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COMMENT

The Medical Review Committee Privilege: A Jurisdictional Survey

I. INTRODUCTION

Prompted by the need for open, candid evaluation of hospital procedures, nearly all hospitals in the United States have established a medical peer review system as a part of their operation. Many of these committees operate under state mandate¹ or are required by federal law as a prerequisite to receiving funding for certain programs.² In addition the Joint Commission on Accreditation of Hospitals requires as a condition of accreditation that hospitals maintain a system of medical review evaluation of hospital operations.³

The problem faced by hospitals and other health care providers is that physicians are frequently reluctant to participate in peer review evaluations for fear of exposure to liability, entanglement in malpractice litigation, loss of referrals from other doctors, and a variety of other reasons.⁴ To combat this reluctance and to enhance the improvement of medical care services, at least forty-six states now have statutes that protect the work of medical review committees.⁵ While

1. See, e.g., FLA. STAT. ANN. § 395.011 (West 1986 & Supp. 1988); MICH. STAT. ANN. § 14.15(21513) (Callaghan 1988); NEB. REV. STAT. § 71-2046 (1986); see also IIB HOSPITAL LAW MANUAL (Medical Staff) ¶ 1-2, at 7-9 (1987) (discussing regulations that require hospitals to perform reviews).

2. See, e.g., 42 U.S.C. §§ 1395x(e), 1395(k) (1982); see also IIB HOSPITAL LAW MANUAL, *supra* note 1, ¶ 1-3, at 9-10 (discussing federal regulations requiring peer review).

3. JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, JCAH ACCREDITATION MANUAL, Standards MS.1, MS.6 (1987) [hereinafter ACCREDITATION MANUAL]. The standards require: There is a single organized medical staff that has overall responsibility for the quality of the professional services provided by individuals with clinical privileges, as well as the responsibility of accounting therefore to the governing body. There is a mechanism to assure that all individuals with clinical privileges provide services within the scope of individual privileges granted.

Id. at MS.1. "As part of the hospital's quality assurance program, the medical staff strives to assure the provision of quality patient care through the monitoring and evaluation of the quality and appropriateness of patient care." *Id.* at MS.6.

4. Hall, *Hospital Committee Proceedings and Reports: Their Legal Status*, 1 AM. J.L. & MED. 245, 254 (1975). As Hall explains:

A physician's qualifications, competence, and ethics all are called into question when a medical staff committee is requested to review his application for staff privileges, to determine the extent of his clinical privileges, or to assess the quality of his work. The nature of these activities suggests that committee participants may lose professional friends, as well as referrals, from physicians who receive unfavorable reviews. In addition, the committee members, and the hospital as well, may be exposed to costly litigation alleging defamation, the most common claim arising from committee activities.

Id.

5. See *Sanderson v. Frank S. Bryan, M.D.*, 361 Pa. Super. 491, 495 n.3, 522 A.2d 1138, 1140 n.3 (1987) (listing the states and statutes that recognize a medical review privilege), *appeal denied*, 517 Pa. 624, 538 A.2d 877 (1988); IIA HOSPITAL LAW MANUAL (Medical Records) 78-106 (1986) (listing state statutes dealing with discovery and admissibility of medical records, and giving a summary of each).

these state laws protect committees under varying names, such as "peer review" or "medical review," and the laws differ in scope, the purpose of the statutes is generally twofold: (1) to afford immunity from liability for committee members participating in good faith in the peer review process; and (2) to protect the "proceedings of a medical review committee, the records and materials it produces and the materials it considers" from discovery or introduction as evidence at trial.⁶ These protections, which are exceptions to the general rules of free and open discovery in civil actions and liberal disclosure of evidence at trial, represent an effort by the legislatures and the courts to balance the needs of plaintiffs in a civil action against the needs of health care facilities in order to improve health care through careful review of standardized health care operations and of the performance by doctors and staff.

This Comment discusses the peer review committee privilege that protects the testimony, proceedings, and work product of review committees from discovery in civil actions, as established by different states. The Comment also discusses the immunity from liability offered to review committee members, but only in the limited context necessary to examine the evidentiary and discovery privilege. While the issues of immunity from liability and the discovery privilege are actually two separate issues, this Comment will argue that the two issues are so closely related and often intertwined as to make completely separate treatment improper and likely to cause confusion. For example, the "good faith" requirement contained in many of the medical review statutes provides an otherwise unavailable cause of action to a doctor alleging defamation arising during a review committee meeting, but the discovery privilege may effectively bar the doctor's claim.⁷ Because immunity from liability and the discovery privilege are so closely related, they are discussed together in the context of the individual plaintiff's cause of action.

Section II of this Comment discusses the scope of the peer review privilege and examines several state statutes and cases. This section describes what persons, types of committees, and materials may claim the peer review privilege.

Section III discusses common law protections for such documents and proceedings. While this may seem at first to be a merely academic effort given that nearly all states now have statutes outlining the privilege for their jurisdiction, such an examination is important because it influences some courts' treatment of the privilege when applying the statute.

Section IV examines the privilege in cases in which a doctor sues the hospital alleging either defamation committed by a member of a peer review committee, illegal discrimination by a hospital, or a conspiracy to prevent her from practicing at the hospital in violation of federal antitrust laws or state unfair trade practices statutes.⁸ Subsection IV(A) discusses cases arising under federal

6. N.C. GEN. STAT. § 131E-95 (1986).

7. For a discussion of the impact of the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§ 11101-11152 (West Supp. 1988), see *infra* notes 124-33 and accompanying text.

8. For a brief discussion of the impact of the Health Care Quality Improvement Act of 1986 on these types of actions, see *infra* notes 124-33 and accompanying text.

law such as federal antitrust actions or civil rights violations. Subsection IV(B) discusses cases in which the doctor alleges defamation or unfair trade practice under state law.⁹ This Comment points out that while cases under federal and state law present similar factual questions in such lawsuits, the protection afforded medical review committee records may differ greatly.

Section V discusses suits by patients against doctors and hospitals alleging medical malpractice. Subsection V(A) discusses how the statutory privilege is and should be applied in suits by medical malpractice plaintiffs against doctors alone. In these cases the hospital is not made a party to the lawsuit but becomes involved as custodian of certain records sought by the plaintiff, or because hospital officials, employees, or committee members have been subpoenaed to testify. Subsection V(B) discusses the peer review privilege in cases in which the hospital is sued under a respondeat superior or corporate negligence theory of liability. This section concludes that while plaintiffs have a greater need of access to medical review records in the latter type of case, the arguments in favor of disclosure of medical review records in both types of medical malpractice cases are weak, as state courts and legislatures generally recognize.

Section VI looks briefly at the complicated issues surrounding the protection afforded various reports and documents that make up the broader area of risk management, but which do not strictly speaking constitute part of the peer review process. While this topic is somewhat collateral to the main subject of the Comment, discovery of hospital risk management records, particularly incident reports, is a subject of increasing litigation. While such records may or may not be included as part of the peer review committee process in a particular hospital, they are an important part of the hospital's system for improving the quality of, and reducing the cost of health care. Because of their importance to both medical malpractice plaintiffs and to the hospitals that depend on the records, state courts and legislatures must constantly balance the conflicting needs of both parties in much the same manner as they do for the records of the medical peer review committees. The purpose of this section, however, is not to give an extensive overview of the issues and answers surrounding such protections as attorney work product or attorney-client privilege, but to present arguments as indicated by the case law of several jurisdictions surrounding discoverability and protection of such documents.

The last section of this Comment summarizes the discussions and conclusions drawn from the proceeding sections. In addition this section suggests principles for trial and appellate court application of the peer review privilege and legislative options for states seeking to establish such a privilege or improve on an existing statute.

The Comment concludes that once a state has made the policy decision to afford privileged status for certain hospital records, the legislature and the courts should not undermine the policy objectives by circumventing or weakening the privileged status with exceptions not mandated by constitutional considerations

9. For a brief discussion of the impact of the Health Care Quality Improvement Act of 1986 on these types of actions, see *infra* notes 125-26 and accompanying text.

or the long-run interests of justice. Nothing is worse than a half-hearted privilege; it becomes a game of semantics that leaves parties twisting in the wind while lawyers determine its scope. When this happens the public becomes frustrated by a seeming lack of justice and the political considerations supporting the privilege crumble. This Comment argues that the better approach is either not to recognize a privilege at all and thereby permit free and open access by parties to all the information sought, or to recognize not just the literal words codifying the privilege, but the full policy considerations as well and to allow the privilege to embrace all communications that further those policy considerations.

The appendix to this Comment reviews cases articulating the North Carolina medical review privilege, codified at North Carolina General Statutes section 131E-95. While the case law on this statute is scarce, the appendix compares the privilege as applied by North Carolina's appellate courts with the application of similar statutes in other jurisdictions.

II. THE SCOPE OF THE PRIVILEGE

A typical medical review privilege statute may read something like this:

Proceedings and records of all review committees described in [a related section] shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care professional or institution arising out of matters which are the subject of evaluation and review by such committee. No person within attendance at a meeting of such committee shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any finding, recommendation, evaluation, opinion, or other action of such committee or member thereof. Information, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were presented during proceedings of such committee nor should any person testifying before such committee or who is any member of such committee be prevented from testifying as to matters within his knowledge, but the witness cannot be asked about his testimony before such committee or opinion formed by him as a result of such committee hearing.¹⁰

While the language, and hence the scope, of the statutes varies from state to state, most share several common threads.

First, the statute defines a medical review committee. The statute may enumerate the specific hospital committees falling within the scope of the privilege,¹¹ or it may list a few general types and include a catchall phrase intended

10. This example was taken from OHIO REV. CODE ANN. § 2305.251 (Anderson 1981), a typical peer review statute.

11. *E.g.*, ME. REV. STAT. ANN. tit. 32, § 3296 (1988) (mandatory medical staff review committees and hospital review committees); MONT. CODE ANN. §§ 50-16-201, 50-16-203, 50-16-205 (1987) (tissue committees and committees that assist in the training, supervision, or discipline of

to permit the hospital to expand the list or create various medical review committees as needed.¹² While the names may vary and the functions overlap, the statute usually includes some or all of the review committees recommended by the Joint Commission on Accreditation of Hospitals.¹³ These committees usually include various departmental committees responsible for reviewing the quality of health care service in each particular department and are composed of doctors, nurses, and hospital staff personnel working within the department.¹⁴ In addition, most hospitals will have specialized committees responsible for performing particular functions.¹⁵ For example, a credentials committee has responsibility for screening doctors' applications for hospital privileges and for recommending to the executive committee, after investigation and review of performance, when privileges should be revoked.¹⁶

In some jurisdictions the privilege statute may simply refer to "an organized committee" within the hospital having the "responsibility of evaluation and improvement of the quality of care rendered in the hospital."¹⁷ In such instances, courts generally hold that any hospital committee performing such a function falls within the protection of the statute.¹⁸

health care professionals); N.J. STAT. ANN. § 2A:84A-22.8 (West Supp. 1988) ("utilization review committees").

12. ALASKA STAT. §§ 18.23.030, 18.23.070 (1986) (quality assurance, morbidity and mortality, cost control, and similar committees); COLO. REV. STAT. § 12-43.5-102 (1985 & Supp. 1986) ("peer review committees or other committees that perform similar review services"); N.Y. EDUC. LAW § 6527 (McKinney Supp. 1988) (utilization review, quality control, and similar committees).

13. See generally ACCREDITATION MANUAL, *supra* note 3, at MS.6, 6.1-6.1.7.2 (describing the functions of various medical review committees on a departmental basis); Hall, *supra* note 4, at 247-50 (using ACCREDITATION MANUAL as a framework for a "suggested organizational structure" for medical review).

14. Hall, *supra* note 4, at 247-48. Hall indicates that hospitals follow the GUIDELINES FOR THE FORMULATION OF MEDICAL STAFF BYLAWS, RULES AND REGULATIONS—1971 in setting up departmental committees. For example, each department may "establish a *medical care evaluation committee* having the responsibility of reviewing the patient care provided therein . . . [and fostering] continuing education and improvement of patient care" through ongoing departmental case presentations. Hall, *supra* note 4, at 247-48. In addition, some of the more specialized committees, such as a tissue committee, might exist within a department. Hall, *supra* note 4, at 248.

15. These committees may include, but are not limited to:

- (1) credentials committee—responsible for recommending the extension or revocation of hospital privileges to a particular physician as well as performing periodic evaluations of the performances of current staff members;
- (2) medical records committee—responsible for maintaining and managing the hospital's medical records, including patient records;
- (3) utilization review committee—which helps establish the hospital's policy on length of stays, admissions, discharges, and overall use of hospital facilities;
- (4) executive committee—responsible for "overseeing the medical staff's responsibility to the governing board for the quality of medical care rendered to patients within the institution."

Hall, *supra* note 4, at 248-49; see generally ACCREDITATION MANUAL, *supra* note 3, at MS.6, 6.1-6.1.7.2 (describing the recommended structure and function of each committee).

16. See Hall, *supra* note 4, at 248-49.

17. E.g., CAL. EVID. CODE § 1157 (West Supp. 1988).

18. See *Matchett v. Superior Court*, 40 Cal. App. 3d 623, 115 Cal. Rptr. 317 (1974). In *Matchett* the California Court of Appeals refused to apply the privilege statute to records of hospital administration, but held the records of the hospital's credentials, tissue, records, and executive committees were protected because each had responsibility for evaluation and improvement and the

Most state statutes protect all documents resulting directly from the proceedings of committee meetings such as "records and materials it produces,"¹⁹ and the courts seem to have little difficulty determining what these documents are.²⁰ However, when a statute also protects "[a]ll proceedings, records and materials prepared in connection with the reviews"²¹ or "[a]ny information, data, reports, or records *made available* to a utilization review committee of the hospital,"²² the courts have more difficulty. In general, most of the statutes provide that documents are not protected just because they are in the possession of a medical review committee; that is, a hospital may not hide otherwise discoverable information by sending it to a review committee.²³ Treatment varies, however, regarding documents produced indirectly as a result of activities involving or performed at the direction of a medical review committee.

