Anatomy of the Conflict Between Hospital Medical Staff Peer Review Confidentiality and Medical Malpractice Plaintiff Recovery: A Case for Legislative Amendment

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I. INTRODUCTION

The role of hospitals in the provision of medical care has changed dramatically in recent years. Hospitals were once considered charitable institutions which provided health care only to those unable to afford private medical care administered in the home.¹ Today, physician “house calls” are but a distant memory. The majority of physicians practice out of private offices and rely on hospitals to tender the individual care they once provided.²

The modern hospital offers a wide range of medical services and facilities.³ In light of this enlarged role in the practice of


³ Examples of some of the more important services and facilities include emergency medical care, clinical testing, radiology and surgical facilities, and institutional care which encompasses 24-hour nursing personnel to monitor vital signs, administer drugs, perform physical therapy, and administer special diets. An in-depth examination of these services and the hospital’s standard of care in their performance is contained in the JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS (1983) [hereinafter cited as JCAH ACCREDITATION MANUAL].
medicine, hospitals have emerged as a primary source of medical care. Consonant with this role, the hospital has been charged with duties intended to assure the quality of health care practiced within its confines. One such duty was imposed under the recent decision of *Elam v. College Park Hospital*. The *Elam* court held that it is the responsibility of the hospital to exercise reasonable care in selecting and periodically evaluating the competence of private physicians granted medical staff privileges and allowed to use the hospital’s medical facilities. Efforts to prove breach of this duty may be hampered, however, by California Evidence Code section 1157, which was enacted prior to *Elam*. Section 1157 provides that the proceedings and records of a hospital’s medical staff peer review committee are immune from discovery. A conflict thus arises between section 1157’s aim of ensuring nondisclosure of such testimony and records, and the medical malpractice claimant’s interest in discovering such evidence in order to prove negligence. The effect of the conflict is to force trial courts to either disallow essential discovery or to construe section 1157 contrary to the probable legislative intent.

This comment addresses that conflict. The comment contains three sections which will attempt to analyze and reconcile the competing interests the two rules represent. First, the origins of the doctrine of hospital corporate negligence and Evidence Code section 1157 will be reviewed to discover both the context in which each arose and the interests each seeks to promote. Second, the conflict between those laws will be examined and judicial attempts at a reso-

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7. *Id.* at 346, 183 Cal. Rptr. at 165. In reversing summary judgment for the defendant hospital, the court noted that “imposing the duty of care upon a hospital should have the ‘prophylactic’ effect of supplying the hospital with a greater incentive to assure the competence of its medical staff and the quality of medical care within its walls.” *Id.* *Elam* specifically found this duty applicable with respect to independent physicians and surgeons, who are neither employees nor agents of the hospital; prior cases had already held that a hospital may be liable for malpractice committed by physicians actually employed by the hospital or ostensibly acting as agents of the hospital. See, e.g., Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 397 P.2d 161, 41 Cal. Rptr. 577 (1964); see also infra notes 14-15 and accompanying text.
8. Act of Aug. 8, 1968, ch. 1122, § 1 Stats. 1968 (codified as amended at CAL. EVID. CODE § 1157 (West Supp. 1984)). This section states, in relevant part, that “Neither the proceedings nor the records of [any] medical . . . staffs in hospitals having the responsibility of evaluation and improvement of the quality of medical care rendered . . . shall be subject to discovery.” For the full text of § 1157 see infra note 49.
lution will be discussed to illustrate the practical effect of the conflict at trial. Finally, an amendment to Evidence Code section 1157 will be proposed which incorporates discovery guidelines that allow the plaintiff to discover enough information on which to base his cause of action, while leaving intact the basic confidentiality essential to effective peer review.

II. GENESIS OF CONFLICT: THE EVOLUTION OF HOSPITAL LIABILITY AND THE PROTECTIONS AFFORDED PEER REVIEW

A. Origins of the Doctrine of Hospital Corporate Negligence

For many years hospitals enjoyed immunity from civil suits under the doctrine of charitable immunity. However, as hospitals evolved into profit-making businesses, the rationale for charitable immunity eroded. This erosion led to the judicial repeal of the charitable immunity doctrine in most jurisdictions during the 1940's and 1950's. In the wake of this repeal, hospitals have been found liable to their patients under two distinct theories of law. The doctrine of respondeat superior provides that a hospital is vicariously liable for the tortious conduct of its employees or agents acting within the scope of their employment. Under the doctrine of hospi-

9. See supra note 1.

10. Two theories were generally used to support the doctrine of charitable immunity for hospitals. The first was based on a notion that one who accepts charity has impliedly waived his right to damages for injury suffered through the benefice of a charitable hospital. The second theory was that the charitable hospital was not liable for the acts of doctors and nurses because those persons were independent contractors and the hospital did not control their practice of medicine. See Schloendorf v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914). The underlying basis for both theories was that the desire to avoid large damage awards—and the irreparable harm that could result to the hospital and in turn to its needy patients—outweighed the individual's need for recovery. However, the evolution of hospitals into profitable businesses, coupled with the inception of insurance to cover such awards, made clear that such immunity no longer outweighed the needs of insured plaintiffs. See Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 NYS.2d 3 (1957) (overruling Schloendorf, 211 N.Y. 125, 105 N.E. 92); see also President & Directors v. Hughes, 13 F.2d 810 (D.C. Cir. 1942) (a seminal decision in the abolition of hospital charitable immunity); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 577 (1964); and Bowers v. Olch, 120 Cal. App. 2d 108, 260 P.2d 997 (1953). See also Southwick, Vicarious Liability of Hospitals, 44 MARQ. L. REV. 153 (1960) (an in-depth analysis of the application of the
tal corporate negligence, liability can be imposed on a hospital for the breach of a duty directly owed to its patients. This second theory is based on the premise that the hospital owes a duty to the patient to exercise due care in areas traditionally within the hospital's governance. Prior to the mid-1960's, those areas were generally limited to: the selection and retention of hospital employees, the selection and maintenance of hospital supplies and equipment, and the maintenance of the hospital's building and grounds.

One group not encompassed by these three traditional areas of hospital responsibility was staff physicians who practiced out of community-based private practice, but who were granted the use of the hospital's medical facilities and personnel. Staff physicians were not employees of the hospital and they were generally recognized as independent contractors having professional and legal autonomy from the hospital.

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For examples of the application of the doctrine of hospital corporate negligence in other jurisdictions, see South Highlands Infirmary v. Camp, 279 Ala. 1, 180 So. 2d 904 (1965) (hospital liable for not inspecting equipment adequately); New Biloxi Hosp. Inc. v. Frazier, 245 Miss. 185, 146 So. 2d 882 (1962) (hospital liable for negligence for employee). A more complete list appears infra note 22.


14. So-called staff physicians should be distinguished from the resident physicians who are employed by the hospital. Staff physicians are private doctors granted medical staff privileges to treat their patients in the hospital setting. The need for staff privileges arises when a patient requires institutional care, clinical testing, or major surgery. See Comment, The Hospital and the Staff Physician-An Expanding Duty of Care, 7 CREIGHTON L. REV. 249 (1974) (analysis of the individual and concurrent duties of staff and resident physicians); O'Sullivan & Wing, The Hospital Based Physician, Current Status and Significance, J. LEGAL MED. 20, July-August (1973) (discussion of the staff physician's changing role in modern hospitals).

As medical knowledge advanced and specialization became more commonplace, the staff physician flourished. Hospitals became unable, financially or practically, to employ full-time specialists in each medical area. As a result, hospitals relied increasingly on the staff physician to render necessary medical services at their institution. This increased reliance, however, created a need to more closely monitor the care rendered by staff physicians. In 1965, one jurisdiction found the hospital to be the logical body to monitor that performance. In the now landmark decision of Darling v. Charleston Community Memorial Hospital, the Illinois Supreme Court expanded the doctrine of hospital corporate negligence to encompass an affirmative duty by the hospital to insure the quality of care rendered by its staff physicians.

In Darling, the plaintiff was a college student who was originally admitted to the hospital emergency room for treatment of a broken leg. Subsequent to his emergency treatment, he was admitted as a regular patient and, through the course of grossly negligent treatment, his leg became gangrenous and had to be amputated. The Illinois court found that under the doctrine of corporate negligence, the hospital owed the plaintiff a direct duty to insure the standard of care administered in its institution. Accordingly, the court

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decision applying the independent contractors theory is Schloendorf v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914). There, Justice Cardozo based this theory on the premise that the hospital provides the facilities but exercises no control over the physician's practice. Id. at 127, 105 N.E. at 92. For a sampling of the voluminous commentary on the independent contractor theory, see Southwick, Vicarious Liability, supra note 11; Mills, Corletto In Perspective, J. LEGAL MED. 3, Feb. (1977) (discussing a New York case which found staff review board physicians individually liable for the incompetence of a staff physician); Zaslows, Vicarious Liability of A Hospital For Tortious Acts of Its Independent Contractors Delivering Medical Care, 49 PA. B.A.Q. 466 (1978) (examination of the trend expanding hospital liability to encompass independent contractor physicians).

16. See O'Sullivan & Wing, supra note 14 at 20, 21.

17. See generally Southwick, The Hospital as an Institution - Expanding Responsibilities Change Its Relationship With The Staff Physician, 9 CAL. W.L. REV. 429 (1973) (hospital bears responsibility of monitoring staff physician competence while not conflicting with a staff physician's rights) [hereinafter cited as Southwick, The Hospital].


19. Id. at 338, 211 N.E.2d at 260. Although most often cited as the landmark decision in the extension of hospital corporate liability, the court found the hospital liable under either or both of two theories: (1) negligence in its provision of nurses too unqualified to recognize plaintiff's inadequate care and, (2) negligence in failing "to require consultation with or examination by members of the hospital surgical staff skilled in such treatment; or to review the treatment rendered to the plaintiff and to require consultants to be called in as needed." Id. (emphasis added).

