

251. *Id.* See *American Civil Liberties Union Foundation v. Deukmejian*, 32 Cal. 3d 440, 440-447, 651 P.2d 822, 829-831, 186 Cal. Rptr. 235-37 (1982). The standard used in *Shepard* is similar in context to other state standards. See also *Cashen v. Spann*, 77 N.J. 138, 142 (1978) ("substantial showing of need" for informer's name required in civil action); *McClain v. College Park Hospital*, 492 A.2d 991, 997 (1985) (New Jersey Supreme Court recognized that the executive privilege is similar conceptually to hospital committee proceedings). See also *Hall, Hospital Committee Proceedings and Reports: Their Legal Status*, 1 AM. J.L. & MED. 245, 274-75 (1975) (discussion of states that have enacted statutes to protect hospital committee reports).

252. *Mink*, 410 U.S. at 80 (Senate committee explained "it is not an easy task to balance opposing interests, but it is not an impossible one either"). See also *Cronin v. Strayer*, 467 N.E.2d 143, 149 (1984) (trial court is in the best position to weigh fairly the competing interests of the parties affected by discovery). *Bredice v. Doctors Hospital Inc.*, 50 F.R.D. 249 (D.D.C. 1970) (hospital staff reports not subject to discovery without showing "exceptional necessity"); *Upjohn v. U.S.*, 449 U.S. 383, 393 (1981) ("an uncertain privilege or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

253. See H. CROSS, *THE PEOPLE'S RIGHT TO KNOW* (1953) (statutory freedom of information laws discussed, with author noting that considerations of confidentiality are becoming less relevant with the onslaught of consumer protection laws); Comment, *supra* note 6, at 1097 (case by case balancing test approach); see also Comment, *Government Information and the Rights of Citizens*, 73 MICHIGAN L.R. 971 (1975). The majority of states exempt inter-agency memoranda and correspondence. *Id.* at 1172-1174. "Specific statutory exemptions are legislative attempts to pre-determine the results of the balancing test on a categorical basis," *Id.* at 1176.

the party seeking disclosure should not be required to demonstrate a compelling need.²⁵⁴

The same standard should apply in a corporate hospital negligence case as in a case concerning interagency government memoranda. The policy justifications for keeping interagency files confidential include the theory that persons will be inhibited from free discussion if files are not protected.²⁵⁵ The policy considerations in favor of enactment of Evidence Code section 1157 included encouraging frankness, candor, and objectivity in staff committee investigations.²⁵⁶ The policies are similar, yet the executive privilege is not absolute.²⁵⁷ Thus, peer review records and proceedings should not be absolute. A qualified privilege applied by the trial judge on a case by case basis is the best means to assure a proper administration of justice.²⁵⁸

C. Trade Secret Privilege

The trade secret privilege embodied in Evidence Code section 1060 was enacted by the California Legislature in 1965.²⁵⁹ The privilege provides protection for secret information essential to the continued operation of a business or industry.²⁶⁰ The trade secret privilege prevents a witness from testifying if testimony will injure an otherwise profitable business.²⁶¹ Disclosure of matters protected by the privilege may be necessary, however, to reveal unfair competition, fraud, or the improper use of dangerous materials.²⁶² Recognizing the trade secret privilege in these instances would allow the wrongdoer to shield unlawful conduct from legal scrutiny.²⁶³ Commentators recognize the dangers of application of the trade secret privilege when used to conceal fraud or when use of the privilege would result in injustice.²⁶⁴ Furthermore, commentators recognize that copyright and patent laws already provide adequate protection for matters sometimes classified as trade secrets.²⁶⁵

254. *Shepard*, 17 Cal. 3d at 127, 130 Cal. Rptr. at 267-269, 550 P.2d at 171-172.

255. *Id.*; see *supra* notes 233-254 and accompanying text.

256. See *supra* notes 74-95 and accompanying text.

257. *Id.*

258. See *infra* notes 285-302 and accompanying text.

259. CAL. EVID. CODE §1060 (trade secret privilege); see also J. WIGMORE, *supra* note 12, at §2212 (trade secret privilege generally).

260. CAL. EVID. CODE §1060.

261. *Id.*

262. See CAL. EVID. CODE §1060; see also CAL. EVID. CODE §915 (disclosure of secret to court); CAL. PENAL CODE §653 (overhearing and recording confidential communication).

263. See, CAL. EVID. CODE §1060.

264. *Id.*

265. *Id.*

The standards for application of the trade secret privilege should be used for the peer review privilege.²⁶⁶ The basis for applying trade secret privilege standards to the peer review privilege is twofold. First, just as existing patent and copyright laws provide some protection for trade secrets, the immunity statutes adequately protect physicians acting within the scope of hospital committee proceedings.²⁶⁷ If the application of the peer review privilege would conceal fraud, or dangerous practices, the privilege should not be used.