For example, in *Tucson Medical Center, Inc. v. Misevch*²⁴ the Arizona Supreme Court determined that information merely considered by a medical review committee, as opposed to records produced by the committee itself, were not protected.²⁵ On the other hand, in *Palmer v. City of Rome*²⁶ a New York trial court ruled that a pathological report later used to review the work of a pathologist was protected, despite plaintiff's claims that the report was not designed for evaluation purposes and was not created by a formal committee of the hospital. Under the New York medical committee review statute, the privilege extends to "any individual who participated in the preparation of incident reports" as required by New York law or to a "committee established to admin-

quality of care rendered in the hospital. *Id.* at 628-32, 115 Cal. Rptr. at 319-22; *see also* Dade County Medical Ass'n v. Hlis, 372 So. 2d 117, 119 (Fla. Dist. Ct. App. 1979) (holding reports of the hospital's ethics committee protected, even though it would not do so under a literal interpretation of the statute); Poulcott v. Surgical Assocs. of Warner Robins, P.C., 179 Ga. App. 138, 140, 345 S.E.2d 639, 641 (1986) (surgical conference was within the statutory definition of medical review committee, even though "there was no set membership in this committee other than the chairperson and the committee functioned as an initial, rather than determinative, step in the hospital's peer-review process"); *Palmer v. City of Rome*, 120 Misc. 2d 558, 560, 466 N.Y.S.2d 238, 240 (Sup. Ct. 1983) (statute does not require formation of a formal committee); ILL. ANN. STAT. ch. 110, para. 8-2101 (Smith-Hurd 1984 & Supp. 1988) (all records used "in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care are privileged"). *But see* *Hollowell v. Jove*, 247 Ga. 678, 683, 279 S.E.2d 430, 434 (1981) (Georgia Supreme Court certified questions to the United States Court of Appeals for the Fifth Circuit and held that the statute did not cover information generated or maintained by entities other than "medical review committees" as defined in GA. CODE ANN. § 31-7-140 (1985)).

19. N.C. GEN. STAT. § 131E-95(b) (1986).

20. *See, e.g.*, *Shelton v. Morehead Memorial Hosp.*, 318 N.C. 76, 83, 347 S.E.2d 824, 829 (1986) (holding the records of hospital review committees protected).

21. ARIZ. REV. STAT. ANN. § 36-445.01 (Supp. 1986).

22. COLO. REV. STAT. § 13-21-110(1) (1973 & Supp. 1986) (emphasis added).

23. *E.g.*, ARK. STAT. ANN. § 82-3204 (1976) ("information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such action merely because they were presented during the [committee] proceedings"); FLA. STAT. ANN. § 768.40 (West 1986) (material "otherwise available from original sources are not to be construed immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee"); N.C. GEN. STAT. § 131E-95(b) (1986) ("information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee").

24. 113 Ariz. 34, 545 P.2d 958 (1976).

25. *Id.* at 36-37, 545 P.2d at 960-61.

26. 120 Misc. 2d 558, 559-60, 466 N.Y.S.2d 238, 239-40 (Sup. Ct. 1983).

ister a utilization review plan, or a committee having the responsibility of evaluation and improvement of the quality of care rendered."²⁷ The Florida courts seem to afford the statute the most liberal interpretation and have held in several cases that documents not strictly within the language of the statute were nevertheless protected by " 'the overwhelming public interest in maintaining the confidentiality' of such records." ²⁸

Of particular interest to certain types of plaintiffs are the reports of hospital credentials committees, which review physician qualifications and performance and determine whether hospital privileges should be denied or revoked.²⁹ Since many of the privilege statutes do not specify whether the privilege covers a credentials committee report, courts must determine if the committee functions as a medical peer review committee as provided by the state's statute. For example, the Missouri privilege statute protects "proceedings, findings, deliberations, reports, and minutes of peer review committees."³⁰ In *State ex rel. Faith v. Enright*³¹ the Missouri Supreme Court determined that although a credentials committee is a peer review committee, its findings and deliberations were not protected unless they specifically concerned patient health care. In contrast to this position, a Delaware court determined that the Delaware statute, which covers "records and proceedings of hospital and nursing home quality review committees," protected records of committees that consider staff privileges.³²

Committee members, especially physicians, understandably may be reluctant to participate in frank and open discussion about co-workers or other physicians.³³ The major purpose behind the medical review privilege is to permit the committees to work in a confidential setting in which individual members may engage in a "[c]andid and conscientious evaluation of clinical practices within the institution."³⁴ Because of this concern for open and candid evaluations,

27. N.Y. EDUC. LAW § 6527 (McKinney Supp. 1988); see also *Sakosko v. Memorial Hosp.*, 167 Ill. App. 3d 842, 522 N.E.2d 273, 276 (1988) (pathology reports of tests performed to determine source of plaintiff's infection and consultation report authored by physician who was an expert in infection control were initiated and used by hospital's environmental services committee for internal quality control, medical study, and to improve patient care, and were therefore privileged under the Illinois statute).

28. *HCA of Florida, Inc. v. Cooper*, 475 So. 2d 719, 720 (Fla. Ct. App. 1985) (per curiam) (quoting *Dade County Medical Ass'n v. Hlis*, 372 So. 2d 117, 121 (Fla. Dist. Ct. App. 1979)); see also *Segal v. Roberts*, 380 So. 2d 1049, 1051 (Fla. Dist. Ct. App. 1979) (although the records did not fall within the statute's definition, "many of the matters sought here are not subject to discovery as a matter of public policy"), *cert. denied*, 388 So. 2d 1117 (Fla. 1980).

29. See discussion of suits by patients against hospitals, *infra* notes 184-241 and accompanying text, and suits by doctors against hospitals, *infra* notes 90-183 and accompanying text.

30. MO. ANN. STAT. § 537.035(4) (Vernon 1988).

31. 706 S.W.2d 852 (Mo. 1986) (en banc).

32. *Robinson v. LeRoy*, No. 84-121 (D. Del. Nov. 16, 1984) (WESTLAW, 1984 WL 14129); see also *Burnett v. Vakili*, 685 F. Supp. 430, 431 (D. Del. 1988) (in diversity action, federal court found Delaware statute protected "employment applications, employment records, resumes and C.V.'s of any resident who attended" the plaintiff).

33. Physicians, for example, may be fearful of losing referrals from other physicians, becoming involved in a malpractice action as an involuntary expert witness, or in many cases, may have a realistic fear of being sued themselves for action taken or opinions stated in the committee proceeding. See *supra* note 4. For a discussion of the impact of the Health Care Quality Improvement Act of 1986, see *infra* notes 124-33.

34. *Hall, supra*, note 4, at 246; see *Bredice v. Doctors Hosp.*, 50 F.R.D. 249 (D.D.C. 1970)

most medical review committee statutes offer committee members several protections.

First, committee members are not subject to subpoena for discovery or testimony at trial concerning the committee proceedings.³⁵ This privilege normally extends to committee members, persons called upon to testify at the meeting, and any other person in attendance.³⁶ Members with knowledge gained outside the committee process may still be deposed or called upon to testify, but may not be questioned about what took place at a committee meeting.³⁷

Whether a committee member may voluntarily testify about what transpired at a meeting may depend on the statute. In *West Covina Hospital v. Superior Court*,³⁸ for example, the California Supreme Court held that the language of the California statute, that "no person in attendance at a meeting of any of those committees shall be required to testify,"³⁹ did not preclude a committee member from voluntarily testifying. This may be the exception, however, since many of the other statutes provide that persons in attendance shall not be permitted or required to testify.⁴⁰ In addition, because the policy behind the privilege is to promote candid and open discussion among all those present, the privilege should belong to all participants. Permitting one member to waive the privilege and testify regarding the proceedings runs counter to the intended result, because this would leave other committee members without protection.⁴¹

(discussing the "overwhelming public interest" in preserving the confidentiality of committee records), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

35. *E.g.*, GA. CODE ANN. § 31-7-133 (1985) ("no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings"); N.Y. EDUC. LAW § 6527 (McKinney Supp. 1988) (same).

36. *E.g.*, GA. CODE ANN. § 31-7-133 (1985); N.Y. EDUC. LAW § 6527 (McKinney Supp. 1988). This stands in sharp contrast to more personal types of privileges, such as the attorney-client privilege, where the presence of a third party may be deemed to destroy the communication's privileged status; such privileges are not usually destroyed by the presence of a third person who is an agent of one of the parties to the privileged communication. *See, e.g.*, *State v. Van Landingham*, 283 N.C. 589, 602, 197 S.E.2d 539, 547 (1973) (confidentiality destroyed if the communication is "made in the presence of a third person, not the agent of either party" (citing 97 C.J.S. *Witnesses* § 290 (1957)); *Taylor v. Taylor*, 179 Ga. 691, 177 S.E. 582 (1934) (clerk employed by an attorney incompetent to testify about confidential matters communicated in his or her presence); *see also* *State v. West*, 317 N.C. 219, 223, 345 S.E.2d 186, 189 (1986) (clergy-communicant privilege destroyed by presence of minister's wife during confession).

37. *See, e.g.*, *Eubanks v. Ferrier*, 245 Ga. 763, 267 S.E.2d 230 (1980) (plaintiff's attorney should have been allowed to question a doctor on the medical review committee who had previously treated plaintiff's husband concerning his treatment of the husband, and the attorney should have been able to call medical review committee members as expert witnesses and ask them hypothetical questions based on facts obtained from nonprivileged sources).

38. 41 Cal. 3d 846, 718 P.2d 119, 226 Cal. Rptr. 132 (1986).

39. CAL. EVID. CODE § 1157(b) (West Supp. 1988) (emphasis added).

40. *E.g.*, FLA. STAT. ANN. § 768.40 (West 1986); GA. CODE ANN. § 31-7-133 (1985). *But see* N.Y. EDUC. LAW § 6527 (McKinney Supp. 1988) (not required to testify); N.C. GEN. STAT. § 131E-95 (1986) (not required to testify, and separate provision stating that such person "cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings").

41. An interesting case on a related point is *Gadd v. News-Press Publishing Co.*, 412 So. 2d 894 (Fla. Dist. Ct. App. 1982). *Gadd* involved a writ of mandamus petition brought by a newspaper seeking inspection of certain personnel or personal files and records of a public hospital. The debate centered on whether the records were protected under the Florida medical review privilege statute which provided:

Second, committee members who participate in the medical review process are immune from liability "on account of any act, statement or proceeding undertaken, made, or performed within the scope of the functions of the committee."⁴² This immunity is subject to exception when committee members act with malice or fraud,⁴³ and several courts have held that committee members may be sued for defamation or other actions not deemed to be in good faith as part of the peer review proceeding.⁴⁴ In addition, at least one federal court has determined that neither the immunity nor the privilege from discovery apply in federal antitrust actions.⁴⁵

Some of the privilege statutes provide exceptions for statements made during committee proceedings if the speaker is "a party to an action or proceeding the subject matter of which was reviewed at such meeting."⁴⁶ Thus, in several New York cases, courts held statements made by party defendants during com-

The investigations, proceedings, and records of a committee as described in the preceding subsections shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such committee

FLA. STAT. ANN. § 768.40(4) (West 1979) (emphasis added).

After acknowledging that previous cases held the privilege extended to personnel committee files on a "public policy" basis, the court stated, "Those cases dealt with personal injury, malpractice or defamation actions specifically covered by section 768.40(4), and we reject their application to a case arising under the Public Records Act." *Gadd*, 412 So. 2d at 896.

The *Gadd* court would deny a party in a suit against the hospital access to such records if the suit arose out of matters considered in the materials sought, but would make the records available to newspapers and members of the general public. The apparent reasoning of the court is that doctors participating in review committee activities only need protection from persons who may file suits against them for actions taken by the committee, but need no such protection from the general public.

The problem with this reasoning is that it subjects the committee work to public scrutiny, while denying plaintiffs in medical malpractice actions access to records that could help them prove their case. Fortunately, such thinking is not contagious. Another Florida District Court of Appeals, indicated it might reject such an argument, *City of Williston v. Roadlander*, 425 So. 2d 1175 (Fla. Dist. Ct. App. 1983), and the Florida Supreme Court rejected the *Gadd* court's reasoning outright in a later case. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984) (holding that the privilege was not limited to malpractice actions against health providers based on malpractice). In addition, the Ohio Court of Appeals rejected a similar argument that the Ohio privilege statute, OHIO REV. CODE ANN. § 2305.251 (Anderson 1981), which contained similar language, was restricted to cases involving medical malpractice. *Atkins v. Walker*, 3 Ohio App. 3d 427, 430, 445 N.E.2d 1132, 1136 (1981). *But see Daily Gazette Co. v. West Virginia Bd. of Medicine*, 352 S.E.2d 66 (W. Va. 1986) (to the extent that any hospital peer review information is brought before Board of Medical Examiners, public is entitled to such information after probable cause to substantiate charges of disciplinary disqualification is found); *Baxter County Newspapers v. Medical Staff of Baxter Gen. Hosp.*, 273 Ark. 511, 622 S.W.2d 495 (1981) (because state's Freedom of Information Act did not exempt medical review committee proceedings, newspaper could not be denied access).

42. N.C. GEN. STAT. § 131E-95(a) (1986).

43. *E.g.*, FLA. STAT. ANN. § 768.40(2) (West 1986) (committee member must act without malice or fraud); N.C. GEN. STAT. § 131E-95 (1986). For a brief discussion on the immunities afforded committee participants under the Health Care Quality Improvement Act of 1986, see *infra* notes 123-32 and accompanying text.

44. See *infra* notes 90-183 and accompanying text.

45. *Memorial Hosp. v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981) ("The public interest in private enforcement of federal antitrust law in this context is simply too strong to permit the exclusion of relevant and possibly crucial evidence by application of the Hospital's privilege."). For a brief discussion of the immunities afforded committee participants under the Health Care Quality Improvement Act of 1986, see *infra* notes 124-33 and accompanying text.

46. *E.g.*, N.Y. EDUC. LAW § 6527 (McKinney Supp. 1988). *Contra* N.C. GEN. STAT. § 131E-95 (1986) (no exception for party to action).

mittee meetings were subject to discovery, but the courts refused to permit discovery of full transcripts of proceedings.⁴⁷ Of course, in such cases the corporate hospital is not considered a "party" within the meaning of the exception.⁴⁸

When and how the medical review privilege can be waived is also the subject of several court opinions. In a case before a New York Court of Claims the court held the privilege waived by the director of a psychiatry inpatient unit when the director referred to protected committee reports during a deposition.⁴⁹ In a more recent case the Georgia Court of Appeals held that "privilege" status, if it existed to protect the reports in question, was waived when an article in the *Atlanta Journal/Constitution* quoted material from a committee deliberation and decision.⁵⁰ The Georgia Supreme Court later reversed the court of appeals, holding that the newspaper report of peer review information did not alter the "privilege" status of the reports.⁵¹

Not every court finds the review privilege so easily waived. In *Sakosko v. Memorial Hospital*⁵² the Illinois Court of Appeals held that under Illinois medical review privilege, any disclosure "whether proper or improper, shall not waive or have any effect upon the confidentiality, nondiscoverability or nonadmissibility of that information."⁵³ In *Atkins v. Walker*⁵⁴ the Ohio Court of Appeals held that a letter written by a member of the hospital credentials committee to the hospital's chief of staff concerning plaintiff's hospital privileges remained privileged even after plaintiff was given a copy of the letter. Accordingly, plaintiff could neither introduce the letter at trial on his libel suit, nor testify as to the contents of the letter.⁵⁵ In *Burvett v. Vakili*⁵⁶ a federal district court applying the Delaware privilege declined to hold that a medical center had waived its claim to the privilege by failing to support its claim "with an affidavit listing and describing each document and the basis of privilege for each."⁵⁷ In an earlier case the court had held that such failure amounted to a waiver of attorney-client privilege or protection of attorney work product.⁵⁸

47. *E.g.*, *Carroll's Estate v. St. Luke's Hosp.*, 91 A.D.2d 674, 457 N.Y.S.2d 128 (1982); *Lenard v. New York Univ. Medical Center*, 83 A.D.2d 860, 442 N.Y.S.2d 30 (1981).