20. Id. at 328-29, 211 N.E.2d at 256.
held the hospital liable for the inferior quality of the care provided. From the seminal decision of *Darling*, the theory of hospital liability for the negligence of its staff physicians has been adopted and expanded by a growing number of jurisdictions. In 1982, that

21. Id. at 338, 211 N.E.2d at 261. It is interesting to note that although the *Darling* decision is cited as the seminal case for a hospital's duty to monitor the care administered by staff physicians, the *Darling* opinion did not state whether the defendant Dr. Alexander was an employee of the hospital or a staff physician. Subsequent Illinois cases have inferred that the doctor, on emergency call the day plaintiff was admitted, was in fact an employee. This inference led the Illinois courts to limit the doctrine of hospital corporate negligence theory to hospital employees. See, e.g., Lundahl v. Rockford Memorial Hosp. Ass'n, 93 Ill. App. 2d 461, 235 N.E.2d 671 (1968) (holding that the *Darling* theory of corporate negligence is applicable only to resident physicians employed by the hospital); Stogsdill v. Manor Convalescent Home, Inc., 35 Ill. App. 3d 634, 665, 343 N.E.2d 589, 612 (1976) (limiting theory to resident doctors by holding that "treatment is a medical question entirely within the discretion of the treating physician, not the hospital, especially where the doctor is privately employed."). Other Illinois decisions limited *Darling* to its facts. See, e.g., Collins v. Westlake Community Hosp., 12 Ill. App. 3d 847, 299 N.E.2d 326 (1973), rev'd on other grounds, 57 Ill. 2d 388, 312 N.E.2d 614 (1974); Slater v. Missionary Sisters of the Sacred Heart Hosp., 20 Ill. App. 3d 464, 314 N.E.2d 715 (1974). The circle was seemingly closed in 1980, however, when an Illinois court found hospitals responsible for the selection and review of all physicians tendering medical services in the hospital. See Holton v. Resurrection Hosp., 88 Ill. App. 3d 655, 410 N.E.2d 969 (1980); see also Walker v. Alton Memorial Hosp. Assoc., 91 Ill. App. 3d 310, 414 N.E.2d 850 (1980), discussed infra notes 154-156 and accompanying text.

liability and attendant duty was recognized by the California Court of Appeal in Elam v. College Park Hospital.\textsuperscript{23}

Elam involved an allegation of medical malpractice by a hospital staff podiatrist in the performance of foot surgery. Plaintiff named the hospital in her complaint, alleging that it breached its duty to insure “the competence of its staff physician.”\textsuperscript{24} At trial, the court granted the hospital’s motion for summary judgment, finding that no triable issue of fact existed as no such duty existed under California law.\textsuperscript{25} The Court of Appeal reversed; after reviewing case precedent and relevant statutory authority, it found the hospital “accountable for negligently screening the competence of its medical staff to insure the adequacy of medical care rendered to patients at its facility.”\textsuperscript{26}

The Elam court reasoned that this duty is consistent with existing California judicial and statutory law.\textsuperscript{27} The court cited relevant cases,\textsuperscript{28} and several Health and Safety Code sections which charge a hospital’s governing body with the duty to provide quality health care and which grant the board plenary power to accomplish that goal.\textsuperscript{29} It further found that the scope of this duty was implicitly

\textsuperscript{23} 132 Cal. App. 3d 332, 183 Cal. Rptr. 156 (1982). The decision, as modified, defined the duty to be one of “insuring the competency of its medical staff and the quality of the medical care provided through prudent selection, review and continuing evaluation of physicians granted staff privileges.” \textit{Id.} at 346, 183 Cal. Rptr. at 164.

\textsuperscript{24} \textit{Id.} at 336, 183 Cal. Rptr. at 158. The complaint also named the podiatrist, Martin Schur, and Doctors Merrill Cahn and Samuel Markarian. Dr. Markarian had co-admitted Elam pursuant to hospital bylaws which required concurrence of a \textit{medical} doctor for the admission of a podiatric patient; the concurring doctor is equally responsible for the patient’s medical care. Dr. Cahn assisted Schur in surgery.

\textsuperscript{25} \textit{Id.} at 335, 347-48, 183 Cal. Rptr. at 158, 160-161.

\textsuperscript{26} \textit{Id.} at 346, 183 Cal. Rptr. at 165.

\textsuperscript{27} \textit{Id.} at 339-44, 183 Cal. Rptr. at 160-63. Although the issue of corporate negligence was one of first impression, \textit{see supra} note 12, the court’s survey of California judicial precedent revealed that hospitals owe a “duty of reasonable care to protect patients from harm.” \textit{Id.} at 340, 183 Cal. Rptr. at 161.


\textsuperscript{29} \textsc{Cal. Health & Safety Code} \textsection 1250 (West Supp. 1981) (which provides that a hospital shall have a “governing administrative body with overall administrative and professional responsibility”); \textsection 32125 (West Supp. 1982) (which confers the power to make and enforce all regulations, rules and by-laws necessary for the administration, government, protection and maintenance of the hospital”); and \textsection 32128 (West Supp. 1980) (which imposes the duty on a hospital’s governing body to operate the hospital “in the best interests of the public health”).
and explicitly provided for in the Business and Professions Code\textsuperscript{30} and the California Administrative Code.\textsuperscript{31} These sections mandate, in part, that the hospital governing body must establish procedures and standards to evaluate physicians applying for staff privileges and to insure their continued competence.\textsuperscript{32}

These mandates, however, create a new difficulty in and of themselves. In many instances, the hospital board of directors is composed of laypersons, who are often influential professionals from the community.\textsuperscript{33} As such, hospital directors rarely possess the medical knowledge necessary for the assessment or review of a physician’s competence.\textsuperscript{34} Accordingly, the board is forced to rely on its medical staff to promulgate and implement performance standards and evaluation criteria with which to judge their peers.\textsuperscript{35}

B. Quality Assurance Through Medical Staff Peer Review

The necessity of the hospital board's reliance on peer administered review is recognized under California law.\textsuperscript{36} Health and Safety

\begin{itemize}
\item[30.] \textit{CAL. BUS. & PROF. CODE} § 2282 (West Supp. 1980).
\item[31.] \textit{CAL. ADMIN. CODE}, tit. 22, R.'s 70701, 70703 (1980).
\item[32.] \textit{CAL. BUS. & PROF. CODE} § 2282 (West Supp. 1984 \textit{as amended}) requires that the hospital medical staff must be a self-governing body, charged with the selection, review, and reappointment of medical staff physicians. The section further provides that this process is to be in compliance with the minimum guidelines required by the Joint Commission on Accreditation of Hospitals. For more information regarding the accreditation guidelines, see infra note 39.
\item[33.] See O'Sullivan & Wing, supra note 14; Porter, \textit{Profile of a Hospital Trustee}, TRUSTEE 21 (Jan. 1975).
\item[34.] See, Southwick, \textit{Hospital Liability}, supra note 1; Lescoe, \textit{Regulation of Health Care by Medical Staff Bylaws}, J. LEGAL MED. 17 (Feb. 1977) (discussion of hospital by-laws and delegation of responsibilities); Hackler, \textit{Hospital Trustees' Fiduciary Responsibilities: An Emerging Tripartite Distinction}, 15 WASHBURN L.J. 422 (1976) (distinguishing among trustee responsibilities in non-profit private, non-profit public, and for-profit private hospitals).
\item[35.] Cf. Appleman, \textit{The Darling Case - A "Real" Tiger?}, INS. L.J. 714 (1975) (an insurance company defense-oriented article which argues that only physicians with great experience are qualified to assess their peers' medical competence).
\item[36.] Under California law, the hospital governing body must establish medical staff review committees to oversee many facets of medical care. \textit{See CAL. ADMIN. CODE} tit. 22 R. 70703 (e)(1980). The basic committees included in this section are the Executive Credentials Committee (which reviews physician applications for medical staff privileges and investigates the references therein); the Medical Records Committee (which evaluates patient records, compares pre-operative and post-operative diagnoses, examines pathology reports, and decides whether surgery was necessary); the Tissue Committee (which supervises the quality and necessity of surgery); the Utilization Review Committee (which, as required for federal Medicare payments, reviews the medical necessity of institutional care and compares alternatives such as outpatient care); the Infections Committee (which monitors the reporting and evaluation of patient infections, infectious material disposal, and the use of antibiotics in the control of infections); and the Pharmacy and Therapeutics Committee (which monitors the intrahospital se-
Code section 32128 dictates that the hospital governing body must implement committees composed of its medical staff, whose responsibilities are to include the assessment of physicians applying for staff privileges and the ongoing review of performance and competence of those doctors currently on the staff. The code section further requires these committees to perform reviews in accordance with minimum standards promulgated by the Joint Commission on Accreditation of Hospitals (JCAH).37

The JCAH accreditation manual requires in relevant part that “the medical staff shall participate in the maintenance of high professional standards by representation on Committees concerned with

lections, disbursement, and handling of all drugs). These committees, required by R. 70703(e), are not a complete listing of all the committees required under California law. Other committees may include the Blood Utilization Committee, Antibiotic Committee, Nuclear Medicine Committee, Intensive Care Committee, Joint Conference Committee, Morbidity and Mortality Committee, to name a few.