Secondly, operation of the modern hospital is similar to a business corporation.²⁶⁸ Essential to continued operation of hospital business is the hospital's reputation.²⁶⁹ A reputable hospital will draw more clients and thereby increase profits.²⁷⁰ This reputation is integral to the "product" of the hospital, namely, providing quality medical services.²⁷¹ Disclosure of unfavorable committee report findings diminishes the hospital's reputation.²⁷² The disclosure would affect profits, since patients would be likely to obtain services elsewhere. Similarly, the disclosure of trade secrets by a business would diminish the unique qualities of a particular business.²⁷³ Disclosure would give other businesses access to the trade secrets.²⁷⁴ Thus disclosure might also cause profits of the business to decrease.²⁷⁵ Unlike the trade secret privilege, however, the privilege protecting hospital committee secrets is not subject to discovery by patient litigants under any circumstances.²⁷⁶

A situation could arise in which a hospital knew that a doctor was incompetent or impaired and did not prevent the doctor from performing negligent surgeries.²⁷⁷ If the surgeon's performance fell below a

266. See *infra* notes 267-284 and accompanying text.

267. See *supra* notes 27 and accompanying text.

268. See *Sacramento Bee*, September 16, 1985, at 10, col. 1. In a statement from Dr. Hultgren he noted, "[w]e're entering an era where medicine is big money; its big business. Private practitioners are not in corporations. If you don't make money, you're out. If you're a big moneymaker, you're an asset to the corporation." *Id.*

269. Interview with Francis N. Fullam, Assistant Executive Director, West Jersey Health System Eastern Division, Cherry Hill, New Jersey (notes on file at Pacific Law Journal).

270. *Id.*; see *infra* note 274 and accompanying text.

271. See *supra* note 269 and accompanying text.

272. See, e.g. *Gonzales v. Nork*, Civ. No. 228566 (Super Ct. Sacramento County, Cal., Nov. 27, 1973) *rev'd*, 60 Cal. App. 3d 728, 31 Cal. Rptr. 717 (1976), *rev'd and remanded*, 20 Cal. 3d. 500, 573 P.2d 458, 143 Cal. Rptr. 240 (1978).

273. See *Wear, A Balanced Approach to Employer-Employee Trade Secret Disputes in California* 31 HASTINGS L.J. 671, 693-95 (1980) (balancing test to determine disclosure of trade secrets).

274. *Id.* at 673-75.

275. *Id.*

276. See *supra* notes 260-272 and accompanying text.

277. See *supra* notes 113-125, 210-215 and accompanying text.

reasonable standard of care the patient litigant would have a cause of action in corporate hospital negligence. The patient litigant, however, could not recover, because the conduct constituting negligence is absolutely privileged from discovery.²⁷⁸ The trade secret privilege in California will not be applied to conceal fraud or otherwise work injustice.²⁷⁹ This standard should apply to the privilege protecting hospital committee meetings from discovery. Whether the hospital is protecting the memoranda of hospital peer review committees to conceal the wrongs committed by staff members should be monitored by the trial court.²⁸⁰ To effectuate this monitoring, the court in a malpractice action could hold an in camera inspection²⁸¹ to ascertain the result of medical investigative committees. After balancing the *Shepard* factors,²⁸² the judge could determine if application of the privilege was necessary to the proper administration of justice.

In the majority of states, the privilege of self-critical analysis is not absolute.²⁸³ The privilege is generally applied on a case by case basis.²⁸⁴ Statutes and decisions have indicated the privilege can be overcome by a showing of exceptional need by the party seeking discovery.²⁸⁵ The following proposed statute achieves a balanced result.

PROPOSAL: QUALIFIED PEER REVIEW PRIVILEGE

The California Legislature should amend Evidence Code section 1157 to provide for a qualified instead of an absolute privilege. The enactment of a statutory amendment to section 1157 would be the most effective means of ensuring the proper administration of justice. Plaintiff access to peer review committee records will serve the purpose of the Legislature of improving health care in California.

Use of Committee Reports, Records or Statements in Judicial and Administrative Proceedings

(a) Absent a showing of *extraordinary necessity*, the minutes, analysis, preliminary and final findings and reports of a medical utiliza-

278. See *supra* notes 71-95, 126-141 and accompanying text.

279. See *supra* notes 260-286 and accompanying text.

280. See *infra* notes 287-303 and accompanying text.

281. *Saddleback Community Hospital v. Superior Court*, 158 Cal.App.3d 206, 209, 204 Cal.Rptr. 598, 600.