48. *Lenard*, 83 A.D.2d at 861, 442 N.Y.S.2d at 31 (1981) ("to expose the statements of all members to discovery whenever the hospital itself is named as a party would inhibit the free and open discussion at these meetings which the Legislature sought to encourage by enacting the statute"); *Silva v. State*, 109 Misc. 2d 809, 810, 441 N.Y.S.2d 43, 47 (N.Y. Ct. Cl. 1981) (word "party" does not include incorporeal entity).

49. *Slotnik v. State*, 129 Misc. 2d 553, 493 N.Y.S.2d 731 (N.Y. Ct. Cl. 1985).

50. *Emory Univ. v. Houston*, 185 Ga. App. 289, 364 S.E.2d 70 (1987), *rev'd sub nom.* *Emory Clinic v. Houston*, 258 Ga. 434, 369 S.E.2d 913 (1988). The hospital involved was Emory Hospital, which is affiliated with the Emory University School of Medicine, and the article attributed its source to "Emory officials."

51. *Emory Clinic v. Houston*, 258 Ga. 434, 369 S.E.2d 913, 914 (1988) (source of such information is irrelevant).

52. 167 Ill. App. 3d 842, 522 N.E.2d 273 (1988).

53. *Id.* at 853, 522 N.E.2d at 275.

54. 3 Ohio App. 3d 427, 445 N.E.2d 1132 (1981).

55. *Id.* at 432, 445 N.E.2d at 1136.

56. 685 F. Supp. 430 (D. Del. 1988).

57. *Id.* at 432.

58. *See Coastal Corp. v. Duncan*, 86 F.R.D. 514, 520-21 (D. Del. 1980).

In two states the peer review statute permits the trial court to waive the privilege under certain circumstances. The Virginia statute exempting review records from discovery, for example, may be waived upon court order after a hearing and showing "of good cause arising from extraordinary circumstances."⁵⁹ The Nebraska statute contains a similar provision.⁶⁰

III. COMMON LAW PROTECTION FOR MEDICAL REVIEW RECORDS

Whether medical review records were afforded any privilege at common law is at best uncertain. The most frequently cited case dealing with common law protection of hospital medical review records is *Bredice v. Doctors Hospital*,⁶¹ a federal district court opinion from the District of Columbia. In *Bredice* plaintiff in a medical malpractice action sought discovery of documents in the possession of defendant hospital, including "[r]eports, statements, or memoranda, including reports to the malpractice carrier, reduced to writing, [and] pertaining to the deceased or his treatment no matter when or to whom or by whom made."⁶² Plaintiff also sought reports or minutes of any board or committee concerning the death of Frank Bredice. The district court found that the minutes and reports sought by plaintiff were records of medical staff reviews of committees formed pursuant to the requirements of the Joint Commission on Accreditation of Hospitals. The court then held the reports and minutes were privileged:

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. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. 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.⁶³

Based on what it termed "sound public policy," the court concluded that since "good cause" for discovery of the reports had not been shown, they were not discoverable.

The impact of *Bredice* was seriously curtailed by a later federal district court case, *Gillman v. United States*.⁶⁴ In *Gillman* plaintiff brought an action under the Federal Tort Claims Act after her husband committed suicide by setting himself afire while a patient at a federally owned mental hospital. Plaintiff sought discovery of the report of a Board of Inquiry investigating the incident, the report of director of the hospital after receiving the report from the Board of

59. VA. CODE ANN. § 8.01-581.17 (1984).

60. NEB. REV. STAT. §§ 71-2046, 71-2048 (1986).

61. 50 F.R.D. 249 (D.D.C. 1970), *aff'd mem.*, 479 F.2d 920 (D.C. Cir. 1973).

62. *Id.* at 249-50.

63. *Id.* at 250.

64. 53 F.R.D. 316 (S.D.N.Y. 1971).

Inquiry, and statements obtained by the Board of Inquiry from various named personnel at the hospital. The court, citing *Bredice*, held that the report of the Board of Inquiry and of the director were not discoverable.⁶⁵ However, the court distinguished between statements and reports that dealt with treatment of the deceased patient, and those that dealt with suggestions for future action.⁶⁶ Finding that the common-law protection in *Bredice* applied only to the latter—although nothing in *Bredice* so indicated—the court held that the former were discoverable.⁶⁷

Numerous subsequent opinions have cited *Bredice* and *Gillman* with mixed results. In many of these cases, courts have struggled with whether their jurisdiction recognizes a common-law privilege for medical review records in the absence of a statute or whether certain records should be protected on public policy grounds even though the records involved do not seem to fall within the literal definition of the existing statute. For example, in *Dade County Medical Association v. Hlis*⁶⁸ a Florida Court of Appeals, citing *Bredice*, held records of a hospital ethics committee protected based on “public interest.”⁶⁹ On the other side, the Wisconsin Supreme Court in *Shibilski v. St. Joseph's Hospital*⁷⁰ specifically refused to apply the privilege set forth in *Bredice*.⁷¹

In another frequently cited opinion, *Nazareth Literary and Benevolent Institution v. Stephenson*,⁷² the Kentucky Court of Appeals rejected *Bredice* and refused to recognize a judicial exception to discovery, stating such an exception would only hinder the court in its search for truth.⁷³ In *Davidson v. Light*⁷⁴ a federal district court in Colorado refused protection for an “Infection Control Report” prepared by the hospital’s Infection Control Committee, because it found the report was “concerned primarily with the problem of a single patient, relate[d] to current patient care, and [was] generated because of a specific incident or occurrence rather than a general desire for discussion or improvement.”⁷⁵ These factors, the *Davidson* court held, distinguished the case from *Bredice*.⁷⁶

In other cases, courts have refused to recognize a common-law privilege or refused to extend the statutory privilege beyond the wording of the statute on public policy grounds. In *St te ex rel. Chandra v. Sprinkle*⁷⁷ defendant hospital refused to turn over reports of an Ad Hoc Committee established to investigate the death of an infant at the hospital. The committee had been set up at the

65. *Id.* at 318.

66. *Id.* at 319.

67. *Id.*

68. 372 So. 2d 117 (Fla. Dist. Ct. App. 1979).

69. *Id.* at 121.

70. 83 Wis. 2d 459, 266 N.W.2d 264 (1978).

71. *Id.* at 467, 266 N.W.2d at 268.

72. 503 S.W.2d 177 (Ky. 1973).

73. *Id.* at 179.

74. 79 F.R.D. 137 (D. Colo. 1978).

75. *Id.* at 140.

76. *Id.* at 139.

77. 678 S.W.2d 804 (Mo. 1984) (en banc).

request of the child's father, an internist with staff privileges at the hospital, to examine the child's death from alleged improper care at the hospital's emergency room. Finding the Missouri medical review committee statute⁷⁸ protected committee members only from liability, the Missouri Supreme Court refused to recognize a privilege from discovery under the "clear language of the statute" and rejected the hospital's public policy argument.⁷⁹ In *Kenney v. Superior Court*⁸⁰ the California Court of Appeals determined that any bar to discovery of medical review records could be overcome by plaintiff demonstrating a need for the documents. This position was altered by the court in a later decision, *Matchett v. Superior Court*,⁸¹ decided after the California legislature passed a peer review protection statute.⁸²

Arguments based on public policy and the need for open and candid evaluation of medical practices have been put forth by parties in numerous cases in which no medical review statute protected the communications. While the *Bredice* position has found some support,⁸³ the majority of state courts reject such common-law privilege.⁸⁴ While the point may seem moot given that nearly every state has enacted a statute protecting medical review committee records, the issue of common law protection is important for two reasons. First, under the Federal Rules of Evidence, federal courts sitting in nondiversity cases look to federal common law of privilege to decide whether communications are privileged.⁸⁵ Thus, in cases arising under federal law, such as claims alleging anti-trust or civil rights violations, federal courts must determine whether medical review documents have traditionally been afforded a privileged status by other federal courts.⁸⁶

Second, many state courts cling to the archaic principle of strictly constru-

78. MO. REV. STAT. § 537.035 (1978) (current version at MO. REV. STAT. § 537.035 (1986)).

79. *Sprinkle*, 678 S.W.2d at 807.

80. 255 Cal. App. 2d 106, 63 Cal. Rptr. 84 (1967).

81. 40 Cal. App. 3d 623, 115 Cal. Rptr. 317 (1974).

82. See CAL. EVID. CODE § 1157 (West Supp. 1988) (discussing reports and records of review committees).

83. See, e.g., *Mewborn v. Heckler*, 101 F.R.D. 691 (D.D.C. 1984) (memorandum opinion by federal magistrate refusing to compel discovery of Medical Utilization Review Committee, citing *Bredice*). Another interesting case, discussed in more detail at *infra* notes 290-97 and accompanying text, is *Cameron v. New Hanover Memorial Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982). In *Cameron* the North Carolina Court of Appeals determined the peer review privilege was "grounded in the common law," which protected certain hospital records even prior to the passage of the medical review committee statute. *Id.* at 437, 293 S.E.2d at 915. This position may have been altered somewhat by the North Carolina Supreme Court in *Shelton v. Morehead Memorial Hosp.*, 318 N.C. 76, 347 S.E.2d 824 (1986), which determined that whatever common-law privilege had existed was codified in the statute.

84. See, e.g., *Coburn v. Seda*, 101 Wash. 2d 270, 276, 677 P.2d 173, 177 (1984) (en banc) (finding the Washington peer review statute in derogation of the common law and should be strictly construed); *Davison v. St. Paul Fire & Marine Ins. Co.*, 75 Wisc. 2d 190, 199, 248 N.W.2d 433, 438 (1977) (refusing to recognize a common-law privilege and strictly construing the privilege statute on that basis).

85. FED. R. EVID. 501; see *infra* note 138 for the text of Rule 501.

86. See *infra* notes 137-53 and accompanying text.

ing statutes they deem contrary to the common law.⁸⁷ Thus, a court that finds the medical review privilege firmly rooted in public policy of the common law may be more likely to give the statute a broad interpretation and include documents, committees, and persons that do not fall within the literal meaning of the statute.⁸⁸ On the other hand, courts viewing the privilege as contrary to common law or as a narrow exception to the rules allowing liberal discovery by parties, may give the privilege a narrow construction and protect only those committees and documents spelled out in the language of the statute.⁸⁹ The better rule for courts to follow, as the remainder of this Comment argues, is to examine the underlying policy the legislature endorsed by creating the privilege, and to protect any communications if such protection will further the intended goals of that policy.

IV. FEDERAL AND STATE CLAIMS BY DOCTORS AND OTHER HEALTH CARE PROFESSIONALS AGAINST HOSPITALS AND MEDICAL REVIEW COMMITTEE MEMBERS

A. *Federal Claims by Doctors Against Hospitals Alleging Antitrust Violations or Illegal Discrimination*

Frequently doctors⁹⁰ or other health care professionals⁹¹ who have been denied privileges to practice at a particular hospital bring private suits against

87. See, e.g., *Coburn*, 101 Wash. 2d at 276, 677 P.2d at 177; *Davison*, 75 Wisc. 2d at 197, 248 N.W.2d at 438 (strictly construing the Wisconsin statute as contrary to the common law).

As one commentator noted:

The force and potency of statutes in contemporary judicial processes are formidable. To interpret statutes in derogation of the common law is a notion now obsolete. The modern view regards them as embodying statements of public policy articulated by the most authoritative policy-determining organ of the State. Accordingly, proper judicial construction of a statute requires recognition and implementation of the underlying legislative purpose, a sensitive process which must accommodate society's claims and demands reflected in that purpose.

R. ALDISERT, *THE JUDICIAL PROCESS* 170 (1976).

88. See, e.g., *Dade County Medical Ass'n v. Hlis*, 372 So. 2d 117, 121 (Fla. Dist. Ct. App. 1979) (holding that records of the hospital's ethics committee did not fall directly within the medical review committee statute, but that they were protected by "overwhelming public interest in maintaining the confidentiality" of such records" (quoting *Tuscon Medical Center v. Misevch*, 113 Ariz. 34, 38, 545 P.2d 958, 962 (1976)); *Cameron v. New Hanover Memorial Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901 (applying the privilege to documents created prior to the passage of the statute), *cert. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982).

89. See, e.g., *Hollowell v. Jove*, 247 Ga. 678, 680, 279 S.E.2d 430, 433 (1981) (stating the privilege did not have retroactive effect and did not apply to committees not defined in the statute); *Davison*, 75 Wisc. 2d at 197, 248 N.W.2d at 438 (refusing to recognize a common-law privilege and strictly construing the privilege statute on that basis).

90. See, e.g., *Patrick v. Burget*, 108 S. Ct. 1658 (1988) (physician alleging interference by private medical partnership); *Tambone v. Memorial Hosp.*, 825 F.2d 1132 (7th Cir. 1987) (physician denied staff privileges); *Quinn v. Kent Gen. Hosp.*, 617 F. Supp. 1226 (D. Del. 1985) (hospital refused physician a position on active medical staff); *Robinson v. Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979) (surgeon denied staff privileges).

91. See, e.g., *Bhan v. NME Hosp.*, 772 F.2d 1467 (9th Cir. 1985) (nurse-anesthetist); *Wilks v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983) (chiropractors), *cert. denied*, 467 U.S. 1210 (1984); *Kaczanowski v. Medical Center Hosp.*, 612 F. Supp. 688 (D. Vt. 1985) (podiatrists); see also Note, *Denying Hospital Privileges to Non-Physicians: Does Quality of Care Justify a Potential Restraint of Trade?*, 19 IND. L. REV. 1219 (1986) (discussing antitrust actions by nonphysician health care professionals).

the hospital alleging unfair treatment in violation of federal law. In some cases, doctors attempt to show that members of a hospital medical review committee, usually a credentials committee, conspired to prevent them from practicing in a particular hospital or community in violation of federal antitrust laws. In other cases, the plaintiffs allege they were the victims of illegal acts of discrimination by the hospital.

In both types of cases, the hospital's system for reviewing the qualifications of a particular health care professional comes under intense scrutiny. Often, individual members of a credentials or other review committee are named as individual defendants in the lawsuit.