The above committees are required to report to the Executive Committee at least once every three months or when an incident occurs. The Executive Committee is the hospital's governing committee, and is responsible for instituting, effecting, and enforcing the hospital's standards of medical care. It reviews all data submitted and then recommends action to the governing board. Such action may include the discipline of staff members, the revocation, limitation, or denial of staff privileges, and the granting or denial of a physician's application to medical staff. See JCAH ACCREDITATION MANUAL, supra note 3, Medical Staff 103-15. See also C. Eisele, THE MEDICAL STAFF IN THE MODERN HOSPITAL (1967) (a complete examination of the form, function, and responsibilities of the medical staff in the modern hospital).

37. The Joint Commission on Accreditation of Hospitals [hereinafter cited as JCAH] is a voluntary organization founded in 1951 by the American College of Surgeons, the American College of Physicians, the American Hospital Ass'n, the American Medical Ass'n, and the Canadian Medical Ass'n. At that time the JCAH assumed the responsibility of administering the "Hospital Standardization Program," which was implemented by the American College of Surgeons in 1918. The goal of the JCAH is to improve the quality of medical care through implementation of standards for medical practice, and ongoing assessment of the care rendered at hospitals.

Today, the JCAH accreditation standards have been adopted expressly and implicitly by many jurisdictions. See, e.g., CAL. HEALTH & SAFETY CODE § 32128, supra note 40; KAN. ADMIN. REG. art. 28-34-1 (1969) (definition of medical staff), art. 28-34-6(a) (1969) (organization of medical staff), and art. 28-34-5 (1969) (hospital's governing authority). In 1965, Congress enacted the Federal Medicare Act (Public Law 89-97), which expressly provided that JCAH standards must be met for participation under the Act. A subsequent amendment deems JCAH accreditation to be prima facie compliance with the Medicare Conditions of Participation for Hospitals, necessary to receive payment under the Act. See 42 U.S.C. § 1395(b)(b)(a)(1)(1982).

This legislative recognition evidences the effectiveness of the JCAH in promoting quality patient care. This effectiveness is underscored by the dramatic increase of JCAH-accredited hospitals in its early years. During the first year of JCAH accreditation, only 12.9 percent of the hospitals surveyed met the commission’s minimum criteria. By 1965, 85 percent of all hospital beds in the United States were accredited by the JCAH. Today, the JCAH standards are the hospital industry norm in patient care. See JCAH ACCREDITATION MANUAL, supra note 3, at Introduction ix-xiii; AMERICAN HOSPITAL ASSOCIATION, HOSPITAL ACCREDITATION REFERENCES, at vii (1961); C. Eisele, supra note 36.
patient care." The manual further provides that in order to be accredited by the commission, the hospital "shall demonstrate that the quality of care provided to all patients is consistently optimal by continually evaluating it through reliable and valid measures. Where the quality of patient care is shown to be less than optimal, improvement in quality shall be demonstrated."

As these requirements indicate, the underlying purpose of the peer review system is to promote an elevated standard of patient care. These committees perform investigations of physicians applying for staff privileges, establish standards and procedures for patient care, audit each surgery performed, and investigate discrepancies between preoperative and postoperative diagnoses. The committees compile records and evaluations and engage in frank discussions about the performance and competence of their peers. Should the committee find a peer to be incompetent, a report and recommendation is made to administrators, who may then take action to revoke, limit, or deny medical staff privileges.

Although proven effective in elevating the standard of medical care, inherent in this system of review is a conflict between the two groups whose interests are at stake. The hospital—and, vicariously, the patient—demands scrupulously candid and honest evaluation of each staff member's competence. This interest is countered in turn by the interests of the staff physicians who demand that their rights are not infringed upon by this review. In today's litigious society, numerous lawsuits have been filed in response to the committees's attempts to promote both interests. Patients, as in the Elam case, have brought actions alleging that the hospital's inadequate review procedures failed to reveal the incompetence of their physician and thus contributed to their injury. Conversely, staff physicians have brought actions charging the committee with slander and libel in their evaluations, or denial of their due process rights in the refusal

38. JCAH ACCREDITATION MANUAL, supra note 3, Medical Staff, Standard IV at 111.
39. Id. at Quality of Professional Services, Standard I, at 27.
40. See supra note 36.
41. JCAH ACCREDITATION MANUAL, supra note 3, Medical Staff, Standard III, Executive Committee, at 108. This subsection defines the review process of the Executive Committee whose duty it is to assess a physician's medical record, discuss and evaluate his competence, and make recommendations of action, if any, concerning that physician's staff privileges. See supra note 36.
42. See supra note 41; see also Comment, Medical Peer Review Protection in the Health Care Industry, 52 TEMPLE L.Q. 552 (1979).
43. See supra note 22. All cases cited therein relate to the hospital's duty to monitor physician competence.
or revocation of staff privileges.\textsuperscript{44}

This constant threat of litigation was a key factor in the medical community's realization that, in order for peer review committees to function effectively, they must be afforded some measure of confidentiality.\textsuperscript{45} Such confidentiality would promote candor and honesty—elements essential to effective peer review—by removing the threat that the confidential discussions could be made public through medical malpractice litigation.\textsuperscript{46} Effective peer review was therefore found essential to both the maintenance of a high quality of patient care, and to the nonliability of the hospital.

C. Confidentiality Under California Evidence Code Section 1157

In 1968, the California Legislature responded to this need for medical staff peer review confidentiality. The Legislature weighed this need against the potential adverse effect such confidentiality would have on plaintiff discovery. In the Legislature's estimation, plaintiff access to records of peer review proceedings had a chilling effect on the proper performance of that review.\textsuperscript{47} The Legislature determined that the public interest in an elevated standard of medical care through medical staff peer review, outweighed the discovery needs of an individual plaintiff who, presumably, had other sources of information with which to support a cause of action.\textsuperscript{48} Accord-

\begin{enumerate}
\item \textit{Id.} Such sources of information include the patient's own medical records, access to the treating physician for deposition and discovery of other past or pending malpractice claims, hospital manuals of policy and procedure, and hospital incident reports. \textit{See Fox, Tactics In Hospital Discovery of Malpractice "Elam" Cases}, CTLA FORUM, May 1983, at 123 (plain-
ingly, the Legislature enacted Evidence Code section 1157, which made the records and the proceedings of the medical staff peer review committee confidential and, with narrow exceptions, immune from discovery.49

Originally, section 1157 was proposed to the Legislature in 1967 by the California Medical Association (CMA) and the California Hospital Association (CHA).50 Although their proposal came long before the Elam court's recognition of hospital corporate liability for staff physicians, the associations were alarmed by the implications of the decision in Kenney v. Superior Court.51 In Kenney, a case involving an action against a staff physician for the negligent attorney discovery tactics); Bower, Discovery of Peer Committee Review Reports In Medical Malpractice, TRIAL LAW. Q., Summ. 1983, at 55 (technical arguments to overcome the prohibitions against discovery of peer review proceedings and records).

49. CAL. EVID. CODE. § 1157 provides:

Neither the proceedings nor the records of organized committees of medical, medical-dental, podiatric, registered dietician, or veterinary staffs in hospitals having the responsibility of evaluation and improvement of the quality of care rendered in the hospital or medical or dental review or dental hygienist review or chiropractic review or podiatric review or registered dietician review or veterinary review committees of local medical, dental, dental hygienist, podiatric, dietetic, veterinary, or chiropractic societies 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 a meeting who is a party to an action or proceeding the subject matter 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 by the carrier in refusing to accept a settlement offer within the policy limits.

The prohibitions contained in this section shall not apply to medical, dental, dental hygienist, podiatric, dietetic, veterinary, or chiropractic society committees that exceed 10 percent of the membership of the society, nor to any such committee if any person serves upon the committee when his or her own conduct or practice is being reviewed.

(The italicized portions indicate changes or additions by amendment since originally enacted).

50. See J. Ludlam, History of Section 1157 of the Evidence Code, Remarks at the Truck Insurance Exchange Seminar on Elam v. College Park Hospital (Apr. 9, 1983) (copy on file in the Santa Clara Law Review Office). Attorney Ludlam is senior counsel to the California Hospital Association (CHA) and has worked closely with the California Medical Association (CMA). He was instrumental in the CHA/CMA proposal and subsequent legislative enactment of § 1157. See Letter from James E. Ludlam to then Governor Ronald Reagan urging that Evidence Code § 1157 be signed into law (July 29, 1968) (copy on file at the Santa Clara Law Review Office).

treatment of a fracture, the plaintiff sought the production of all hospital records of disciplinary proceedings, staff status evaluations, and the names, addresses and class of each doctor participating in such proceedings. Noting that the records had great discovery value, the trial court granted plaintiff's motion. This judgment was upheld on appeal.\(^{52}\)

The *Kenney* decision illustrated the vulnerability of peer review proceedings to plaintiff discovery requests. The medical community recognized that the public disclosure of medical staff peer review proceedings or the use of such proceedings to impune a doctor's competence in malpractice litigation would have a chilling effect on effective peer review.\(^{53}\) In response to this threat, the medical community quickly organized its initial proposal for 1157. As originally introduced, the bill was very simple. It provided blanket immunity from discovery for all records and proceedings of the medical staff peer review committees. The bill further protected all in attendance at such a proceeding from being compelled to testify as to those proceedings in any civil litigation.\(^{54}\) However, the California Trial Lawyers Association (CTLA) objected to these blanket provisions, and after a spate of negotiations, the bill was finally amended to include certain exceptions.\(^{55}\) These exceptions allowed the discovery of statements made by a party in the lawsuit during committee proceedings in which the party's conduct was under review, and the right of discovery in refusal of staff privileges cases.\(^{56}\)

52. *Id.* at 109, 63 Cal. Rptr. at 87.
54. The original proposal of Assembly Bill 1069 was introduced to the assembly by Assemblyman V. Veysey on March 19, 1968. That proposal read: "Neither the proceedings or the records of medical review committees of local medical societies or of medical hospital staffs in hospitals shall be subject to discovery, and no person in attendance at a meeting of such medical review committee may be required to testify as to what transpired thereat." (copy on file at the Santa Clara Law Review Office).
55. *See* J. Ludlam, *supra* note 50 at 4. *See also* letter from Assemblyman Victor V. Veysey to then Governor Ronald Reagan, urging his signature on Assembly Bill 1069. In his letter, Assemblyman Veysey notes the endorsement of section 1157 as amended by the California Trial Lawyers Association (CTLA), and the California Hospital Association (CHA) (August 2, 1968) (copy on file at the Santa Clara Law Review Office). Attorney Ludlam noted in remarks at the seminar, *supra* note 54, that the "CTLA approval of Evidence Code section 1157 (as amended) was a quid pro quo for CHA support of Evidence Code section 1158." Section 1158 provides a right of an authorized plaintiff attorney access to the records of his client.
56. These exclusions from discovery immunity read:

The prohibition relating to discovery or testimony shall not apply to the proceedings or records of such committees or to statements made by any person in attendance at such a meeting who is party to an action or proceeding, the subject matter of which was reviewed at such meeting, or to any person requesting
The provisions of 1157, as finally enacted, did not fully encompass the discovery needs of the plaintiff or the confidentiality needs of the committee. It was, however, a working balance which proved to be adequate in the ensuing years.