282. See *supra* notes 234-259 and accompanying text.

283. See *supra* notes 9-32 and accompanying text.

284. Comment, *supra* note 6, at 1093.

285. See *supra* notes 287-290 and accompanying text.

tion review committee, peer review committee, medical staff committee, tissue review committee, or any other medical competence review committee shall not be subject to discovery or admissible into evidence in any civil or administrative proceeding.

(b) This qualified privilege does not extend to *primary health records* or to any oral or written statements submitted to or presented before a medical utilization committee, medical staff committee, or tissue review committee.

(c) This section shall not affect the right of any individual employed by, formerly employed by, or formerly associated with a hospital or extended care facility within California to admit into evidence or subject to discovery the minutes and reports of a medical utilization review committee, peer review committee, medical staff committee or tissue review committee, for the limited purpose of adjudicating the propriety of an adverse action by such institution affecting the employment or association of such person.²⁸⁶

(d) This self-critical analysis privilege is construed to protect the evaluative but not the factual portions of self-analyses.²⁸⁷

(e) Definitions

1. *Extraordinary Necessity*

Extraordinary necessity²⁸⁸ refers to exceptional rather than ordinary factual situations. This provision refers to the ability of a judge to withdraw the privilege if necessary for the proper administration of justice.

286. See D.C. CODE ANN. §32-505 (1981) (allows the discovery of peer review upon a showing of extraordinary need); cf. N.C. GEN. STAT. §8-53 (1981) (the N.C. legislature intended to make a provision to avoid injustice and suppression of truth by allowing the trial judge discretion to compel disclosure).

287. See Comment, *supra* note 6, at 1093 (interpreting extraordinary need test). This standard was used in a recent New Jersey Supreme Court medical malpractice case. *McClain v College Park Hospital*, 492 A.2d 991, 992-996 (1985). Plaintiff was a patient at defendant College Hospital. While undergoing a routine "D&C" (dilation and curettage) her endotracheal tube came out while in recovery. She quickly underwent cardiac and respiratory arrest, lapsed into a coma and died the same day. The death of the plaintiff coincided with several other deaths occurring in the Ob-Gyn unit of the defendant hospital. Following those deaths, investigations were initiated by the State Board of Medical Examiners (Board). The investigation was conducted by the executive committee of the Board and reports of the committee's evaluations and recommendations were filed. The plaintiff contended that the records were relevant to the civil litigation and that the information was otherwise unavailable to her from other sources. The Board found no cause of action against those who were responsible for the deaths of plaintiff and others. The Supreme Court, however, noted that this constituted "gross malpractice, gross negligence and gross incompetence which is much more than is required of plaintiffs in proving a deviation from accepted medical standards." Consequently, the court fashioned standards which could be applied by a trial court to determine whether discovery would be permitted. *Id.*

288. See *supra* notes 287 and accompanying text.

2. Primary Health Records

Primary health records are defined as information, documents or records otherwise available from original sources. Primary health records are not to be construed as immune from discovery in any civil action merely due to presentation during proceedings of a review committee. A person who testifies before such a committee or who is a member of the committee is *not* prevented from testifying as to factual matters within the witnesses knowledge, but the witness cannot be asked about opinions formed as a result of the committee hearings.

By requiring that the peer review privilege be qualified rather than absolute, the foregoing proposal ensures that existing professional and legal sanctions will serve as effective deterrents of medical incompetence. Application of the privilege would avoid injustice and suppression of truth by allowing a trial judge to compel disclosure.

STANDARD GOVERNING DISCLOSURE OF CONFIDENTIAL INFORMATION

The appropriate trial court standard for governing the disclosure of confidential investigative records in hospitals is a showing of particularized need that outweighs the public interest in confidentiality.²⁸⁹ The trial court may consider certain factors in balancing the litigant's personal interests against the confidentiality claims of the hospital. These factors are similar to the balancing factors used by the California Supreme Court in *Shepard v. Superior Court*.²⁹⁰ The balancing factors include: (1) the extent to which the information may be available from other sources; (2) the degree of harm that the litigant will suffer from the unavailability of the records and proceedings; and (3) the possible prejudice to the committees in permitting discovery. Trial courts should be cognizant of the three balancing factors when determining whether peer review proceedings and records may be subject to discovery. Hence, the three balancing criteria must be examined in the context of a civil proceeding based upon corporate hospital negligence.

First, trial courts should be concerned about the ability of the plaintiff to obtain the information to establish corporate negligence from other sources.²⁹¹ Examples of other sources of information that are

289. See *Shepard*, 17 Cal. 3d at 126-27, 130 Cal. Rptr. at 267-68, 550 P.2d at 171-72 (same standard used for discovery under 1040(b)(2)).