In a recent United States Supreme Court decision, *Patrick v. Burget*,⁹² a unanimous Court⁹³ decided that medical peer review committees operating under the Oregon medical review statute were not immune from antitrust liability under sections 1 and 2 of the Sherman Act.⁹⁴ The decision settled differences in federal court treatment of medical review activities under federal antitrust law,⁹⁵ and, as one commentator put it, struck a "temporary blow" to medical peer activity in general.⁹⁶

Plaintiff in *Patrick* was a general and vascular surgeon who sued members of an Astoria, Oregon medical clinic. Plaintiff filed the complaint after resigning his hospital privileges at Astoria's only hospital and following a recommendation by a committee of the state Board of Medical Examiners that his privileges be terminated. The committee was chaired by one of the defendants. Plaintiff alleged that defendants had "initiated and participated in . . . peer-review proceedings to reduce competition from petitioner rather than to improve patient care."⁹⁷ Following a jury verdict of \$650,000, which was trebled by the trial court, defendants appealed.

At issue in *Patrick* was the so called "state action" defenses announced by the Supreme Court in *Parker v. Brown*.⁹⁸ In *Parker* the Court determined that activity by the California Director of Agriculture in restricting competition among raisin producers did not violate the Sherman Act. The *Parker* Court held that the Sherman Act did not "restrain state action or official action directed by a state."⁹⁹ Later, the Court expanded the *Parker* doctrine to include certain suits against private individuals.¹⁰⁰

In *Patrick* the Court pointed out that its earlier decisions, in particular *Cal-*

92. 108 S. Ct. 1658 (1988).

93. The actual vote was 8-0, with Justice Blackmun not participating.

94. *Patrick*, 108 S. Ct. at 1663; see 15 U.S.C. §§ 1-2 (1982).

95. Compare *Marrese v. Interqual, Inc.*, 748 F.2d 373 (7th Cir. 1984) (finding members of a medical review committee immune from antitrust liability), *cert. denied*, 472 U.S. 1027 (1985), with *Posner v. Lankenau Hosp.*, 645 F. Supp. 1102 (E.D. Pa. 1986) (hospital and medical staff not immune from antitrust liability).

96. O'Brian, *Full immunity for peer review suffers a blow*, Am. Med. News, May 27, 1988, at 1, col. 2.

97. *Patrick*, 108 S. Ct. at 1661.

98. 317 U.S. 341 (1943).

99. *Id.* at 351.

100. See *Southern Motor Carriers Rate Conference, Inc., v. United States*, 471 U.S. 48 (1985).

ifornia Retail Liquor Dealers Association v. Midcal Aluminum,¹⁰¹ had established a "two-prong test to determine whether anticompetitive conduct engaged in by private parties" was shielded from the antitrust laws.¹⁰² "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy. Second, the anticompetitive conduct must be actively supervised by the State itself."¹⁰³ The Court then held that the Oregon review scheme failed the second prong because it did not "establish a state program of active supervision over peer-review decisions."¹⁰⁴

Defendants in *Patrick* argued, among other things, that because the hospital privilege termination procedure was subject to judicial review by the state courts, there existed sufficient state supervision to satisfy the second prong in the *Midcal* test.¹⁰⁵ The Court refused to address whether judicial review of physician termination proceedings alone was sufficient supervision to constitute state action under *Midcal*. The Court expressed doubts about whether any meaningful judicial review actually existed under the Oregon scheme and stated simply that if such review existed in Oregon at all, it fell "far short of satisfying the active supervision requirement."¹⁰⁶

Prior to the Supreme Court's decision in *Patrick*, at least two circuit courts had determined that other state medical review schemes were actively supervised by the state under the *Midcal* test. In *Marrese v. Interqual, Inc.*¹⁰⁷ the United States Court of Appeals for the Seventh Circuit found the Indiana statutory scheme met the *Midcal* test by having a "clearly articulated and affirmatively expressed . . . state policy,"¹⁰⁸ and by actively supervising the peer review process.¹⁰⁹ In a later case, however, the Seventh Circuit rejected the "state ac-

101. 445 U.S. 97 (1980).

102. *Patrick*, 108 S. Ct. at 1662.

103. *Id.* at 1662-63 (citations omitted).

104. *Id.* at 1664. The Court noted:

[The Oregon] statutory scheme does not establish a state program of active supervision over peer-review decisions. The Health Division's statutory authority over peer review relates only to a hospital's procedures; that authority does not encompass the actual decisions made by hospital peer-review committees. The restraint challenged in this case (and in most cases of its kind) consists not in the procedures used to terminate hospital privileges, but in the termination of privileges itself. The State does not actively supervise this restraint unless a state official has and exercises ultimate authority over private privilege determinations.

Id. (footnote omitted).

105. *Id.*

106. *Id.* at 1664-65. For a discussion of judicial review of termination proceedings by medical staff committees, see *Barrows v. Northwestern Memorial Hosp.*, 123 Ill. 2d 49, 525 N.E.2d 50 (1988). Since the *Patrick* case, the United States Court of Appeals for the Eleventh Circuit has determined that the Florida peer review scheme, which does involve judicial review, meets the *Parker* state action test. *Bolt v. Halifax Hosp. Medical Center*, 57 U.S.L.W. 2101 (11th Cir. Aug. 23, 1988) (No. 84-3256); see *infra* notes 114-15 and accompanying text.

107. 748 F.2d 373 (7th Cir. 1984).

108. *Id.* at 388. Indiana possessed a comprehensive statutory scheme providing for a state-supervised system of medical peer review. IND. CODE § 34-4-12.6 (1982); see also *Ezpeleta v. Sisters of Mercy Health Corp.*, 800 F.2d 119, 122 (7th Cir. 1986) (*per curiam*) (noting that after *Marrese*, antitrust actions against hospitals regarding staff privileges under the medical peer review process were prohibited under the state action doctrine and might be deemed frivolous and subject attorneys to Rule 11 sanctions).

109. *Marrese*, 748 F.2d at 390. Indiana's "active supervision" included reviewing the confiden-

tion" defense as it applied to the Illinois medical review procedure because the Illinois Department of Public Health was not obliged to inspect peer review materials and because there was no other inspection of peer review materials by state inspectors.¹¹⁰

In the court of appeals opinion in *Patrick*,¹¹¹ the United States Court of Appeals for the Ninth Circuit had determined that the Oregon statutory scheme met the *Midcal* test because the state's scheme showed a clear intent to "replace competition with regulation in the relevant market."¹¹² Contrary to the Supreme Court's findings, the Ninth Circuit found the review process was supervised by the state and that its decisions were judicially reviewable.¹¹³

In a recent case from the United States Court of Appeals for the Eleventh Circuit, *Bolt v. Halifax Hospital Medical Center*,¹¹⁴ the court determined that the Florida peer review scheme met the *Parker* state action doctrine requirements. The court determined that the active supervision requirement was met by judicial review in the Florida courts. The court stated:

Although agency review and judicial review differ in some respects, these differences do not detract from our conclusion that judicial review may constitute active state supervision for purposes of the state action exemption. That judicial review may be provided without express legislative authorization does not make that review any less a form of regulation by the state. It is sufficient if the legislature clearly articulates a policy and then acquiesces in the court's implementation of that policy. Further, that judicial review is not automatic in the sense that it must be triggered by the affirmative act of an aggrieved party does not make the state's supervision any less effective

Of course judicial review cannot constitute active state supervision unless it is available on an established basis and is of a sufficiently probing nature. To be sufficiently probing, the scope of judicial review must first of all encompass the fairness of the procedures used in reaching the decision. Furthermore, it must involve consideration of whether criteria used by the decision makers were consistent with the state policy and whether the decision had a sufficient basis in fact.¹¹⁵

Federal District courts outside the Seventh and Ninth Circuits appear less willing to apply the state action doctrine to antitrust suits involving medical review committees. In *Posner v. Lankenau*¹¹⁶ the Federal District Court for the Eastern District of Pennsylvania declined to follow the Seventh Circuit's *Mar-*

tial records of medical peer review committees, regulating the licensing of physicians and hospitals within the state, promulgating standards of proper hospital care, and enforcing the rules of competent medical practice within the state. *Id.*

110. *Tambone v. Memorial Hosp.*, 825 F.2d 1132, 1134-35 (7th Cir. 1987).

111. 800 F.2d 1498 (9th Cir. 1986).

112. *Id.* at 1505.

113. *Id.* at 1506. Oregon's supervision of the medical peer review process consisted of the Board of Medical Examiners, a state agency whose activity the court of appeals found equivalent to state supervision. *Id.*

114. 57 U.S.L.W. 2101 (11th Cir. Aug. 23, 1988) (No. 84-3256).

115. *Id.*

116. 645 F. Supp. 1102 (E.D. Pa. 1986).

rese approach, finding that the Pennsylvania scheme was not intended to replace competition with regulation and therefore did not meet the first prong of the *Midcal* test.¹¹⁷ In *Quinn v. Kent General Hospital*¹¹⁸ the court stated that whether the antitrust liability would frustrate the policy of peer review was irrelevant "since the relevant inquiry is not whether the exemption would foster the purpose of the statute, but whether the restriction of competition is a necessary consequence of engaging in the activity promoted by the statute."¹¹⁹

As the *Quinn* case indicates, even a state that adequately supervises its medical peer review process so as to meet the heavy requirements of the *Patrick* decision¹²⁰ may still be unable to overcome the first prong of the state action test: "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.'"¹²¹ Again, the lower federal courts have been divided on this point and the Supreme Court declined to take up the issue in *Patrick*.¹²²

The Supreme Court also pointed out in *Patrick* that Congress has not been idle in determining the extent of any antitrust protection for medical review committees.¹²³ In 1986 Congress passed the Health Care Quality Improvement Act,¹²⁴ which exempts members of medical review committee actions commenced on or after November 14, 1986, from any liability under federal or state law¹²⁵ if certain requirements are met.¹²⁶ In particular, the Act requires hospi-

117. *Id.* at 1117-18.

118. 617 F. Supp. 1226 (D. Del. 1985).

119. *Id.* at 1239 n.10.

120. *See supra* note 103.

121. *Patrick*, 108 S. Ct. at 1663 (quoting *Midcal*, 455 U.S. at 105).

122. *Id.* ("[W]e need not consider the 'clear articulation' prong of the *Midcal* test, because the 'active supervision' requirement is not satisfied.")

123. *Id.* at 1665-67 n.8.

124. Pub. L. 99-660, 100 Stat. 3743, 3784 (codified at 42 U.S.C.A. §§ 11101-11152 (West Supp. 1988)).

125. The Act is primarily aimed at federal antitrust claims brought by physicians against committee members, *id.* § 11101(4), but also provides immunity for damages actions "under any law of the United States or of any State (or political subdivision thereof)." *Id.* § 11111(a)(1). The Act exempts from its protection actions brought under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000f, the Civil Rights Acts, 42 U.S.C. §§ 1981-1996, and actions brought by the Attorney General under the Clayton Act, 15 U.S.C. § 15C. *See* 42 U.S.C.A. § 11111(a)(1) (West 1988).

The immunity from damages actions brought under state law does not take effect until October 14, 1989, *id.* § 11111(c)(1), but state legislatures may opt in before that date, *id.* § 11111(c)(2)(A), or opt out altogether. *Id.* § 11111(c)(2)(B).

126. In addition to the requirements that notice and hearing be provided persons who are the subjects of adverse professional review committee action, *id.* § 11112(b), and the requirements that all committee activities be reported to the Secretary of Health and Human Resources, *id.* §§ 11111(b), 11131-11137, the Act requires that medical review committees conduct activities according to certain guidelines. Namely, for the protection to apply,

a professional review action must be taken—

- (1) in the reasonable belief that the action was in the furtherance of quality health care,
- (2) after a reasonable effort to obtain the facts of the matter,
- (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
- (4) in the reasonable belief that the action was warranted by the facts known

tals to employ certain minimal procedural safeguards as part of the review process and to report a summary of their actions to the state's Board of Medical Examiners, which in turn must report this information to the Secretary of Health and Human Services.¹²⁷

The Act provides only incomplete relief to physicians engaged in the peer review process. First, the Act is not retroactive and therefore does not apply to cases like *Patrick* in which the events complained of took place prior to its effective date.¹²⁸ Second, the Act, like many of the state privilege statutes, does not protect committee members who act in bad faith or with a motive other than the promotion of health care.¹²⁹ This limited protection has many doctors concerned that a plaintiff, like the physician in *Patrick*, need only allege some type of impermissible motive behind committee action in order to entangle doctors in antitrust litigation despite the Act's protection.¹³⁰ Third, the Act applies only to actions brought by "physicians" as defined in the Act,¹³¹ and does not apply to actions brought by "nurses, other licensed health care practitioners, or other

after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 1111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

Id. § 11112(a).

In addition, the Act limits the protection to committee actions based on the professional conduct of a physician and provides:

[A]n action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on—

(A) the physician's association, or lack of association, with a professional society or association,

(B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,

(C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,

(D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or

(E) any other matter that does not relate to the competence or professional conduct of a physician.

Id. § 11151(9).

In effect, the Act provides its own requirements of "good faith" or "without malice or economic advantage intent" as a prerequisite to the protection. A plaintiff such as the one in *Patrick*, who can allege the committee members acted for reasons other than those permitted by the statute, can break through the Act's immunity and present a claim. However, if a committee member in a suit can prove the above standards were met, the trial court must award "to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith." *Id.* § 11113.

127. *Id.* §§ 11111(b), 11131-11137.

128. *Patrick*, 108 S. Ct. at 1665 n.8; *Tambone v. Memorial Hosp.*, 825 F.2d 1132, 1135 n.2 (7th Cir. 1987).

129. *See supra* note 126.

130. Meyer, *Protection now lies in new law*, *Am. Med. News*, May 27, 1988, at 1, 9, 12.

131. "The term 'physician' means a doctor of medicine or osteopathy or a doctor of dental surgery or medical dentistry legally authorized to practice medicine and surgery or dentistry by a State (or any individual who, without authority holds himself or herself out to be so authorized)." 42 U.S.C.A. § 11151(9) (West Supp. 1988).

health professionals who are not physicians."¹³² Finally, a hospital that fails to meet the reporting requirements of the Act can lose the privileged status for the review committees operating within the hospital, and this loss of immunity acts retroactively, beginning three years prior to the date the Secretary of Health and Human Resources publishes the name of hospital in the *Federal Register*.¹³³

The real threat from cases like *Patrick*, however, is that physicians may simply avoid participating in the peer review process out of fear that participation will lead to litigation.¹³⁴ The more desirable participants in the medical review process participate out of a sense of duty, and a wish to expose and remove incompetent physicians and other health care professionals from the profession, as well as to improve overall health care quality by reviewing procedures of competent physicians.¹³⁵ The obviously less desirable members are the ones that wish to use the committee process to their own economic advantage or to vent some personal frustration. While it is true that the latter might profit the most from keeping peer review proceedings secret, these same people will probably be the least deterred from participation by uncertainties about disclosure. If committee members are exposed to liability and ridicule that may accompany disclosure of committee proceedings, most will opt not to participate. If so, this leaves only those physicians who wish to use the review process to their own advantage, because these will be the physicians who consider participation worth the risk and bother.¹³⁶

While the *Patrick* case appears to decide the issue of antitrust immunity for medical review committee members not protected by the Health Care Quality Improvement Act, an issue left undecided is whether the documents produced or used by a review committee are privileged from discovery in antitrust cases.¹³⁷ Under the Federal Rules of Evidence, federal courts look to state law

132. *Id.* § 11115(c); see Note, *supra* note 91, at 1229 n.76. The Act also does not affect medical malpractice claims. 42 U.S.C.A. § 11115(d) (West Supp. 1988).