III. CONFLICT DEFINED: PEER REVIEW CONFIDENTIALITY V. ELM

A. Relationship Between Elam and Evidence Code Section 1157

The Legislature enacted section 1157's "working compromise" in 1968 with the aid of the CMA, CHA, and CTLA,\(^5\) and it proved to be an effective grant of statutory protection during the first fourteen years of its existence. The provisions of section 1157 were rarely challenged, and in those few cases where they were, the courts readily grasped the statute's underlying intent to render confidential all aspects of the peer review process.\(^6\) The 1982 decision in *Elam v. College Park Hospital*,\(^6\) however, has posed a serious threat to the continued viability of section 1157. *Elam* has revived, with new vigor, the old conflict between the competing needs of medical staff peer review confidentiality and the need for plaintiff discovery of those peer review proceedings.

This conflict, once seemingly settled by the legislative enactment of section 1157, is now renewed as a result of the imposition of liability on a hospital for the negligence of its staff physicians.\(^6\) This new cause of action, as posited by the *Elam* court, is based on the hospital's negligence in the selection or periodic reevaluation of its staff physicians's competence—an assessment made by the medical staff peer review committee.\(^6\) Thus the plaintiff's need to discover

hospital staff privileges.

Assembly Bill 1069, *amended* in assembly June 12, 1968 and June 26, 1968 (copy on file at the Santa Clara Law Review Office). Evidence Code § 1157 was later amended to include discovery exceptions for "any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits." *Compare* statutes cited supra notes 49 and 54.

57. *See supra* notes 50, 51, 55, 56.
60. *See supra* note 23 and accompanying text.
61. *See supra* notes 36-37.
information pertaining to the protected reviews is intensified: the proof of the hospital’s negligence lies within the protected peer review process.

Plaintiff’s intensified need for discovery has engendered a plethora of creative arguments by plaintiff attorneys who all seek one objective: to avoid the discovery immunities of section 1157. The argument in favor of allowing plaintiff discovery of peer review proceedings finds support in open questions posed by the Elam court in its decision. The argument is further augmented by inherent weaknesses in the statutory construction of section 1157 which served as springboards for discovery requests.

Foundations for permitting discovery will be examined below in light of section 1157’s past judicial construction. In addition, the practical effect of plaintiffs’ arguments in recent trial court litigation will be offered to show the seriousness of the threat now posed to the continued confidentiality of peer review.

B. The Judicial Precedent Construing Evidence Code Section 1157

The logical starting point in this examination of Elam’s effect on section 1157, is a review of judicial precedent which has construed that section. Although the cases relating to section 1157’s construction are few, they are uniform in their adherence to the confidentiality provisions within that section. As one trial court judge

62. See, e.g., de Vries, Medical Staff Peer Review Records Should Be Discoverable, CTLA FORUM, October 1982, at 230 (plaintiff attorney arguments for peer review discovery); Bernstein, Access to Physician’s Hospital Records, 45 HOSPITALS: JOURNAL OF AMERICAN HOSP. ASS’N, 148 (SEPT. 1971) (NOTING THE PRO’S AND CON’S OF PHYSICIAN REVIEW RECORD DISCOVERY); SLAWKOWSKI, Do the Courts Understand the Realities of Hospital Practice?, 22 ST. LOUIS U.L.J. 452 (1978) (discussing the practical effect of confidentiality for all peer review proceedings); Fox, supra note 48; Bower, supra note 48.

63. Discussed infra note 73 and accompanying text.

64. Id.

65. Henry Mayo Newhall Mem. Hosp. v. Superior Court, 81 Cal. App. 3d 626, 631-35, 146 Cal. Rptr. 542, 544-47 (1978). Of the five cases which have dealt with Evidence Code § 1157, see supra note 58, four are actions for medical malpractice and one is an action for breach of a hospital’s contract with staff physicians. American Mutual, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561, was the first case to mention § 1157. In that action for medical malpractice, the appellate court issued a writ of mandate to the trial court to vacate its order compelling production of files belonging to a physician’s attorney, basing that decision on either attorney work-product or peer review committee privilege. Matchett, 40 Cal. App. 3d 623, 115 Cal. Rptr. 56, followed American Mutual and was the first case to fully construe § 1157. In that action for medical malpractice, the plaintiff requested discovery of the hospital’s peer review files and certain administrative files. After an in-depth examination of the underlying policy of § 1157 (see infra notes 67-69 and accompanying text), the court denied plaintiff’s request as to
recently stated of Evidence Code section 1157, "[I]t's one of the most heavily protected exclusions we have in the Evidence Code, and [the protections] are for a specific reason. We want to encourage doctors to be frank and open and to kick off incompetent staff members, and that's why it is there." A more articulate, if less candid, explanation of the public policy underlying section 1157 was offered by the court in *Matchett v. Superior Court*, the first California decision of record to actively construe that section. *Matchett* was a mandate proceeding to compel the discovery of a hospital's personnel, staff, and peer review committee files. In denying the writ the court found that:

When medical staff committees bear delegated responsibility for the competence of staff practitioners, the quality of in-hospital medical care depends heavily upon the committee members' frankness in evaluating their associates' medical skills and their objectivity in regulating staff privileges. Although composed of

the discovery of medical review committee proceedings and records, but granted discovery of administrative files subject to *in camera* review to excise protected proceedings. In *Schulz*, 66 Cal. App. 3d 440, 136 Cal. Rptr. 67, the malpractice plaintiff argued that § 1157's language, by stating that the prohibition on discovery shall not apply "to any person requesting hospital staff privileges . . . ," made discoverable all review records of any physician granted staff privileges. After embracing the *Matchett* construction of § 1157, the *Schulz* court found that the plaintiff's construction of § 1157 "would render sterile the immunity provisions of the statute." *Id.* at 445, 136 Cal. Rptr. at 70.

*Roseville Community Hosp.*, 70 Cal. App. 3d 809, 139 Cal. Rptr. 170, involved an action for breach of contract by the pathology group at the hospital. In granting plaintiff's discovery request for minutes and recordings of staff committee meetings, the court applied the *Matchett* construction of § 1157 to encompass the group as "staff" for purposes of the statute. (The group was paid by the hospital directly, in the manner of resident physicians.) As such, the court found the plaintiffs entitled to discovery under the express exception to discovery immunity in cases involving revocation of staff privileges. *County of Kern*, 82 Cal. App. 3d 396, 147 Cal. Rptr. 248, was a medical malpractice case against a county hospital wherein plaintiff requested production of the hospital administrator's files pertaining to the training, progress, and evaluation of the defendant doctor. The appeals court overturned the trial court's blanket production order, holding that the court should first review the files *in camera* and remove any portions containing protected proceedings. Finally, in *Henry Mayo Newhall Mem. Hosp.*, 81 Cal. App. 3d 626, 146 Cal. Rptr. 542, plaintiff had obtained a transcript of staff review meetings from court files in an unrelated mandamus action and thereafter served interrogatories based on information in that transcript. When defendant hospital refused to answer, the plaintiff was granted a motion to compel based on the argument that the hospital had waived any privilege afforded that information when it filed the transcript in the other proceeding. After a review and affirmation of *Matchett*’s construction of § 1157, the court summarily ordered the trial court to vacate its order. The court found that to construe a voluntary filing in an unrelated action as waiver of the privilege would "render hollow the immunity provided" by the statute and subvert the legislative intent. *Id.* at 635, 146 Cal. Rptr. at 547.

volunteer professionals, these committees are affected with a strong element of public interest.

... Section 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgement that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality.

This verbalization of section 1157’s public policy rational has been meticulously followed in each subsequent judicial construction of that section. In following this construction, the California judiciary has consistently recognized that, should the legislative grant of confidentiality to peer review committees be undermined in medical malpractice cases, the result would be to diminish the effectiveness of those committees in promoting an elevated standard of medical care.

C. Elam Questions the Viability of Section 1157

Contrary to this uninterrupted line of judicial construction, the Elam court seemingly did not consider that the evidence most relevant to proving the hospital’s negligence was barred from discovery by Evidence Code section 1157. Indeed, section 1157 was not mentioned in the opinion. Lending credence to this proposition are the questions posed by the court in the final paragraph of its opinion. In that paragraph, the Elam court addressed the issue on appeal: the granting of summary judgment in favor of respondent hospital. Finding that triable issues of fact did indeed exist, the appeals court gave examples of what it saw as viable issues to be decided at trial:

For example, whether Hospital should have conducted an investigation through its peer review committee upon notice of the Bailey case [a prior malpractice action against respondent doctor]? Whether the committee had conducted periodic reviews of [respondent doctor] Schur in a non negligent manner? Assuming a review was made after notice of the Bailey case, was it performed in a non negligent manner? If it had been made in a careful and proper manner, would the committee have recommended revocation or suspension of Schur’s staff privileges? 