290. *Id.*; see *supra* notes 279-287 and accompanying text.

291. *Shepard*, 17 Cal. 3d. at 126, 130 Cal. Rptr. at 268, 550 P.2d at 172.

freely discoverable include the administrative files of the hospital,²⁹² surgical privilege cards,²⁹³ staff membership re-application documents,²⁹⁴ and the patient's medical record.²⁹⁵ As an alternative, courthouse records could be consulted for information regarding how frequently a hospital has been sued.²⁹⁶ The Board of Medical Quality Assurance should also be contacted to determine whether any prior investigations of the hospital or the physician have been conducted.²⁹⁷ If the plaintiff is able to obtain information regarding negligence from other sources, the judge should strictly apply the privilege limiting discovery.

Second, courts should consider the degree of harm that the litigant will suffer from the unavailability of the committee records. An egregious example of harm would be the litigant's inability to establish a cause of action because the plaintiff cannot discover the facts necessary for a proper pleading of the case. The court may focus on how pivotal the information is in establishing the cause of action.²⁹⁸ Another example would be the expense or undue hardship of obtaining the information from other sources. If a plaintiff can discover information from other sources without undue hardship and expense, a strict privilege should be upheld.

Finally, consideration must also be given to the possible prejudice to the function of peer review proceedings if the privilege is withdrawn. Discovery of peer review committee reports and proceedings may have a chilling effect upon frankness or thoroughness in self-evaluation.²⁹⁹ In addition, courts should be aware that physicians may not come forward with information of a colleague's negligence for fear of retribution by either the hospital or the negligent physician.³⁰⁰ However, courts should also be aware that most physicians would take the steps necessary to protect the long-term reputation of their profession and their hospitals, and would bring forward relevant information.³⁰¹ In

292. See Nelson, *supra* note 68, at 306 (describing the alternative methods to discover evidence to establish corporate hospital negligence).

293. *Id.* at 307.

294. *Id.*

295. *Id.*

296. *Id.* at 309.

297. *Id.*

298. *United Farm Workers v. Superior Court*, 170 Cal. App. 3d 391, 395 ____ Cal. Rptr. ____ (1985). Even the first amendment right of freedom of association is not absolute. *Id.* at 395. Associational activities may be inquired into in deference to a compelling state interest of truth in litigation. Disclosures may be compelled only when that disclosure is directly related to the claim of the plaintiff. *Id.*

299. *Matchett*, 40 Cal. App. 3d at 628, 115 Cal. Rptr. at 322 (1984); see *supra* notes 71-95 and accompanying text.

300. Comment, *supra* note 6, at 1092-93.

301. *Jenkins v. Delon Wu*, 468 N.E. 2d 1162 (1984) (plaintiff in malpractice case contended that even *without* the peer review privilege physicians would take steps necessary to protect the long-term reputation of their profession and their hospital).

fact, the Code of Ethics for the medical profession requires physicians to report unethical or illegal conduct.³⁰² Thus, recognition of a peer review committee privilege based on protection of confidentiality should occur on a case by case basis weighing the three *Shepard* factors.

CONCLUSION

Medicine is an essential service in modern society. While the vast majority of health professionals are competent, some incompetent physicians pose a threat of physical harm to the public. A basic tenet of western society is that each person is responsible for his or her wrongs. If an individual injures someone through negligence, the individual must accept the consequences. This tenet applies to all businesses and occupations. One of the primary bases of liability in our system of justice is based upon fault.

Consistent with the axiom that each person is responsible for his or her wrongs is the maxim that the law abhors forfeiture of a remedy. The remedy for negligent evaluation of peer review committee proceedings is an action for corporate hospital negligence. California Evidence Code section 1157, without amendment, cripples the check on negligent practitioners by prohibiting disclosure of information necessary for establishment of corporate hospital liability. This comment has recognized the state interest in protecting confidential records and proceedings of hospital peer review committees. The importance of the state interest in policing physician incompetency is evidenced by *Elam v College Park Hospital*. These competing interests compel a case by case balancing by trial judges. A qualified privilege should be adopted by the California Legislature that would allow access by litigants to committee records when necessary to support a claim. The adoption of a qualified privilege will serve the purpose of improving the quality of medical care in California hospitals.

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302. See American Medical Association, *Principles of Medical Ethics*, reprinted in S. REISER, A. DYCK & W. CURRON, *ETHICS IN MEDICINE* 30-38 (1977).

The medical profession should safeguard the public and itself against physicians deficient in moral character or professional competence. Physicians should observe all laws, uphold the dignity and honor of the profession and accept its self-imposed disciplines. They should expose, without hesitation, illegal or unethical conduct of fellow members of the profession.

Id.