133. *Id.* § 11111(b).

134. However, as William Jessee, M.D., vice-president of education for the Joint Accreditation of Health Care Organizations of the American Medical Association, recently pointed out, "They [physicians] must understand that *Patrick* and HCQIA both stand for the principles that MDs must be 'crystal clean about keeping economics out' of peer review and that they must strictly follow due process rules." Meyer, *supra* note 130, at 9, col. 3.

135. As part of the Congressional findings accompanying the Health Care Quality Improvement Act, Congress noted the "need to restrict the ability of incompetent physicians to move from state to state without disclosure or discovery of the physician's previous damaging or incompetent performance," and found this nationwide problem could be remedied through "effective professional peer review." 42 U.S.C.A. § 11101(2), (3) (West Supp. 1988).

136. As another doctor explained, "The point is, if you're involved in peer review, you may be dragged through the mud. So why bother?" O'Brian, *supra* note 96, at 18, col. 4 (comment by Dr. Leigh Dolin). For a more detailed discussion of exempting medical peer review from antitrust liability, see Havighurst, *Professional Peer Review and the Antitrust Laws*, 36 CASE W. RES. 1117 (1986) (arguing that properly conducted medical peer review actually enhances competition).

137. Under the Health Care Quality Improvement Act, information reported by hospitals to the Secretary of Health and Human Resources is considered confidential and can be disclosed only to the physician involved in the committee action, or to hospitals employing or extending privileges to a physician under regulations prescribed by the Secretary. 42 U.S.C.A. § 11137(b) (West Supp. 1988). The original Act apparently permitted disclosure to persons involved in medical malpractice actions, see Pub. L. 99-660, 1986 U.S. CODE CONG. & ADMIN. NEWS 6287, but Congress later deleted this provision. See Pub. L. 100-177, 1987 U.S. CODE CONG. & ADMIN. NEWS 960.

when ruling on questions of privilege in diversity cases and to federal law when ruling on privilege in federal claims.¹³⁸ Despite some commonly cited authority in federal courts setting out a common-law privilege for medical review committee reports,¹³⁹ the Seventh Circuit refused to apply the medical review privilege of the state in which an alleged antitrust claim arose. In *Memorial Hospital v. Shadur*¹⁴⁰ the court stated, "The public interest in private enforcement of federal antitrust law in this context is simply too strong to permit the exclusion of relevant and possibly crucial evidence by application of the Hospital's privilege."¹⁴¹ In an antitrust action alleging conspiracy by medical review committee members against the plaintiff-doctor, the plaintiff may be unable to proceed without the medical review committee reports and other records. With this in mind, at least one federal court of appeals has determined that the plaintiff's claim cannot be blocked by a state's medical review privilege. Other circuits are unlikely to take a different approach when plaintiffs are permitted to make antitrust claims involving review committees.¹⁴²

The Health Care Quality Improvement Act does provide protection for those documents required to be reported to the Secretary of Health and Human Services via the state's board of medical examiners.¹⁴³ While courts may take this into account when ruling on discovery matters, the Act itself does not appear to protect reports remaining within the hospital, and it provides no protection when documents may be disclosed under state law.¹⁴⁴

Neither the state action doctrine nor the Health Quality Improvement Act exempts hospitals and committee members from liability in discrimination actions brought under federal law.¹⁴⁵ As with antitrust actions, courts look to federal law in determining the privilege afforded review records,¹⁴⁶ and the few published opinions deciding the issue provide a mixed bag.

In *Doe v. St. Joseph's Hospital*¹⁴⁷ plaintiff-physician brought an action under the Civil Rights Act of 1964. Plaintiff later moved to compel production

138. The Federal Rules of Evidence Provide:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

139. See *Gillman v. United States*, 53 F.R.D. 316 (S.D.N.Y. 1971); *Bredice v. Doctors Hosp.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

140. 664 F.2d 1058 (7th Cir. 1981).

141. *Id.* at 1063.

142. See *Robinson v. Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979) (state privilege does not protect documents in Sherman Act claim).

143. See *supra* note 137.

144. 42 U.S.C.A. § 11137(b) (West Supp. 1988).

145. The Health Care Quality Improvement Act specifically exempts Civil Rights actions. *Id.* § 11111(a)(1).

146. See, e.g., *Schafer v. Parkview Memorial Hosp.*, 593 F. Supp. 61 (N.D. Ind. 1984).

147. No. F 83-201 (N.D. Ind. Apr. 18, 1987) (WESTLAW, 1987 WL 15462).

of documents that formed the basis of the decision to suspend him summarily. In granting plaintiff's motion for discovery of these records, the court noted:

The critical question is the balance between the need for truth and the importance of the state privilege. This privilege is very important and unbridled discovery of the communications to, records of and determinations of the peer review committee should never be permitted. Nevertheless, the need for truth in cases which allege that the communication to, records of or determinations of the peer review committee illustrate [that] discrimination outweighs the right to an absolute privilege. The delicate balance in this case requires that the plaintiff allege facts which create more than a mere inference that the actions of the peer review committee were discriminatory, before the court will permit even in camera inspection of the communications to, records of or determinations of the peer review committee.¹⁴⁸

Applying a similar balancing analysis, the district court in *Green v. Silver Cross Hospital*¹⁴⁹ denied a hospital's motion to compel discovery of another hospital's peer review records which it claimed it needed to defend against plaintiff's claim of racial discrimination. The court in *Green* refused to compel discovery because the hospital failed to show "likely relevance or . . . a compelling reason for not respecting the state law privileges."¹⁵⁰

B. *State Claims by Doctors for Wrongful Revocation of Hospital Privileges or Defamation of Character*

Nearly all state medical review privilege statutes offer immunity from liability to members of the committees for any statements made during a committee proceeding.¹⁵¹ As an additional qualification, however, all committee members are expected to act in good faith, and most statutes require the members to act "without malice or fraud."¹⁵² Because of this good-faith requirement, courts generally agree that the immunity does not abrogate a cause of action by a doctor alleging bad faith, malice, or other wrong by members of a review committee.¹⁵³ This issue frequently arises in cases in which a doctor alleges that his hospital privileges were wrongfully denied or revoked,¹⁵⁴ or in which the doctor alleges members of the committee defamed his character and reputation during

148. *Id.* at 3.

149. No. 83 C 5375 (N.D. Ill. May 20, 1985) (WESTLAW, 1985 WL 1462).

150. *Id.* at 3; *see also* Schafer v. Parkview Memorial Hosp., 593 F. Supp. 61, 65 (N.D. Ind. 1984) (in an age discrimination case, held that "the reasons underlying the peer review privilege are outweighed by plaintiff's need for discovery").

151. *E.g.*, DEL. CODE ANN. tit. 24, § 1768(a) (1987); N.C. GEN. STAT. § 131E-95 (1986). For a discussion of the impact of the Health Care Quality Improvement Act on state law actions, *see supra* notes 124-33 and accompanying text.

152. N.C. GEN. STAT. § 131E-95(a) (1986); *see* DEL. CODE ANN. tit. 24, § 1768(a) (1987) ("so long as such member acted in good faith and without malice"); N.Y. EDUC. LAW § 6527(3) (McKinney Supp. 1988). In order to retain the privilege from state law actions under the Health Care Quality Improvement Act, committee members must also comply with guidelines set forth in the Act to ensure a good faith evaluation. *See supra* note 126.

153. *See* Hall, *supra* note 4, at 256-57.

154. *See, e.g.*, Brandwein v. Gustman, 367 So. 2d 725 (Fla. Dist. Ct. App. 1979); Rodriguez-Erdman v. Ravenswood Hosp. Medical Center, 163 Ill. App. 3d 464, 516 N.E.2d 731 (1987), *appeal*

a committee proceeding, especially a hospital credentials committee.¹⁵⁵ Frequently these two claims are combined in a single cause of action because the complaining physician claims that the false statements led to a denial of staff privileges, and that the denial further damaged her medical career and reputation.¹⁵⁶

The question thus arises: If the jurisdiction continues to recognize a claim by a doctor arising from the actions of those attending a medical review committee, may the courts deny the plaintiff access to the only available evidence to bring the claim? For example, state constitutions consistently contain clauses guaranteeing access to the states' courts and allowing every person in the state a remedy for any legally recognized injury.¹⁵⁷ If a state recognizes a doctor's claim for wrongful denial of hospital privileges, therefore, can the state also deny the doctor access to the records of the hospital's credentials committee if those records contain the only evidence of the alleged wrongful acts? The doctor's entire case may be contained in the committee records; to deny such a plaintiff access may be a de facto abrogation of the doctor's claim and a denial of legal remedy.

The approach of the courts and state legislatures has been mixed. Some of the medical review statutes specifically exempt from the privilege those records concerning a particular doctor's performance in an action by a doctor for wrongful discharge.¹⁵⁸ Others also exempt from the privilege any statements made by a person who is a party to the action for which the statements are sought.¹⁵⁹ In jurisdictions where such an exception to the privilege is not recog-

denied, 118 Ill. 2d 551, 520 N.E.2d 392 (1988); *Cameron v. New Hanover Memorial Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, *cert. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982).

155. *See, e.g.*, *Zambrano v. Devanessian*, 484 So. 2d 603 (Fla. Dist. Ct. App.) (statements that another doctor acted in an unprofessional or unethical manner were not pure opinion and therefore constituted actionable slander), *cert. denied*, 494 So. 2d 1150 (Fla. 1986); *Campbell v. St. Mary's Hosp.* (Fla. Dist. Ct. App.) 312 Minn. 379, 252 N.W.2d 581 (1977); *Franklin v. Blank*, 86 N.M. 585, 525 P.2d 945 (N.M. Ct. App. 1974); *see also Hogen v. Valley Hosp.* 147 Cal. App. 3d 119, 195 Cal. Rptr. 5 (1983) (action for malicious prosecution against defendants who allegedly filed false report with the Board of Medical Examiners); *Hall, supra* note 4, at 256-60 (medical review privilege affords only a "qualified privilege" in cases in which physicians allege defamation by committee members). For a discussion of defamation actions against physicians, see IIB HOSPITAL LAW MANUAL (Medical Staff), *supra* note 1, at ¶ 7-1.

156. *See, e.g.*, *La Marca v. Lakefield Mun. Hosp.*, No. 82 C 5778 (N.D. Ill. June 25, 1985) (WESTLAW, 1985 WL 1874); *Feldman v. Glucroft*, 488 So. 2d 574 (Fla. Dist. Ct. App. 1986), *remanded by* 522 So. 2d 798 (Fla. 1988).

157. *E.g.*, ARIZ. CONST. art. XVIII, § 6; FLA. CONST. art. I, § 21; N.C. CONST. art. I, § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . ."). In addition, Arizona's state constitution prohibits the legislature from abrogating any common-law cause of action and prohibits a limit on recovery; *see Humana Hosp. v. Superior Court*, 154 Ariz. 396, 742 P.2d 1382 (1987) (noting that the anti-abrogation clause prevents the abrogation of claims in existence when the constitution was adopted in 1912, as well as any newly recognized causes).

158. *See, e.g.*, *Snell v. Superior Court*, 158 Cal. App. 3d 44, 204 Cal. Rptr. 200 (1984) (indicating an exception in the California medical review privilege permits discovery by doctors alleging wrongful or arbitrary exclusion from hospital staff privileges); CAL. EVID. CODE § 1157 (West Supp. 1988); ILL. ANN. STAT. ch. 110, para. 8-2101 (Smith-Hurd 1984 & Supp. 1988) ("except that in any hospital proceeding to decide upon a physician's staff privileges, or in any judicial review thereof, the claim of confidentiality shall not be invoked to deny such physician access to or use of data upon which such a decision was based").

159. *E.g.*, CAL. EVID. CODE § 1157(c) (West Supp. 1988) ("The prohibition relating to discov-

nized, however, courts must delicately balance the needs of plaintiffs against the needs of the hospitals to protect the peer review process.

In *Atkins v. Walker*¹⁶⁰ a physician brought a libel suit against a doctor who wrote a letter to the chief of staff of the hospital where plaintiff-physician was applying for staff privileges. The doctor who wrote the letter was a member of the hospital's Credentials Committee, which had the task of screening applicants for hospital privileges. The physician wrote the letter, which presumably concerned plaintiff's qualifications, at the request of the chief of staff. The letter was later used by the Joint Conference Committee in its decision to deny plaintiff hospital privileges. In the suit, plaintiff alleged the letter contained "libelous statements."¹⁶¹ Defendant moved at trial to have the letter excluded from use as evidence on the grounds that it was privileged by the Ohio medical review statute.¹⁶² After granting defendant's motion to exclude the letter, the trial court then granted defendant's motion for summary judgment, because the letter itself made up the whole of the evidence for plaintiff's libel action.

The Ohio Court of Appeals affirmed, rejecting plaintiff's argument that the statutory intent behind the privilege statute was to "limit medical malpractice actions and . . . was not meant to reach libel and slander actions."¹⁶³ In addition, the court rejected plaintiff's contention that the privilege was waived when plaintiff obtained a copy of the letter at the Joint Conference Committee hearing.¹⁶⁴ Because plaintiff obtained knowledge of the letter's contents at the committee hearing, the court also refused to allow plaintiff to testify concerning the contents of the letter.¹⁶⁵ Finally, the court rejected plaintiff's claims that applying the privilege in this case was unconstitutional. The court then noted, "'No doubt the statutory provisions affect the manner in which plaintiff may develop evidence to support his defamation claim. Plaintiff is not, however, foreclosed from prosecuting his claim with other evidence, both direct and circumstantial.'"¹⁶⁶

ery or testimony does not apply to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting . . ."); HAW. REV. STAT. § 624-25.5 (1985) (language similar to California statute); N.Y. EDUC. LAW § 6527(3) (McKinney Supp. 1988) (containing an exception in language similar to the California statute).

In *Pepple v. Parkview Memorial Hosp.*, 511 N.E.2d 467 (Ind. Ct. App. 1987), the Indiana Court of Appeals interpreted a provision in the Indiana statute, which reads:

A professional health care provider, a peer review committee, and the governing board of a hospital or professional health care organization may use information obtained by peer review committees for legitimate internal business purposes, including their own defense.

IND. CODE ANN. § 34-4-12.4 (Burns Supp. 1988). The court held this provision did not permit a physician to use such information in a lawsuit challenging the termination of his hospital privileges. *Pepple*, 511 N.E.2d at 469-70.

160. 3 Ohio App. 3d 427, 445 N.E.2d 1132 (1981).

161. *Id.* at 428, 445 N.E.2d at 1134.