68. Id. at 628-29, 115 Cal. Rptr. at 323.
69. See supra note 65 and accompanying text.
70. See Matchett, 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320.
These questions rest on an implicit assumption that the records and proceedings of the peer review committee are available to the plaintiff. This assumption is clearly inconsistent with the intent of the legislature and with judicial precedent.

The effect of this inconsistency has been to spawn a flurry of discovery requests at the trial court level based on the Elam implication that some measure of discovery may be had. Although no California court of record has ruled on this issue to date, the potential threat to the immunities established under section 1157 is manifest.

D. Statutory Flaws Within Evidence Code Section 1157

The existing threat to the viability of section 1157’s protections is augmented by inherent weaknesses in the language of the statute itself. An application of the “plain meaning rule” of statutory analysis reveals that the statute’s grant of confidentiality does not effectively encompass all that the legislature intended.

One such flaw received judicial notice in the Matchett opinion. In a footnote, the court stated as follows:

Section 1157 establishes an immunity from discovery but not an evidentiary privilege in the sense that medical staff records are excluded from evidence. It stands in contrast with Evidence Code section 1156, which expressly subjects to discovery hospital staff studies made for the purpose of reducing morbidity or mortality, but excludes them as evidence.

The technical argument herein is that although the records and proceedings of a staff peer review committee are not discoverable, a subpoena may be issued for the production of those records at trial.

72. The court queries whether the committees had: (1) conducted a periodic review of defendant Schur and (2) whether that review was non-negligent. Id. These questions can only be answered through examination of committee proceedings and records (i.e., the minutes or agenda of the committee’s review). Both are expressly immune from discovery under EVID. CODE § 1157. See supra note 49.

73. See Matchett, 40 Cal. App. 3d at 626, 115 Cal. Rptr. at 320. A construction of CAL. EVID. CODE § 1157 which would allow the discovery needed to answer the Elam court’s questions would be so narrow that it would render the statute impotent. Traditionally, statutes which provide for medical peer review confidentiality have been construed broadly so as to effectuate the intent of the legislature. See, e.g., Franco v. District Court, 641 P.2d 922, 930 (Colo. 1982), wherein the Colorado Supreme Court held that a peer review confidentiality statute, COLO. REV. STAT. § 2-4-212 (1973), “must be construed in order that the true intent and meaning of the general assembly may be fully carried out.”

74. See generally H. JONES, J. KERNOCHAN & A. MURPHY, LEGAL METHOD 388-402 (1980) (a statute should be accorded its plain meaning before resorting to the “legislative intention” approach to aid interpretation).

75. Matchett, 40 Cal. App. 3d at 629 n.3, 115 Cal. Rptr. at 320 n.3.
The non sequitur inherent in this plain-meaning construction is countered, however, by another rule of statutory construction which has been adopted in California: "Where a statute is susceptible of different constructions, one leading to mischief or absurdity and the other consistent with justice and common sense, the latter will be adopted." The absurdity of making a discovery distinction between production before trial and production at trial is clear. The production of information to opposing counsel at anytime is "discovery," a definition which is consistent with common sense.

Another weakness in the statutory language of section 1157 is found in the mandate that "no person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat." A literal construction of this language would find that this prohibition against compelled testimony does not apply to anyone not in attendance at the meeting—even though such a person may have knowledge of otherwise protected committee proceedings and records. On the basis of this inverted logic, depositions of hospital and clerical personnel could be allowed. The problem with such depositions is that administrators and clerks have often, of necessity, been apprised of the protected proceedings. It is the hospital administrator who must make the final decision to limit or revoke staff privileges of a physician, and that is a decision which must be based on the findings and recommendations of the committee.

In analogous situations, requests for discovery of protected information from such secondary sources have been denied. The case of City of San Diego v. Superior Court involved an attempt by plaintiff to depose police officers about prior disciplinary actions recorded in their departmental personnel files. These files were otherwise protected from discovery by sections of the Penal Code. In

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76. Schulz, 66 Cal. App. 3d at 446, 136 Cal. Rptr. at 71 (quoting Outboard Marine Corp. v. Superior Court, 22 Cal. App. 3d 30, 124 Cal. Rptr. 852 (1975)).
77. Discovery in trial practice is defined in part as the "disclosure by defendant of facts, deeds, documents, or other things that are in his exclusive knowledge or possession . . . ." BLACK'S LAW DICTIONARY 419 (5th ed. 1979).
78. CAL. EVID. CODE § 1157 (emphasis added). See supra note 49 for complete text.
79. See JCAH ACCREDITATION MANUAL, supra note 3, at 55. The provided interpretation of Governing Body, Standard IX, states that the governing body must take "full account of the advice and recommendations of the medical staff" in making its decision to grant, deny or terminate hospital medical staff privileges. Id. at 55.
81. CAL. PENAL CODE §§ 832.7, 832.8 (West Supp. 1978). These sections provide a qualified immunity from discovery for information about police disciplinary hearings contained in an officer's personnel file. This information may only be discovered upon a showing of great need and compliance with CAL. EVID. CODE §§ 1043 and 1045 (providing for prior in camera
that situation, the court noted that "There would be no purpose to protecting such information in the personnel records if it could be obtained by the simple expedient of asking the officers for their disciplinary history orally." The same principle has been applied to information sought from a custodian of records. The court in Craig v. Municipal Court refused to allow a defendant, charged with assault and battery upon Highway Patrol officers, to discover the names and addresses of other persons involved in similar actions with the arresting officers. The court summarized the policy against the disclosure of confidential records by stating:

In the case of a record which is compiled without a person's consent, or with his consent because of some legal requirement and where the subject of the record has a right that access to the record be restricted, the relationship between the custodian of the record and the person who is the subject of the record is analogous to that of attorney-client. . . . The custodian has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of the record is entitled to expect that his right will be thus asserted.

As these cases demonstrate, a strong judicial policy exists in California against the indirect discovery of confidential information from sources which are directly immune from discovery. Despite this clear judicial policy, discovery requests based on the technical flaws inherent in section 1157 have been entertained, and at times granted, by California trial courts in recent cases. The following are two such cases which graphically illustrate the current misapplication of Evidence Code section 1157.

E. Practical Effect of the Elam/Section 1157 Conflict at Trial

One such misapplication of section 1157 at trial occurred in Reynoso v. Alexian Brothers Hospital, which was an action for medical malpractice against a staff physician and the hospital which

82. City of San Diego, 136 Cal. App. 3d at 239, 186 Cal. Rptr. at 115. The court further noted "a litigant may not obtain indirectly what is directly privileged and immune from discovery." Id.
84. Id. at 77, 161 Cal. Rptr. at 23.
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granted him staff privileges. In that case, the plaintiff served interrogatories and requests for admissions on the defendant hospital which included, in relevant part, requests for:

a) The date on which any review of [the defendant doctor] was made;
b) The identity of each doctor involved in such review;
c) Whether any attorney was present during said review;
d) A description of writings or recordings regarding what occurred at each review, as well as the author of such writing, without describing the contents;
e) What action, if any, was taken following such review.

In response, the defendant hospital sought a protective order to preclude discovery on these issues pursuant to Evidence Code section 1157. The court granted the protective order only as to provision “c”—whether an attorney was present—basing that single denial on the attorney-client privilege. In issuing the order granting discovery of the remaining information, the trial judge noted that the existing conflict between section 1157 and Elam, but explained that he was “partially granting” the discovery requests in an attempt to strike a balance between the interests of both plaintiff and defendant. As stated by the judge:

This is not an easy line to draw here. 1157 creates particular limitations for us, as you can appreciate, as you have urged; but 1157 does not permit the proceedings, nor the records, neither of which I am really granting. And you say, well, why even grant what I have granted? I wonder about that myself, except that the Elam case seems to be positing an entirely new area of potential liability based on corporate negligence. . . . I'm going to try to give enough discovery so that there can be a realistic case, but also try not to run afoul of the privileges and limitations that are set forth in these cases.

Although one could argue that the discovery granted in each request infringed upon the protections provided by section 1157, the most glaring example of such infringement is found by the

87. Brief, supra note 86, at 3.
88. Id. Note that the requests and interrogatories are phrased so as to not technically ask for privileged material. The information requested, however, could only come from the protected proceedings and records of the committee's review.
89. Brief, supra note 86, at 5.
90. Id. at 3-4.
91. See supra note 88.
court's allowing of discovery of information specified in item (d). The discovery of item (d) is based on a technical argument of the type noted in the preceding section. The request for a "description of writings or records" engendered by the review "without describing the contents" was clearly drafted to avoid the prohibition against discovery of "proceedings and records" contained in section 1157. But as a practical matter, the only sources of the requested information are the protected "proceedings and records" of the peer review committee.