162. See OHIO REV. CODE ANN. § 2305.251 (1981).

163. *Atkins*, 3 Ohio App. 3d at 430, 445 N.E.2d at 1136.

164. *Id.*

165. For a discussion of waiver and the *Atkins* case, see *supra* notes 54-55 and accompanying text.

166. *Atkins*, 3 Ohio App. 3d at 431, 445 N.E.2d at 1137 (quoting *Samuelson v. Susen*, 576 F.2d 546, 553 (3d Cir. 1978)).

Unfortunately, the *Atkins* court did not explain what the other sources for the information would be in that case. Plaintiff alleged libel in the contents of the letter, and once the letter was excluded there existed no basis for plaintiff's claim. Thus, plaintiff's cause of action was contained in the letter, and the letter was privileged; the privilege effectively blocked plaintiff's claim.

In a Florida case, *Holly v. Auld*,¹⁶⁷ plaintiff doctor brought an action against several members of a hospital credentials' committee, alleging that "their statements had resulted in his denial of staff privileges and loss of reputation, referrals, patients, and fees."¹⁶⁸ In a four-to-three split, the Florida Supreme Court ruled that the Florida medical review statute¹⁶⁹ did not apply exclusively to medical malpractice actions, but also to defamation actions by physicians. In so holding, the court found the credentials committee reports sought by plaintiff were privileged and not subject to discovery.

Two of the three dissenters in *Auld*, however, took a very different view.¹⁷⁰ In a dissenting opinion joined by Justice Adkins, Justice Shaw pointed out that because all committee members were required by the statute to act without malice or fraud, the review privilege and immunity from liability did not block plaintiff's defamation action. Arguing that the majority opinion gave the committee members "an unchecked license to commit acts of fraud and malice," the dissent found the legislature intended to grant only a qualified privilege and that "malice or fraud strips an otherwise privileged communication of its immunity."¹⁷¹ In addition, Justice Shaw claimed that by denying plaintiff access to the reports necessary to bring the action, the "interpretation, as applied, bars access to the courts for redress of injury in violation of article I, section 21, Florida Constitution."¹⁷² As Justice Shaw explained:

[T]he majority opinion fails to recognize the crucial distinction between a suit on medical malpractice which occurs outside the committee proceedings and a suit on defamation which occurs within the committee proceedings. . . . [A] suit on defamation which occurs during the committee proceedings can be prosecuted only if discovery of the committee proceedings is permitted. To deny discovery under these circumstances is to deny access to the courts for redress of injury.¹⁷³

Justice Shaw's argument in *Auld* was by no means novel, even among Florida appellate courts. In a case decided by the Florida Court of Appeals five

167. 450 So. 2d 217 (Fla. 1984).

168. *Id.* at 218.

169. FLA. STAT. ANN. § 768.40(4) (West 1986).

170. The first dissenting justice found the court had decided questions not reached by the appeal because the parties had settled prior to oral argument. As a result, the attorney for plaintiff did not file a brief in support of plaintiff's case and Justice Ehrlich found the question to be moot. *Auld*, 450 So. 2d at 221 (Ehrlich, J., dissenting).

171. *Id.* at 222 (Shaw, J., dissenting). For a further discussion on "qualified privilege" that exempts acts of fraud or malice from the immunity from liability, see Hall, *supra* note 4, at 256-60.

172. *Auld*, 450 So. 2d at 222 (Shaw, J., dissenting).

173. *Id.* at 223 (Shaw, J., dissenting).

years earlier, *Good Samaritan Hospital Association v. Simon*,¹⁷⁴ plaintiff-doctor brought a defamation action against members of the hospital's review committees. Plaintiff alleged that defendants "published false and defamatory matters about [plaintiff] during the course of the meetings of the various medical committees involved" in reviewing plaintiff's application for hospital privileges.¹⁷⁵ Contrary to the majority in *Auld*, the court of appeals in *Simon* specifically found that by preserving plaintiff's right to bring a cause of action against committee members for defamation, the legislature intended to permit access to review committee records in defamation actions.¹⁷⁶ The court noted that

[c]ertain policy considerations influenced the legislature to grant a limited immunity, not including actions involving malice or fraud. Our decision today is consistent with the expressed intent of the legislature to provide meaningful access to the courts for those asserting a cause of action outside this limited immunity. To do otherwise would raise serious constitutional issues.¹⁷⁷

Despite this language, however, the Florida Court of Appeals in several other cases has either dismissed the plaintiff-doctor's defamation action or refused to allow discovery of committee reports the plaintiff claimed were needed to prove her case.¹⁷⁸

The Illinois Supreme Court echoed Justice Shaw's *Auld* dissent, albeit in dictum, in *Jenkins v. Wu*.¹⁷⁹ In *Jenkins* a medical malpractice plaintiff argued that the Illinois medical review privilege¹⁸⁰ was an unconstitutional denial of equal protection since it created an exception for doctors who sued challenging their dismissal from a hospital or a denial of hospital privileges. The court rejected plaintiff's contention and noted the reasoning behind the exception was that

if a physician were denied information relating the reason for his dismissal, he would be unable to challenge an adverse decision. In recognition of the physician's need for this information, the legislature drafted this exception. Indeed, if the legislature had not so provided, the statute's validity might well be questioned under the due process clause.¹⁸¹

Obviously the issues surrounding discovery of review committee records in a physician's claim for wrongful denial of privileges or defamation are more

174. 370 So. 2d 1174 (Fla. Dist. Ct. App. 1979).

175. *Id.* at 1175.

176. *Id.* at 1176.

177. *Id.*

178. See, e.g., *Parkway Gen. Hosp. v. Allinson*, 453 So. 2d 123 (Fla. Dist. Ct. App. 1984) (permitting the physician to proceed with a defamation action, but denying access to committee records); *Brandwein v. Gustman*, 367 So. 2d 725 (Fla. Dist. Ct. App. 1979) (dismissing physician-plaintiff's libel action against review committee members).

179. 102 Ill. 2d 468, 468 N.E.2d 1162 (1984).

180. ILL. ANN. STAT. ch. 110, para. 8-2101 (Smith-Hurd 1984) ("in any hospital proceeding to decide upon a physician's staff privileges, or in any judicial review thereof, the claim of confidentiality shall not be invoked to deny such physician access to or use of data upon which such a decision was based").

181. *Jenkins*, 102 Ill. 2d at 479, 468 N.E.2d at 1168.

complex than in medical malpractice cases. In most malpractice cases, information is available from sources outside the peer review process, and often the reports and other information sought by the plaintiff would not exist at all if it were not for the state's immunity and discovery privilege statute. Except for those cases involving allegations of negligent screening of doctors, the wrongs committed against plaintiffs in medical malpractice actions were committed outside the committee process and the committee serves only to review what has already transpired. Even in negligent screening cases, a plaintiff can discover records outlining the hospital's normal screening procedures and may subpoena persons present to find out if the normal procedures were followed.¹⁸² In an action alleging defamation or wrongful denial of hospital privileges, the committee process itself is on trial. In order to prove her cause of action, the doctor or other health care professional must be able to prove what took place in the committee proceedings.

Unfortunately, the policy considerations in favor of protecting the committee reports are the same in both malpractice and denial of privilege cases. Litigation sensitive physicians are likely to be just as reluctant, if not more so, to engage in open dialogue concerning the qualifications or performance of another physician if they fear their statements may be disclosed to a disgruntled plaintiff-physician. Thus, the courts and the legislatures must continue to balance the conflicting interests of the hospitals and the plaintiff-physicians.

In approaching the problem, both the courts and the legislatures should keep in mind two major policy considerations. First, if the medical review privilege is to be effective at all, physicians participating must be assured of complete confidentiality in the review process. While some jurisdictions may find the better policy is to allow courts to resume their role as forums for consideration of all information and abandon the review privilege altogether, the legislatures in nearly all states have decided society needs the protection in order to promote improvements in health care. However, doctors and others without formal legal training can hardly be expected to understand the complex procedural matters used in determining that a statement is sometimes privileged and sometimes not. For the medical review privilege to work, the proceedings of the committee, its reports, and, most importantly, the statements and testimony of persons appearing before it must be kept absolutely privileged.

The second consideration is that no plaintiff should be completely foreclosed from bringing a legally recognized claim to a court of law. Our traditional sense of justice, sound public policy, and the constitution of every state demand no less. In addition, medical treatment may be adversely affected if

182. As the Arizona Court of Appeals explained:

A plaintiff can also discover a hospital's general credentialing or review procedure policies. A.R.S. § 36-445.01(B) provides that representatives of a hospital may testify whether peer review was conducted with regard to the subject matter being litigated. A plaintiff also has access to medical records available pursuant to a patient's consent. Finally, a plaintiff can retain experts to give opinions regarding all of the above matters. . . . Therefore, neither the Act nor our holding today bars a malpractice plaintiff from proving a negligent supervision claim against a hospital.

Humana Hosp. v. Superior Court, 154 Ariz. 396, 400, 742 P.2d 1382, 1386 (1987).

review committees are permitted to operate maliciously to damage the careers of competent medical professionals. If committee members act with wrongful intent in the review process, the privilege should not apply, and plaintiffs are entitled to full discovery of all information that will enable them to present their claim.

In balancing these two conflicting interests, state policy makers may take several approaches. One approach is to allow in camera inspection of medical review committee reports in certain cases. Limited access to such documents could be provided, under close court supervision, to parties and/or their attorneys, with accompanying court orders, backed up by civil and criminal contempt, that all information obtained will be used only for preparation of the plaintiff's arguments in a closed-session preliminary hearing on plaintiff's motion to compel discovery of the records. Such a procedure would eliminate the need for the trial court to review all the information sought and make a determination of discoverability based on the judge's interpretation of the documents. In addition, this procedure would allow the trial court the benefit of adversarial arguments concerning the contents of the records and the needs of both sides in the balancing of interests. At the hearing the plaintiff would have the burden of proving that the records contain enough evidence to indicate bad faith, malice, or fraud by committee members. If the plaintiff meets this burden, the court can compel discovery and permit the plaintiff to proceed with the case. If the plaintiff fails to meet this burden, the documents remain protected, and the plaintiff's case will frequently fall to a summary judgment motion. A similar procedure could be followed for taking depositions and answering interrogatories, but the court must take care that the procedure does not become so cumbersome or abusive as to interfere with the review committee process or the disposition of claims before the court.

State policy makers may take a second approach as well. They may decide to follow the lead of California and New York and exempt from the privilege statements made by a party to the lawsuit. In addition, statements made concerning a particular doctor's credentials or performance could also be exempt from the privilege when the plaintiff is challenging the truth or accuracy of those statements. While this approach has a certain appeal, it also has many drawbacks. First, the individual committee participants must still discern which statements they make are confidential and which are not. They may be unable to tell whether the privilege applies until a lawsuit has been filed. In addition, as long as they comply with the requirements of good faith pleading such as those contained in Rule 11 of the Federal Rules of Civil Procedure, plaintiffs can circumvent the privilege by naming committee members as parties to the suit. Until the plaintiff has access to what was said at a committee meeting, the courts will be hard pressed to decide whether such a pleading is made in bad faith.¹⁸³

183. The Health Care Quality Improvement Act addresses this problem in part by allowing physicians access to reports kept with the Secretary of Health and Human Services, but also by providing sanctions for frivolous lawsuits by way of court costs and attorney's fees. 42 U.S.C.A. § 11113 (West Supp. 1988).

Balancing the two major interests involved here will require hard choices and a revision of some current procedures, but policy makers should not consider the two goals of confidentiality and access to the courts as mutually exclusive. Through careful planning a consistent and workable solution can be structured that will achieve both objectives.

V. CLAIMS AGAINST DOCTORS AND HOSPITALS ALLEGING MEDICAL MALPRACTICE

A. *Claims Against a Physician When the Hospital is Not a Party*

Often when a patient sues a physician for malpractice a hospital may be joined under a theory of corporate negligence or respondeat superior liability.¹⁸⁴ Sometimes, however, the patient may have no claim against the hospital, as when the act of malpractice occurred at the doctor's office. A hospital is frequently brought into the litigation, however, as a custodian of certain records sought by the plaintiff, usually relating to the doctor's performance at the hospital.

When these records are the result of medical review committee work, the hospital's interest in protecting the confidentiality of the review process is just as great as it would be if the hospital was a party to the action. For this reason, the hospital should be permitted to oppose the production of the records.¹⁸⁵ In addition, most courts have held the defendant-physician has standing to oppose the production of the documents from the hospital.¹⁸⁶ In *Lipschultz v. Superior Court*,¹⁸⁷ for example, the petitioners, two defendant-physicians in a medical malpractice action, opposed production of certain peer review evaluations in the possession of the Arizona Board of Medical Examiners. After determining that documents obtained from medical peer review evaluations were not discoverable, the Arizona Supreme Court wrote:

The plaintiffs . . . contend that the doctors are without standing to contest the trial court's discovery order because the right to object to the production of subpoenaed documents is reserved solely to the witness to whom the subpoena is directed. . . .

This rule preventing a party from challenging a discovery order directed to a non-party witness is, however, not absolute. If a party "can make a claim to some personal right to privilege in respect to the subject matter of a subpoena duces tecum directed to a non-party witness," the party has a right to contest the subpoena. . . .

This exception to the general rule recognizes that in some cases the underlying purpose of the privilege would be defeated if the privi-

184. See *infra* notes 204-41 and accompanying text.

185. See, e.g., *Jenkins v. Wu*, 102 Ill. 2d 468, 468 N.E.2d 1162 (1984) (protecting medical review reports held by medical center and its executive director, neither of whom were parties to plaintiff's malpractice action). See generally, Hall, *supra* note 4, at 247-50 (discussing the role of the hospital and the medical review committee process, as well as the need for confidentiality).

186. See, e.g., *Lipschultz v. Superior Court*, 128 Ariz. 16, 623 P.2d 805 (1981).

187. 128 Ariz. 16, 623 P.2d 805 (1981).

lege could not be asserted by a stranger to the relationship.¹⁸⁸

The rule that a nonparty to the underlying action still has standing to oppose discovery of medical review documents does have limitations. A Florida District Appeals Court determined that the language of the Florida medical review statute protected documents only from discovery by the parties in a malpractice action.¹⁸⁹ The Florida Supreme Court as well as the Ohio Supreme Court found this to be a misinterpretation of the statute.¹⁹⁰ In some states the medical review statute creates an exception for statements made by a party to the lawsuit regarding the subject of the claim.¹⁹¹ While statements made by a party in such cases are subject to discovery,¹⁹² whether that party has standing to oppose the production of other documents on behalf of the hospital or other custodian of the records is less clear. Nevertheless, the rationale applied in *Lip-schultz* indicates the rule would be the same, and a defendant-physician could still oppose production of the records. The public policy considerations for protecting the confidentiality of the review process as it applies to nonparty members of the review committee is just as great.¹⁹³

When a defendant-physician has first-hand knowledge of events discussed during a review proceeding, his knowledge is not necessarily protected by the privilege, even in the absence of an exception in the statute for statements by parties to the action. The general rule is that information that is otherwise discoverable is not protected just because it was discussed at a medical review committee proceeding.¹⁹⁴ In *Anderson v. Breda*,¹⁹⁵ for example, plaintiff in a malpractice action sought to compel defendant-physician to answer a deposition question concerning termination or suspension of any of his hospital privileges. The Supreme Court of Washington held:

Although the extent of a physician's hospital privileges may be determined by what occurs within a quality review committee, the fact that a physician's privileges are restricted, suspended or revoked is not properly subject to the protections of the statute. The goal and funda-

188. *Id.* at 19-20, 623 P.2d at 808-09 (citations omitted).

189. *Gadd v. News-Press Publishing Co.*, 412 So. 2d 894 (Fla. Dist. Ct. App. 1982). For a discussion of *Gadd*, see *supra* note 41.

190. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984) (holding that the privilege was not limited to actions against health providers based on malpractice); *Atkins v. Walker*, 3 Ohio App. 3d 427, 431, 445 N.E.2d 1132, 1137 (1981).

191. *E.g.*, CAL. EVID. CODE § 1157 (West Supp. 1988); NEV. REV. STAT. § 49.265 (1985); N.Y. EDUC. LAW § 6527 (McKinney Supp. 1988).

192. *See, e.g.*, *Carroll's Estate v. St. Luke's Hosp.*, 91 A.D.2d 674, 457 N.Y.S.2d 128 (1982).

193. *Cf.* *Danklef v. Wilmington Medical Center*, 429 A.2d 509 (Del. Super. Ct. 1981). In *Danklef* a malpractice plaintiff suing in Colorado sought a subpoena duces tecum directed at a Delaware medical center to obtain certain records of the center's credentials committee. After determining that Delaware law controlled, the court concluded:

[T]his statute establishes a policy with respect to the medical profession in Delaware which is fundamental to the conduct of the profession and that it is in the interest of the proper administration of standards of professional conduct in this State that the confidentiality of medical committee proceedings be preserved without exception.

Id. at 513.

194. *See supra* notes 19-23 and accompanying text.

195. 103 Wash. 2d 901, 700 P.2d 737 (1985) (en banc).

mental purpose of the statute is open discussion during committee investigations. Open discussion is not inhibited by permitting discovery of the effect of the committee proceedings. The purpose of this statute is to keep peer review studies, discussions, and deliberations confidential. . . .

Additionally, if the final decision to restrict, revoke, or suspend a physician's hospital privileges is made by an administrator or entity other than a peer review committee, the records of that entity or individual are discoverable to the extent they do not contain the record of a quality review committee.¹⁹⁶

The holding in *Anderson* is clearly consistent with the review privilege. The purpose behind the statute is not to hinder a plaintiff's access to information, although this is often an unfortunate side effect. Thus, information within the knowledge of a party and not received as the direct result of a review proceeding should be open and subject to discovery. Many states have codified this rule by permitting parties present at a medical review committee meeting to testify at a deposition or trial, but not allowing them to testify regarding information obtained as a result of the proceeding itself.¹⁹⁷

In a number of cases, parties have challenged the medical review privilege on the ground that it bars their access to information or, in some cases, that it completely prevents them from bringing an action to redress their wrong. Under the latter argument, the plaintiff contends the privilege violates his right to have access to the courts, as mandated by most state constitutions,¹⁹⁸ or that it violates the equal protection clause of the fourteenth amendment to the United States Constitution. In all medical malpractice cases surveyed for this Comment¹⁹⁹ against a doctor alone and in which this issue was raised, the courts rejected arguments based on access to information or access to the courts. These opinions stated the information sought by the plaintiff was available through other means, such as deposing persons involved in the incident.²⁰⁰ Similarly, courts have rejected the equal protection argument by finding a rational relation-

196. *Id.* at 907-08, 700 P.2d at 741-42.

197. *See, e.g.,* FLA. STAT. ANN. § 768.40(5) (West 1986) ("no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee"); N.C. GEN. STAT. § 131E-95 (1986) ("A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings.")

198. For example, article I, § 18 of the North Carolina Constitution states: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. CONST. art I., § 18. This provision has been held to disallow any law that prevents a person from seeking a remedy for an injury done in a court of the state. *Bolick v. American Barnag Corp.*, 54 N.C. App. 589, 593, 284 S.E.2d 188, 191 (1981), *aff'd*, 306 N.C. 364, 293 S.E.2d 415 (1982).

199. *See supra* notes 157-83 and accompanying text for a discussion of the constitutional issues arising from actions by doctors against hospitals.

200. *E.g.,* *Humana Hosp. v. Superior Court*, 154 Ariz. 396, 742 P.2d 1382 (1987) (applying ARIZ. CONST. art. XVIII, § 6); *Palm Beach Gardens Community Hosp. v. Shaw*, 446 So. 2d 1090 (Fla. Dist. Ct. App. 1984); *Jenkins v. Wu*, 102 Ill. 2d 468, 468 N.E.2d 1162 (1984) (applying ILL. CONST. art. IV, § 13 and U.S. CONST. amend. XIV).

ship between discrimination and a legitimate state objective.²⁰¹ However, as the discussion in this Comment should indicate, such constitutional questions, when raised in cases involving corporate negligence by a hospital,²⁰² or actions against hospitals by physicians for defamation or unfair trade practices,²⁰³ are not so easily dismissed.

B. *Claims Against Hospitals for Respondeat Superior Liability or Corporate Negligence*

Hospitals may be sued in medical malpractice actions under one or both of two theories. Under the first, the hospital is held responsible for the negligent actions of staff workers employed directly by the hospital under the doctrine of respondeat superior.²⁰⁴ As a general rule, however, hospitals are not liable for the actions of physicians with hospital privileges, even if their negligent actions occur within the hospital, since physicians traditionally have been considered independent contractors.²⁰⁵

Under the second theory, a hospital may be held liable for negligently maintaining the facility or not establishing adequate procedures to ensure the safety and welfare of patients.²⁰⁶ This type of liability, generally termed "corporate negligence," arises in most of the case law in one of two ways: (1) plaintiff alleges the hospital failed to maintain a system or standard procedure for patient care, and this violated the accepted standard of care for hospitals;²⁰⁷ or (2) the hospital knew or should have known that the physician who caused injury to the plaintiff was not qualified to practice in the hospital and, nevertheless, permitted the physician hospital privileges.²⁰⁸

201. *E.g.*, *Jenkins v. Wu*, 102 Ill. 2d 468, 468 N.E.2d 1162 (1984) (applying ILL. CONST. art. IV, § 13 and U.S. CONST. amend. XIV).

202. *See infra* notes 204-40 and accompanying text.

203. *See supra* notes 151-83 and accompanying text.

204. *See, e.g.*, *HCA Health Services of Midwest, Inc. v. National Bank of Commerce*, 294 Ark. 525, 745 S.W.2d 120 (1988); *Hall, supra* note 4, at 250-52.

205. *Hall, supra* note 4, at 250-52. *Hall* cites two interesting exceptions to this rule, which he claims is eroding. *Beeck v. Tucson Gen. Hosp.*, 18 Ariz. App. 165, 500 P.2d 1153 (1972), involved a staff radiologist, who negligently injured plaintiff during a back x-ray; the court held the hospital liable on a respondeat superior theory for a number of reasons, including the fact that the radiology department operated as a monopoly, the hospital owned the equipment involved, and the hospital exercised a degree of control over the physician by regulating working hours. In addition, *Hall* states that some courts hold hospitals liable for performance of "non-medical administrative duties." *Id.* (citing *Keene v. Methodist Hosp.*, 324 F. Supp. 233 (N.D. Ind. 1971)).

206. *Hall, supra* note 4, at 252-53. As *Hall* explains it:

This so-called "corporate negligence" doctrine is based upon the premise that the hospital, by virtue of its custody of the patient, owes him the duty of exercising care in the construction, maintenance, and operation of the hospital. If this duty is breached in some manner, the hospital may be held directly accountable to the patient.

Id. at 252.

207. *E.g.*, *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966); *Campbell v. Pitt County Memorial Hosp.*, 84 N.C. App. 314, 352 S.E.2d 902, *aff'd*, 321 N.C. 260, 362 S.E.2d 273 (1987).

208. *E.g.*, *Superior Court v. Marshall Hosp.*, 158 Cal. App. 3d 44, 204 Cal. Rptr. 200 (1984); *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156 (1982); *Mennes v. South Chicago Community Hosp.*, 100 Ill. App. 3d 1029, 427 N.E.2d 952 (1981); *Bost v. Riley*, 44 N.C. App. 638, 262 S.E.2d 391, *cert. denied*, 300 N.C. 194, 269 S.E.2d 621 (1980).

The issues surrounding the medical review privilege in the context of a suit against a hospital for respondeat superior liability are similar to those in which the physician alone is sued. Of course the court does not face any of the standing questions presented in some of the cases against physicians alone, since the hospital is a party to the lawsuit and always has standing to oppose the disclosure of records. As long as the committee or group that produced the documents in question qualifies as a medical review committee under the statute, the courts almost without exception apply the privilege and refuse discovery.²⁰⁹

The more complicated issues in both respondeat superior and corporate negligence cases involve which committee activities are protected by the statute, and which documents are privileged. In *Sherman v. District Court*²¹⁰ a former hospital patient sought discovery of "any document received from or prepared by JCAH [Joint Commission on Accreditation of Hospitals] and related to each and every JCAH on-site survey conducted at the hospital during the period of time from January 1, 1977," to date.²¹¹ The Colorado medical privilege statute protected documents "made available to a utilization review committee."²¹² The statute further defined a utilization review committee as "a committee established for the purpose of evaluating the quantity, quality, and the timeliness of health care services rendered" under Colorado law and federal law.²¹³ Despite this rather broad definition, the Colorado Supreme Court found it neces-

209. *E.g.*, *Matchett v. Superior Court*, 40 Cal. App. 3d 623, 115 Cal. Rptr. 317 (1974) (applying the privilege to credentials, records, and executive committees, but refusing to protect hospital administration records); *Sherman v. District Court*, 637 P.2d 378 (Colo. 1981) (holding the privilege applies to any committee document when the committee performs a "utilization review committee function"). *Contra* *Baxter County Newspapers v. Medical Staff of Baxter Gen. Hosp.*, 273 Ark. 511, 622 S.W.2d 495 (1981) (because state's Freedom of Information Act did not exempt medical review committee proceedings, newspaper could not be denied access); *Daily Gazette Co. v. West Virginia Bd. of Medicine*, 352 S.E.2d 66 (W. Va. 1986) (to the extent that any hospital peer review information is brought before Board of Medical Examiners after probable cause to substantiate charges of disciplinary disqualification is found, public is entitled to such information); *see supra* note 40 (discussion of *Gadd v. News-Press Publishing Co.*, 412 So. 2d 894, (Fla. Dist. Ct. App. 1982)). An example of a fairly broad interpretation of the Texas medical review statute is *Texarkana Memorial Hosp. v. Jones*, 551 S.W.2d 33 (Tex. 1977). In that case, plaintiff sought discovery of meetings of various hospital groups in connection with a malpractice suit by an infant hospital patient. In particular, plaintiff sought the following:

- (I) The minutes of all Pediatric Section Meetings [on certain dates].
- (II) The minutes of any other section meeting in which discussions occurred relative to blindness caused by excessive oxygen, the blood gas machine, or pertaining to drawing blood from patients in the nursery.
- (III) The minutes of any other Pediatric Section Meetings in which discussion occurred relative to the events which transpired during the treatment of [plaintiff].
- (IV) The minutes from the meetings of the General Medical Staff [on certain dates].
- (V) The minutes of the Board of Directors meetings concerning the purchase of equipment and facilities in the nursery.

Id. at 34.

Applying the Texas Medical Review statute, the Texas Supreme Court held that because the records and proceedings of any hospital committee were confidential and beyond the reach of court subpoena, the deliberations of every group of persons constituted by the rules and bylaws of the hospital in its service was placed behind the veil. *Id.* at 35. "This includes the clinical departments, the standing committees, the general medical staff, and the Board of Directors." *Id.* The court then held all the items sought by plaintiff were protected from discovery. *Id.* at 36.

210. 637 P.2d 378 (Colo. 1981).

211. *Id.* at 380.

212. COLO. REV. STAT. § 13-21-110(1) (1973 & Supp. 1986).

213. *Id.* § 13-21-110(2).

sary to remand the case to determine whether the JCAH or the hospital infection control committee served a "utilization review committee" function."²¹⁴

In determining what committees and groups the privilege covers, state courts vary greatly in applying their privilege statutes. In *Hollowell v. Jove*²¹⁵ the Georgia Supreme Court indicated the Georgia statutory privilege was to be strictly construed and only applied to the committees specified in the statute. The court also stated the statute did not cover information generated or maintained by entities other than a "medical review committee" as defined in the statute.²¹⁶ On the other hand, the Texas Supreme Court interpreted its somewhat broader statute to cover the records and deliberations of every group of persons constituted by the rules and bylaws of the hospital.²¹⁷ The Washington Supreme Court seems to have come down somewhere between these two extremes. In *Coburn v. Seda*²¹⁸ plaintiff in a malpractice action sought discovery of records of a hospital committee that reviewed quality of patient care. The court determined the Washington privilege statute²¹⁹ applied only if the committee involved was a "regularly constituted committee or board of [the] hospital whose duty it is to review and evaluate the quality of patient care."²²⁰ The court then stated that in determining whether the privilege applied, the trial court should consider,

in addition to other relevant evidence, the guidelines and standards of the Joint Commission on Accreditation of Hospitals and the bylaws and internal regulations of [the hospital]. These materials may aid the trial court in ascertaining the organization and function of the committee as well as whether it is regularly constituted A further factor which the trial judge should take into account is whether the committee's function is one of current patient care or retrospective review.²²¹

In cases in which the plaintiff alleges corporate negligence, the plaintiff often seeks documents concerning actions the hospital took, or more importantly did not take, in order to avoid the incident.²²² This is especially true

214. *Sherman*, 637 P.2d at 382.

215. 247 Ga. 678, 279 S.E.2d 430 (1981).

216. *Id.* at 683, 279 S.E.2d at 434 ("The legislature could have defined a 'medical review committee' more broadly than it did. . . . We must presume that its failure to do so was a matter of considered choice."). *But see* Poulnot v. Surgical Assocs. of Warner Robins, P.C., 179 Ga. App. 138, 140, 345 S.E.2d 639, 641 (1986) (surgical conference within definition of a medical review committee, even though "there was no set membership . . . and the committee functioned as an initial, rather than determinative, step in the hospital's peer-review process").