In a case similar to Reynoso, Tyus v. West Covina Hospital, the court again seemingly abandoned the legislative objective of section 1157 in favor of granting plaintiff discovery. Tyus was a medical malpractice action alleging that the defendant hospital was negligent in ensuring the competence of its staff physician. At one point in the pre-trial discovery battle, plaintiff subpoenaed the hospital's medical staff secretary to appear at a deposition and served on the secretary a subpoena duces tecum requesting her to bring with her the minutes and attendance sheets of certain medical staff committee meetings. When the hospital refused to comply, plaintiff sought an order to compel production. The judge examined section 1157 in light of these requests and eventually focused on statutory language which contained what he considered to be an exception applicable to the case at bar: "The prohibitions [against discovery] contained in this section shall not apply to medical . . . society committees that exceed 10 percent of the membership of the society, nor to any such committee if any person serves upon the committee when his own

92. See supra notes 74-76 and accompanying text.
93. It would seem clear, albeit not to the court in this case, that any aspect of "what occurred at each review" would fall under the discovery immunity granted to records and proceedings of the peer review committee. The creative argument presented by plaintiff's attorney is plainly based on an interpretation of section 1157 which is inconsistent with the legislative intent. See Matchett v. Superior Court, 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317, 320 (1974). The defendant hospital took up this decision on appeal, but the case settled out of court before an appellate decision was rendered. Telephone conversation with Burton K. Wines, attorney for appellants (Feb. 8, 1984).
95. Appellant's Opening Brief at 1-2, West Covina Hosp. v. Superior Court, 153 Cal. App. 3d 134, 200 Cal. Rptr. 162 (1984). Originally, the complaint named both the staff physician and the hospital. However, the cause of action against the doctor was settled out of court and West Covina Hospital is the only remaining defendant. Id.
96. Id. at 3.
conduct or practice is being reviewed.” Although the language of section 1157 suggests this exception is applicable only to medical staff society proceedings, the judge reached a different interpretation of the phrase, “nor to any such committee,” and ordered the secretary’s deposition and production of the minutes and attendance records of the hospital peer review proceedings. The judge reasoned that such “limited” discovery would serve to establish a foundation from which his alleged exception could be asserted.

The granting of the discovery requests in Tyus seems to completely disregard the objectives of section 1157. The medical staff secretary, although not technically in attendance at the peer review proceeding as required to invoke the statutory protections, clearly is knowledgeable as to the committee proceedings. As to the minutes themselves, it is incomprehensible that they could be construed as anything other than the “proceedings and records of the . . . medical review committee.” As such, the case is a graphic example of the seriousness of the threat posed to the continued immunities of section 1157.

The probable motive behind the decisions to allow discovery in both Reynoso and Tyus is understandable, albeit misguided. The Elam case created a cause of action for hospital negligence, and in the trial court’s view, the plaintiff is unable to pursue that claim without some discovery of the peer review proceedings. However commendable the motive, the decisions granting discovery where it is barred by statute amount to a usurpation of the legislative function.

Legislative action can counter such misguided judicial legislation. Section 1157 should be amended in a manner which reflects a careful balancing of the competing interests promoted by Elam and the present version of section 1157. The amended provision should

97. Id. at 2-3.
98. Medical societies are distinguished from hospital medical staff within California Evidence Code § 1157. In the first sentence of that section, the legislature clearly differentiated between “medical . . . staffs in hospitals” and “medical . . . review committees of local medical . . . societies.” It is a rule of statutory construction that “a word or clause in a statute is presumed to have the same meaning throughout.” Corey v. Knight, 150 Cal. App. 2d 671, 680, 310 P.2d 673, 679 (1957). Thus, the exception applicable to medical society proceedings should not be applicable to hospital medical staff peer review proceedings, contrary to the holding in Tyus.
99. Brief at 3.
100. Id. at 22-23. The judge stated that this exception “looks to me to be in the disjunctive” and was therefore somehow applicable to medical staff peer review. Id. at 23 n.8. But see infra note 111. This decision was taken on appeal but, to date, no decision has been forthcoming. Telephone conversation with David Jimenez, Attorney for Appellant (Feb. 8, 1984).
101. CAL. EVID. CODE § 1157.
contain allowances for plaintiff's discovery—thus permitting the pursuit of a valid cause of action—and detailed, absolute protections which insure the true confidentiality of peer review activities. Such an amendment would once again render section 1157 a "working compromise" between the interests of peer review confidentiality and plaintiff discovery.

IV. RESOLUTION OF CONFLICT: CONSTRUCTION OF AN EQUITABLE BALANCE OF INTERESTS

A. Compatibility of Elam and Evidence Code Section 1157

To effect a working compromise between Elam and section 1157, the interests that each seeks to promote must first be understood. Initial examination of these competing interests reveals that it is ironic that a conflict exists at all. Elam and section 1157 each represent an attempt by a different branch of the legal system to promote the same general goal—the administration of quality health care in the hospital setting. In Elam, the court's finding that the hospital may be held liable for its staff physician's negligence represents the judiciary's effort, through negative inducement, to encourage "hospitals to actively oversee the competence of their medical staff and the quality of the medical treatment rendered on their premises." In turn, the discovery protections afforded to medical staff peer review committees in section 1157 represent the legislature's effort, through positive inducement, to create an atmosphere of confidentiality wherein constructive professional criticism can occur in fulfillment of the hospital's oversight responsibility. As a federal district court noted in Gillman v. United States, a case involving the same type of conflict, "We are faced with the not uncommon dilemma of both sides being right." The contradictory aspects of Elam and section 1157 cannot be completely eradicated since each serves a slightly different interest. However, a careful analysis of the interests sought to be promoted

102. 132 Cal. App. 3d at 347, 183 Cal. Rptr. at 165.
103. Matchett, 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320; see also supra notes 68-69 and accompanying text.
105. Id. at 318.
106. Elam is plaintiff-oriented and attempts to "provide victims with an additional avenue for relief." Elam, 132 Cal. App. 3d at 347, 183 Cal. Rptr. at 165. Section 1157, however, is patient-oriented and attempts to provide protections which will encourage quality medical peer review and which will in turn enhance the quality of hospital medical care provided.
suggests an equitable balance may be achieved. As a preface to this analysis, it will be helpful to review the basic policy underlying the grant of confidentiality to the peer review proceedings. A succinct articulation of this policy is found in *Bredice v. Doctors Hospital, Inc.*, a seminal decision in the area of peer review discovery:

Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients . . . Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit . . . The value of these discussions . . . would be destroyed if the meetings and the names of those participating were to be opened to the discovery process.

With this policy in mind, an examination of case law in other jurisdictions that has attempted to draw discovery limits encompassing the needs of both committee and plaintiff may be useful. Such examination suggests that equitable discovery distinctions may be made which reflect both interests.

The issue may be stated as follows: what exclusions from a blanket immunity for peer review activity may be made which would facilitate plaintiff's discovery, yet not impair the effectiveness of the peer review activity? In response, the sections below analyze the general types of information sought to be discovered by a medical malpractice plaintiff, and then weigh the potential effect discovery would have on the candor of a peer review committee.

This analysis will differentiate between discovery that adversely affects peer review committee confidentiality, and that which does not. This distinction will help identify types of information that must be absolutely protected if review committee confidentiality is to be maintained. Similarly, various types of information that might be useful to a plaintiff, yet are not essential to committee confidentiality, will be delineated. These areas, as they are defined, will be incorporated by reference into a proposed amendment to Evidence Code section 1157. Thus, a resolution will be achieved which accommodates both the committee's requirement of confidentiality, and a plaintiff's need for discovery.

108. *Id.* at 250.
109. A proposed model Evidence Code § 1157 is appended to this comment [hereinafter cited as "model 1157"].
B. Absolute Privilege for the Proceedings, Records, and Investigations of the Medical Staff Peer Review Committee

The resolution proposed herein is premised on the need for confidentiality in order to effectively assess a peer’s medical competence. This premise makes clear that all facets of the committee’s proceedings and records should be absolutely privileged. This privilege should encompass all minutes, memoranda, notes or other records that relate to the committee’s evaluative or investigative functions and to any basis underlying committee recommendations.

The requirement that all proceedings and records be absolutely privileged goes to the heart of the policy in favor of confidentiality. Such materials would necessarily include the opinions, evaluations, and assessments that form the basis of any effective review. Indeed, the guarantee of confidentiality in relation to peer review activities is an attempt to encourage and promote honest evaluation.110 As the Oregon Supreme Court noted in Straube v. Larson,111 “discussions at such committee meetings, to be of any value, must be frank, even brutal . . . .”112

The necessary brutality inherent in productive peer review would clearly be inhibited by the public release of any committee proceedings. Indeed, as the United States District Court noted in Morse v. Gerity,113 “The danger of inhibiting candid professional peer review exists by the mere potential for disclosure.”114 Such a potential exists in the present section 1157 in that it contains no provision making the records and proceedings or statements of persons in attendance inadmissible at trial.115 This potential for disclosure is magnified by the California trial courts’ recent embrace of plaintiffs’ creative arguments at trial.116 Such potential disclosure may well have a chilling effect on the effective function of the peer review committee.

To counter this threat, the model 1157, in subsection (a), provides that the proceedings and records of a peer review committee and statements of persons in attendance are not “subject to discovery or admissible as evidence in any action or before any administrative

110. See infra note 108 and accompanying text.
111. 287 Or. 357, 600 P.2d 371 (1979).
112. Id. at 363, 600 P.2d at 375.
114. Id. at 472.
115. See supra note 75 and accompanying text.
116. See supra note 95-96 and accompanying text.
body, agency, or person . . . .”\textsuperscript{117} This provision effectively forecloses the argument that such proceedings and records are technically admissible at trial.

A further threat to the frank discussion necessary in peer review proceedings exists in the discovery of confidential committee proceedings from secondary sources. As noted above\textsuperscript{118} a plaintiff may seek discovery of administrative files, memoranda, and statements of persons with knowledge of review proceedings. In many instances, these sources encompass the actual evaluations or investigations made in committee. The fact that these proceedings are found in sources not specifically protected by the discovery immunities should not be construed as a waiver of their privilege. This point was noted in \textit{Franco v. District Court in and for the City and County of Denver},\textsuperscript{119} involving a suit contesting the revocation of staff privileges. Although the plaintiff was given a copy of the minutes of review proceedings—which admittedly were circulated freely among the medical staff—and also discussed the proceedings with committee members, the Colorado Supreme Court ruled that the hospital had not waived its privilege.\textsuperscript{120} The court noted that a waiver of privilege requires “words or actions of intent”—an element the court found lacking.\textsuperscript{121}

Subsection (d) of model 1157 negates the possibility of an implied waiver when privileged information is found in non-privileged locations. That section reads: “Any disclosure of the privileged information described in subsection (a), whether written or oral, without an express intent to waive that privilege, and whether disclosed in an action pursuant to the exceptions expressly provided in subdivisions (a), (b) and (c) of this section, or for any other reason, shall not make unprivileged such information in any other context.”\textsuperscript{122}

In addition to any information engendered \textit{by} the committee, information that is prepared \textit{for} a committee, should also be privileged. Examples of information which might be prepared for a committee include investigative reports authored by the committee or its agents and allegations made by third parties to the committee against a staff physician. Although the provision of immunity for this type of information would hinder a plaintiff’s ability to prove the hospital’s negligent failure to act, that interest is outweighed by the interest in en-

\begin{itemize}
\item \textsuperscript{117} See infra Appendix, model 1157 subsection (a).
\item \textsuperscript{118} See supra notes 94-101 and accompanying text.
\item \textsuperscript{119} 641 P.2d 922 (Colo. 1982).
\item \textsuperscript{120} Id. at 924.
\item \textsuperscript{121} Id. at 931.
\item \textsuperscript{122} See infra Appendix, model 1157 subsection (d).
\end{itemize}
couraging the reporting and investigating of any suspected malpractice. If discovery of information pertaining to these allegations and investigations were allowed, it would have a chilling effect on both of these activities.

Consider the hypothetical situation where a nurse becomes aware of what seems to be the highly irregular, perhaps dangerous, practice of a doctor during surgery. If the reporting of these suspicions were not protected, the nurse might hesitate to say anything unless he or she were absolutely certain that this procedure was wrong. If assured of confidentiality, the nurse could report these suspicions without fear of reprisal by the surgeon, and persons more competent to assess the surgeon's practice could be quickly dispatched to do so.

The same principle applies to the investigation of an allegation or incident. If the details concerning an investigation were not protected from disclosure, investigations might be discouraged, as they obviously tend to draw attention to a possible problem. This tendency was recognized by the court in Gillman v. United States, a case involving an action under the Federal Tort Claims Act by the widow of a mental patient who committed suicide. Upon motion by plaintiff for the discovery of a board of inquiry report about her husband's suicide, the district court noted the government was correct in its assertion that the purposes served by the board "would be thwarted if the proceedings were not accorded the status of confidentiality." The court went on to state:

Neither the witness nor the Board could speak freely if it were believed that the statements could be discovered for use in a lawsuit by a prospective plaintiff. Constructive criticism would be suppressed for fear of the consequences. Indeed, the Government suggests that directors of hospitals might find it more expedient, in such event, to have no official inquiry at all to the

123. This hypothetical situation is suggested by a group of cases consolidated in Katie Cichy v. William Miofsky, M.D., Civ. No. 285139 (Super. Ct. Sacramento County, Cal., Nov. 5, 1979). These cases concerned allegations that the doctor, an anesthesiologist, performed sexual acts on unconscious women patients during surgery. It was alleged that this practice occurred over an extended period of time and was known to, or at least suspected by, other members of the medical staff and nursing personnel.
126. The decedent, a mental patient with known suicidal tendencies, set himself on fire in the courtyard of a federal hospital where he had been committed.
127. Id. at 317-18.
As this argument implies, interest in quality health care is furthered when the reporting and investigating of a potential problem is encouraged by a grant of confidentiality. Indeed, the grant of confidentiality directly furthers the goals of the Legislature in promoting quality health care. The easier it is to report or investigate a suspicious circumstance, the greater the likelihood of discovery of any incompetence.  

To promote this complementary interest, subdivision (a) of the model 1157 protects “investigative actions” for peer review committees. The protected actions should include allegations of incompetence and the reporting or investigating of an alleged act of malpractice. With this protection, the reporting and investigating of medical staff incompetence would be encouraged, resulting in more effective peer review and thus a higher standard of medical care.

C. Exclusions from Discovery Immunity: Procedures, Guidelines, and Purely Factual Information

Unlike the information discussed above, information available from original sources should not be protected because it does not bear on the evaluative function of the committee—for the simple reason that it is created independently of, and usually prior to, any committee action.

Examples of this type of information are hospital-created procedural guidelines for review and hospital standards of medical care. Because these procedures and standards are used in committee, they arguably should fall under the label of protected committee “proceedings.” However, the process by which the review is conducted has little bearing on the encouragement of honest and candid evaluation. It is, in fact, precisely this information which bears directly on whether or not the hospital exercised its duty of reasonable care in overseeing the competence of its staff physicians. Hospital negligence could be shown through the inadequacies or absence of its evaluation procedures. In addition, the facts surrounding the staff physician’s alleged negligence could be compared with the hospital procedures to establish, by circumstantial evidence, that the hospital was negligent.

128. *Id.* at 318.
129. See *supra* note 101 and accompanying text.
130. For example, the standard modus operandi of committee investigation might be considered a committee “agenda,” and thus protected as committee proceedings. Discovery of such a procedural agenda, however, would do little to inhibit candid evaluation of an incident.
in its performance of staff evaluation. An example of this discovery of hospital standards is found in *Kalish v. Mount Sinai Hospital*.  

This was a malpractice case in which plaintiff sought to discover guidelines entitled "Foley Catheter Insertion." The Minnesota Supreme Court found the guidelines "unquestionably relevant" and determined that discovery was not precluded. Although in this case an admissibility question existed, without such a limitation plaintiff could use the guidelines to establish staff incompetence through a comparison of the guidelines with the catheter insertion method used by staff physicians. If the staff's method was negligent yet commonly practiced, the hospital could well be found liable under its duty to monitor the competence of its staff.

Another area that should not be privileged under Evidence Code section 1157 is the purely factual materials that are generated as a result of an untoward incident. These materials must be distinguished from the investigative materials prepared for the hospital review committee, which should be absolutely privileged. These "purely factual" materials would include either those items prepared as a matter of course, such as incident reports, or purely factual accounts or statements concerning the incident at issue. One jurisdiction that has made this distinction is Arizona. *Tucson Medical Center v. Misevch* involved a wrongful death action against a staff anesthesiologist. The Arizona Supreme Court found the demarca-

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131. 270 N.W.2d 783 (Minn. 1978).

132. *See id.* at 784. Plaintiff in this case alleged that during the course of post-operative care, a Foley catheter was misinserted, causing it to break inside his bladder. Additional surgery was required to remove the catheter. Defendant objected to the discovery of catheter insertion guidelines, claiming they were protected under Minnesota medical staff confidentiality statutes. *See Minn. Stat. §§ 145.61 to 145.67 (West Supp. 1971).* The guidelines were prepared by a hospital staff committee consisting of the assistant nursing director and other staff personnel. It was uncontroversial that the guidelines were prepared "to provide a guide showing the norm of health care for the insertion of the catheter." *Id.* at 784-86.

133. *See id.* at 784-85. Minnesota Statute § 145.65 makes such medical guidelines inadmissible, but is silent as to their discovery. Because other statutes in juxtaposition with section 145.61 explicitly make other types of information non-disccoverable, the Minnesota Supreme Court inferred that the guidelines were discoverable under that section. *Id.*

134. *See supra* note 132.

135. *See supra* notes 123-29.

136. 113 Ariz. 34, 545 P.2d 958 (1976).

137. *Id.* at 35, 545 P.2d 959. In *Misevch*, plaintiff alleged that the negligence of Dr. Royal Rudolph in administering anesthesia during surgery caused his wife's death. Plaintiff further alleged Dr. Rudolph was intoxicated and had fallen asleep during surgery. The complaint named the hospital where Rudolph was on staff, Rudolph (and, because the doctor was then deceased, his wife), and the association of anesthesiologists to which Rudolph belonged. Plaintiff filed a motion to compel Tucson Medical Center (TMC) to produce "(1) complaints or incident reports concerning Rudolph at TMC before the [Misevch] surgery; (2) reports and
tion of discovery privilege to be "between purely factual, investigative matters and materials which are the product of reflective deliberation or policy making processes."\textsuperscript{138}

A problem arises in making this distinction, however, if the purely factual information has been incorporated into the committees' proceedings or records. In this situation, the trial judge should be allowed to subpoena the material for in camera review. This review should attempt to isolate any portions that contain purely factual information which should be subject to discovery. This method was mandated by the court in \textit{Walker v. Alton Memorial Hospital Association}.\textsuperscript{139} In this medical malpractice case, the defendant hospital was cited for contempt for refusing to produce court files which were alleged to contain both privileged and non-privileged information.\textsuperscript{140} On appeal, the Illinois Appellate Court affirmed, reasoning that the trial court "must have the opportunity to review the nature of the material" to determine which portions were discoverable and which were not.\textsuperscript{141}

Another solution to the problem of distinguishing between "facts" and "committee proceedings" is concisely articulated in a Minnesota statute relating to the discovery of medical peer review committee proceedings. This statute reads in relevant part: "Information, documents or records \textit{otherwise available from original sources} shall not be immune from discovery or use in any civil action

\begin{itemize}
\item minutes of the medical review committees concerning the surgery; and
\item medical records of other patients of Rudolph at TMC.
\end{itemize}
\textit{Id.} The trial court ordered substantial compliance with the motion and TMC appealed. The supreme court upheld the motion only as to the factual information considered by the medical review committee, and precluded discovery of said committees' minutes and proceedings. \textit{Id.} at 36-37, 545 P.2d at 960-61. The court found the hospital's \textit{knowledge} of Dr. Rudolph's incompetence to be discoverable, but not the peer review process itself. \textit{Id.} at 312, 414 N.E.2d at 852. At trial, the defendant hospital was ordered to produce to the court for in camera review all records requested by plaintiff which it considered privileged. The hospital refused to comply and was cited for contempt of court. On appeal of the order, the Illinois Court of Appeals upheld the contempt citation. The court found that section 2 of the Illinois Medical Practice Act (the Illinois equivalent of Evidence Code § 1157) granted privilege to certain types of evidence but not to others. The court further reasoned that in order to avoid prejudicing either party by summarily granting or denying the requested discovery, the trial court should ascertain if the information alleged to be privileged, in fact warranted protection. The court found that the best method to accomplish this differentiation was through in camera inspection of the documents asserted to be privileged. \textit{Id.} at 312-13, 414 N.E.2d at 852.

\textsuperscript{138} \textit{Id.} Note the further demarcation, as suggested by this comment, that the actual investigation by the committee—as opposed to the hospital or its employees—should be privileged. \textit{See supra} notes 127-29 and accompanying text.

\textsuperscript{139} 91 Ill. App. 3d 310, 414 N.E.2d 850 (1980).

\textsuperscript{140} \textit{Id.} at 312, 414 N.E.2d at 852. At trial, the defendant hospital was ordered to produce to the court for in camera review all records requested by plaintiff which it considered privileged. The hospital refused to comply and was cited for contempt of court. On appeal of the order, the Illinois Court of Appeals upheld the contempt citation. The court found that section 2 of the Illinois Medical Practice Act (the Illinois equivalent of Evidence Code § 1157) granted privilege to certain types of evidence but not to others. The court further reasoned that in order to avoid prejudicing either party by summarily granting or denying the requested discovery, the trial court should ascertain if the information alleged to be privileged, in fact warranted protection. The court found that the best method to accomplish this differentiation was through in camera inspection of the documents asserted to be privileged. \textit{Id.} at 312-13, 414 N.E.2d at 852.

\textsuperscript{141} \textit{Id.} at 312, 414 N.E.2d at 852.
merely because they were presented during the proceedings of a review organization... The "original sources" referred to in the Minnesota statute encompass witness statements, incident reports, and other data which are severable from the proceedings and records of the peer review committee. Allowing plaintiff access to this type of material would permit the plaintiff enough information to state a viable cause of action without impinging on the confidential peer review process.

The types of information discussed in this section are specifically incorporated in model 1157 subdivision (c). This section provides detailed exclusions from the discovery immunities granted under section 1157. Excluded are original sources of information such as incident reports, witness testimony, review procedures, hospital guidelines and bylaws, and the actual committee recommendations concerning the action that should be taken. The section provides that any privileged information included in such original sources does not become unprivileged, and further provides that unprivileged information will not become privileged by the simple "expedient of presenting [it] to a review committee." Resolution of such a conflict is expressly provided for thorough in camera review by the trial court.

These express exceptions embodied in subsection (c) are the cornerstone of the proposed model 1157. By granting the plaintiff enough discovery to pursue his cause of action based on the hospital's negligent selection or retention of incompetent hospital staff physicians, the discovery immunities intended by section 1157 will be guaranteed. The express exceptions will provide the trial court with limits on plaintiff discovery, thus avoiding a judicial undermining of the legislative grant of confidentiality for peer review proceedings. Although the model 1157 does not perfectly accommodate all the needs of the plaintiff or of the peer review committee, it does suggest a workable compromise between their competing interests.

D. Equitable Balance Achieved

The analysis in the preceding section draws a distinction between discovery that inhibits the effective function of a medical peer
review committee and discovery which does not. As discussed, the actions and statements by the committee, in whatever form, must be absolutely protected if the committee is to adequately evaluate the medical competence of the staff physicians. Similarly, the reporting and investigating of untoward incidents needs to be protected if those activities are to be encouraged. Conversely, the hospital review procedures and medical standards do not affect the ability of the committee to evaluate; they merely supply guidelines to the committee enabling it to reach its conclusion. Therefore, those procedures and guidelines should be discoverable. The facts surrounding the incident itself should also be discoverable. Facts can be readily distinguished from committee deliberations because the facts are generated before any committee action and are usually available from sources other than the committee proceedings or records.

By drawing discovery limits at the point where discovery impinges on the evaluative function of the review committee, an equitable balance of interests is achieved. The medical peer review committee is granted absolute confidentiality under which its candid appraisal of a staff physician's competence can occur without threat of its opinions being misused in a different context. In turn, by encouraging honest evaluation, physician incompetence will be more likely discovered and remedied.\textsuperscript{148} It is this action which effectuates the legislative goal of maintaining a high standard of medical care practiced by staff physicians. Allowing a plaintiff to discover information that does not affect the evaluative process of the peer review committee, however, enables that plaintiff to pursue a cause of action against the hospital for its negligent selection or retention of an incompetent physician. This, in turn, promotes the judicial goal articulated in \textit{Elam} of forcing the hospital to "actively oversee" physician competence.\textsuperscript{147}

\section{V. Conclusion}

When confronted with the choice of protecting an individual plaintiff's right to discovery or barring that discovery in order to further the public's interest in quality medical care, the California Legislature chose the latter. The Legislature determined that continuing improvement in medical practices afforded by ongoing peer staff review outweighed the interests of the individual plaintiff in obtaining unencumbered discovery. The result of this determination was incor-

147. See \textit{Elam}, 132 Cal. App. 3d at 347, 183 Cal. Rptr. at 165.}
This legislative judgment is currently threatened by judicial attempts to give effect to the California Court of Appeal’s decision in Elam v. College Park Hospital. The theory of negligence posited in Elam, however, creates a cause of action whose proof, in the main, is barred by the discovery restrictions embodied in Evidence Code section 1157. Recently, in their zeal to apply this new theory of negligence, California trial courts have allowed discovery through judicial construction of section 1157 which mocks the section’s legislative intent.

To stem this tide of well-meaning but incorrect judicial legislation, the legislature should amend section 1157 to more fairly balance the needs of both the plaintiff and the peer review committee. The suggested model 1157 retains basic protections for peer review committee proceedings, but also grants plaintiffs a degree of needed discovery. By incorporating these suggestions into the Evidence Code, the countervailing interests will be served and the current confusion and judicial undermining of section 1157 in the trial courts will be forestalled. Without such action, the contemplated protections of section 1157 will soon be no more than a good intention.

Geoffrey J. Wright
Proposal for Amendment of Evidence Code Section 1157: Proceedings, records, and investigative actions of medical, medical-dental or veterinary staff review committees; local medical, dental, dental hygienist, veterinary, or chiropractic society review committees.

(a) In any civil action neither the proceedings and records of, nor the investigative actions for, medical, medical-dental or veterinary staffs in hospitals having the responsibility of evaluation and improvement of the quality of medical care rendered in the hospital or medical or dental review or dental hygienist review or chiropractic review or veterinary review committees of local medical, dental, dental hygienist, veterinary, or chiropractic societies shall be subject to discovery or admissible as evidence in any action or before any administrative body, agency, or person regardless of the source from which it was obtained. 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, nor shall the statement of any such person in attendance, which pertain to what transpired thereat, be admissible as evidence in any action or in any administrative proceeding, regardless of whether the statement was made in or out of committee, and regardless of the source from which the statement was obtained. The prohibitions relating to discovery, testimony, or admissibility shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at the meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

(b) The prohibitions contained in subdivision (a) of this section shall not apply to medical, dental, dental-hygienist, veterinary or chiropractic society committees that exceed ten percent of the membership of the society, nor to any such committee if any person serves upon the committee when his own conduct or practice is being reviewed.

(c) Except as hereinafter provided, the prohibitions relating to discovery, testimony, or admissibility contained in subsection (a) shall not apply to information available from the original sources hereinafter described: written documents created independently of any committee proceeding or investigation and which do not contain information concerning or derivative of any proceedings and records
of or investigatory actions for such committee; the testimony of any
person as to the purely factual information surrounding the inci-
dent which caused the institution of such proceedings and which
that person acquired independent of any such committee proceeding
or investigation; the review procedures used by the committee or the
hospital guidelines and bylaws pertaining to the standards of medi-
cal care to be practiced within the hospital; or any document or
statement which discloses the final disposition of the proceedings or
investigation including the action, or lack thereof, to revoke, limit,
or deny staff privileges, and which does not disclose the committee's
considered basis for that action. The sources cited herein shall not
be made immune from discovery or use in any civil proceeding by
the mere expedient of presenting them to a review committee; and,
should such privilege be claimed as to these original sources, the
material claimed to be privileged shall be made available for “in
camera” review by the court to determine if (1) the sources are in-
corporated into privileged material and, (2) if any non-privileged
material, as herein defined, can logically be severed from that
which is privileged without adversely affecting the prohibitions con-
tained in subdivision (a) of this section.
(d) Any disclosure of the privilege information described in subsec-
tion (a), whether written or oral, without an express intent to waive
that privilege, and whether disclosed in an action pursuant to the
exceptions expressly provided in subdivisions (a), (b) or (c) of this
section or for any other reason shall not make unprivileged such
privileged information in any other context.
(e) This section shall not be construed as modifying, limiting, or
abrogating the duties of a hospital under existing law as expressed
in Elam v. College Park Hospital, 132 Cal. App. 3d 332, 183 Cal.
Rptr. 156, modified, 133 Cal. App. 3d 94a (1982).