217. *Texarkana Memorial Hosp., v. Jones*, 551 S.W.2d 33 (Tex. 1977); *see* discussion of *Jones*, *supra* note 209. *Contra* *Jordan v. Fourth Circuit Court of Appeals*, 701 S.W.2d 644, 646-49 (Tex. 1985) (limiting the application of the privilege and requiring the party seeking to limit discovery to prove the applicability of the privilege to the information sought); *Goodspeed v. Street*, 747 S.W.2d 526 (Tex. Ct. App. 1988) (noting that TEX REV. CIV. STAT. art. 4495b, § 5.06 (Vernon Supp. 1988), which applies to medical review committees, is more narrow in scope than TEX REV. CIV. STAT. ANN. art. 4447d, § 3 (Vernon Supp. 1988), which applies to any hospital committee).

218. 101 Wash. 2d 270, 677 P.2d 173 (1984).

219. WASH. REV. CODE ANN. § 4.24.250 (Supp. 1988).

220. *Coburn*, 101 Wash. 2d at 277, 677 P.2d at 177-78 (quoting § 4.24.250).

221. *Id.* at 278, 677 P.2d at 178.

222. *E.g.*, *Mennes v. South Chicago Community Hosp.*, 100 Ill. App. 3d 1029, 427 N.E.2d 952

when the case involves an allegation that the hospital was negligent in screening the doctor's application for privileges or did not revoke her privileges after finding out about problems with the doctor. Frequently, only the hospital credentials committee, which has responsibility for screening applications for hospital privileges,²²³ will have access to information about the screening of the doctor's application. When the medical review committee denies plaintiff access to personnel information, plaintiff's remedy may be effectively blocked.

In *Snell v. Marshall Hospital*²²⁴ plaintiff alleged defendant hospital had been negligent in selecting and retaining two staff doctors who caused her injuries. She sought discovery of the hospital's "personnel files . . . including . . . all applications for surgical privileges" pertaining to the two doctors.²²⁵ Acknowledging that California recognized a cause of action for negligent screening of doctors, and admitting that "the sought material would in all likelihood lead to valuable material and admissible evidence," the California Court of Appeals still refused to permit discovery of the hospital's personnel files because they were maintained by the hospital's quality assurance committee, a privileged group.²²⁶ Thus, while the court recognized that plaintiff had a valid cause of action, it held the information sought as proof was effectively blocked by the state's medical review privilege, even if this meant plaintiff had to abandon her remedy.

The *Snell* court also indicated the statute would not bar a physician bringing an action for "wrongful or arbitrary exclusion from hospital staff privileges from discovering the same information."²²⁷ The court stated that the language in the privilege statute exempting "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" did not apply to malpractice cases.²²⁸

As *Snell* indicates, a major problem with the privilege in cases where the plaintiff alleges negligent screening of doctors is that the privilege may foreclose

(1981) (plaintiff sought "[a]ll materials regarding the granting of privileges regarding all Defendant doctors" which the court held to be privileged).

An interesting case in this area is *HCA Health Services of Midwest, Inc., v. Nat'l Bank of Commerce*, 294 Ark. 525, 745 S.W.2d 120 (1988), in which plaintiff sought to introduce a written response to a post-incident disciplinary proceeding involving one of the nurses who attended plaintiff. The nurse was disciplined after plaintiff was injured at defendant hospital. The nurse appealed and filed a written response in which she "complained about the inadequate number of nurses on staff at the time of [plaintiff's] incident." *Id.* at 530, 745 S.W.2d at 125. The court held the response was privileged under the Arkansas medical review privilege statute. *Id.* at 531, 745 S.W.2d at 125-26.

223. *See supra* note 15 and accompanying text.

224. 158 Cal. App. 3d 44, 204 Cal. Rptr. 200 (1984). Claims based on the hospital's failure to properly screen doctors seem to occur more in California than in other states, possibly because of California's explicit recognition of this cause of action in *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156 (1982).

225. *Snell*, 158 Cal. App. 3d at 46, 204 Cal. Rptr. at 201.

226. *Id.* at 48-49, 204 Cal. Rptr. at 202.

227. *Id.* at 48, 204 Cal. Rptr. at 202.

228. *Id.* *But see* *Carroll v. Nunez*, 137 A.D.2d 911, 912, 524 N.Y.S.2d 578, 579-80 (1988) (holding medical malpractice plaintiff entitled to disclosure of any statements made by a party defendant at a medical review proceeding; decision based on language in New York statute that is almost identical to the exception provided for in the California statute); *Carroll's Estate v. St. Luke's Hosp.*, 91 A.D.2d 674, 457 N.Y.S.2d 128 (1982) (medical malpractice plaintiff entitled to statements made by party defendants).

the plaintiff's cause of action altogether. In some cases, plaintiffs argue this violates state constitutional requirements that courts be open and that all persons have a remedy for wrongs done.²²⁹ In addition, plaintiffs may argue that because the privilege sometimes permits physicians access to the same information when their hospital privileges have been revoked, the statute violates the equal protection clause of the state and federal constitutions.²³⁰

These constitutional challenges were considered by the Illinois Supreme Court in *Jenkins v. Wu*.²³¹ The trial court in *Jenkins* had held that the Illinois medical review privilege violated the state and federal constitutions' equal protection clauses, and had compelled discovery of "all reports or other evidence of complaints or commendations relative to the quality of health care provided by" defendant-doctor.²³² After noting that the statute allowed physicians to gain access to the same information when challenging a wrongful discharge, the trial court determined that "[t]he two classes are . . . similarly situated, and by virtue of the plaintiff being barred from this data and the exempted physician being afforded the opportunity to obtain it, plaintiff is arbitrarily and unreasonably discriminated against."²³³

The Illinois Supreme Court reversed. Quoting United States Supreme Court opinions, the court first noted that the unequal treatment in this situation must be reasonable, not arbitrary, and must be reasonably related to the object of the legislation. The court then found the dissimilar treatment justified because of the differences between the positions of the two types of plaintiffs involved.²³⁴ Furthermore, the court stated that a malpractice action did not involve the same issues as those in a wrongful discharge action because in the latter, "information concerning the committee meeting [is] essential to the physician's claim."²³⁵ In a malpractice claim, however, plaintiffs have "full and complete access to their own records" and may also "depose all persons involved in their treatment and engage experts to give opinions as to the quality of care received."²³⁶

An important question left unaddressed by the *Jenkins* court is whether a privilege that prevents a plaintiff from gaining access to information needed to present a claim violates state constitutional provisions guaranteeing free and open access to the courts and an opportunity to address wrongs done. That specific question was taken up by the Arizona Supreme Court in *Humana Hospital v. Superior Court*.²³⁷ In *Humana* the malpractice plaintiff sought discovery

229. See *supra* notes 151-83 and accompanying text.

230. See, e.g., *Lilly v. Turecki*, 112 A.D.2d 788, 492 N.Y.S.2d 286 (1985).

231. 102 Ill. 2d 468, 468 N.E.2d 1162 (1984).

232. *Id.* at 473, 468 N.E.2d at 1165.

233. *Id.* at 475, 468 N.E.2d at 1166 (quoting trial court's opinion).

234. *Id.* at 479, 468 N.E.2d at 1167-68; see also *Anderson v. Wagner*, 79 Ill. 2d 295, 315, 402 N.E.2d 560, 569-70 (1979) (discussing reasons underlying similar treatment of equal protection and special legislation in Illinois), *appeal dismissed sub nom.* *Woodward v. Burnham City Hosp.*, 449 U.S. 807 (1980).

235. *Jenkins*, 102 Ill. 2d at 479, 468 N.E.2d at 1167-68.

236. *Id.*

237. 154 Ariz. 396, 742 P.2d 1382 (1987).

of credentials files on defendant doctor. Partly because the Arizona privilege statute specifically exempted peer review proceedings from discovery in cases alleging negligent peer review evaluation,²³⁸ plaintiffs claimed the statute effectively abrogated their cause of action in violation of the antiabrogation clause of the Arizona Constitution.²³⁹

After holding that the antiabrogation clause applied to plaintiff's cause of action, the court held the Arizona privilege statute did not abrogate the claim, but merely regulated it. The court stated:

To prove a negligent supervision theory, a plaintiff must establish that the hospital knew or should have known that a physician was not competent to provide certain care and that the hospital's failure to supervise the physician caused injury to the plaintiff.

. . . Information which originated outside the peer-review process is not subject to the privilege and, if otherwise admissible, could be used to prove [plaintiff's] case.²⁴⁰

In addition, the court found that a plaintiff could discover credentialing or review procedure policies, have witnesses testify as to whether the policies were followed, and have her own experts interpret the policies and procedures.²⁴¹ Therefore, the court determined the plaintiff was not denied her day in court because of the review privilege. While discovery of the peer review documents would make presenting the case easier, this interest was outweighed by the public interest in effective peer review and evaluation.

VI. OTHER PROTECTIONS AFFORDED CERTAIN HOSPITAL RECORDS: ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT

Malpractice plaintiffs frequently seek to discover hospital records that are not peer review documents, strictly speaking, but are a part of the hospital's overall health care improvement or risk management program. In particular, hospital incident reports²⁴² "are an essential part of good hospital risk and claims management and . . . a fertile source of information for parties in litigation involving hospitals."²⁴³

As claims against hospitals have increased, the pressure to control risks and maintain accurate records of incidents in the hospital has increased as well. When an incident occurs, especially one causing physical injury to a person, witnesses working for the hospital are required to complete a report describing

238. See ARIZ. REV. STAT. § 36-445.01 (1986).

239. *Humana*, 154 Ariz. at 398-99, 742 P.2d at 1385. Article 18, § 6 of the Arizona Constitution provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." ARIZ. CONST. art. XVIII, § 6.

240. *Id.* at 400, 742 P.2d at 1386 (citations omitted).

241. *Id.*

242. An incident has been defined as "any happening which is not consistent with the routine operation of the hospital or the routine care of a particular patient. It may be an accident or a situation which might result in an accident." AHA & NAT'L SAFETY COUNCIL, SAFETY GUIDE FOR HEALTH CARE INSTITUTIONS 33 (1972) (quoting IIA HOSPITAL LAW MANUAL, *supra* note 5, ¶ 4-5, at 76 (1986)).

243. IIA HOSPITAL LAW MANUAL, *supra* note 5, ¶ 4-5, at 76 (1986).

what happened. Copies of the report may go to a supervisor for remedial measures to prevent recurrence, but "the normal repository of the incident report is the hospital attorney's file" or, in some cases, the hospital's liability insurer, which passes it on to its attorney.²⁴⁴ The privileged status of such reports in the hands of the attorney, or in the hands of other hospital personnel, has been the subject of much debate.

The attorney-client privilege protects any communication made in confidence from a client to an attorney for the purpose of seeking legal assistance, absent a narrow range of exceptions, such as the continuation of a crime.²⁴⁵ The attorney-client privilege is generally considered an absolute privilege, whereas the attorney work product doctrine provides only a qualified immunity.²⁴⁶ The work product immunity protects only "documents and other tangible things"—not facts known to a party—and an opposing party can obtain discovery of documents protected by the work product immunity upon a showing of "substantial need" and inability to obtain the "substantial equivalent . . . by other means."²⁴⁷

One obstacle to asserting the attorney-client privilege in the corporate context is extending it to employees of a corporate client, namely those who completed the incident reports at the hospital. For some time, most courts have recognized the privilege extends to communications between the attorney and a member of a "control group," authorized to make decisions for the corporation with respect to legal matters about which the attorney was consulted.²⁴⁸

The United States Supreme Court in *Upjohn Co. v. United States*²⁴⁹ greatly expanded the traditional attorney-client privilege to include communications between nonmanagement personnel and the corporate attorney when the employees were acting within the scope of their employment. The *Upjohn* Court found the "control group" test too narrow, and held the privilege applied to answers supplied in response to questionnaires sent by the corporation's attorney to

244. Hall, *supra* note 4, at 267-68.

245. See *United States v. United States Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

246. See *Willis v. Duke Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976).

247. FED. R. CIV. P. 26(b)(3).

248. See *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom. General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); Note, *Attorney-Client Privilege—Diversified Industries, Inc. v. Meredith: New Rules for Applying the Privilege When the Client Is a Corporation*, 57 N.C.L. REV. 306, 312 (1979).

249. 449 U.S. 383 (1981). In *Upjohn* a corporation's general counsel sent questionnaires to numerous corporate employees concerning questionable payments made by at least one of the corporation's foreign subsidiaries to foreign government officials. Interviews were also conducted with the managers and other corporate officers and employees. The Internal Revenue Service, during the course of an investigation to determine the tax consequences of the payments, issued a summons demanding production of, among other things, the questionnaires and the counsel's notes on the interviews. The Supreme Court held that the "control group" test afforded too narrow an application to the attorney-client privilege based on these facts. *Id.* at 392. The Court then held that the communications between the employees and the corporate attorney were protected by the attorney-client privilege because "[t]he communications at issue were made by the employees to the general counsel, acting as such, at the direction of corporate superiors, in order to secure legal advice from counsel, and concerned matters within the scope of the employees' corporate duties." *Id.* at 394. Because the Supreme Court was applying the privilege under the Federal Rules of Evidence, the application of *Upjohn* is limited to federal courts.

lower-level employees.²⁵⁰

State courts may be encouraged to follow *Upjohn* in applying their own attorney-client privilege for at least three reasons. First, any unanimous opinion by the United States Supreme Court carries great weight and may reflect the modern, accepted version of the privilege. Second, if critical evidence can be used in state court, but not in local federal court, this may be an open invitation to litigants who could obtain jurisdiction in either court to shop for the court with the evidentiary rules most favorable to their side. Finally, a privilege that attaches depending on whether a party litigates in state or federal court is really no privilege at all. The purpose of the attorney-client privilege is to encourage individuals to seek the advice of legal counsel. If in some cases the privilege is not recognized in state court, then those who might have a need to communicate with counsel will not feel free to take advantage of the privilege afforded by the federal courts under the *Upjohn* rule. Thus, the only purpose that will be served by the federal privilege will be to prevent the introduction of probative evidence in some cases in federal court, but the social good underlying the exclusion will be defeated by the state courts.

Regardless of whether they follow *Upjohn*, states generally recognize the traditional scope of the attorney-client privilege. Included in this scope are communications between a corporate employee and the corporate attorney, when the "communication relates to a fact [about] which the attorney was informed by his client . . . for the purpose of securing primarily either an opinion on law, or legal services, or assistance in some legal proceeding."²⁵¹ The California Supreme Court, for example, set forth guidelines for determining when a communication between an attorney and an employee of a corporate client is privileged in *D.I. Chadbourne, Inc. v. Superior Court*.²⁵² In addition, most courts appear willing to apply the attorney-client privilege to communications made to an insurer who will retain an attorney to defend the insured in a lawsuit.²⁵³

250. *Id.* at 395.

251. *United States v. United States Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); *see Securities Exch. Comm'n v. Gulf & Western Indus.*, 518 F. Supp. 675, 681 (D.D.C. 1981).

252. 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964). The court held:

- 4) Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his statement or report is that of the employer;
- 5) If, in the case of the employee last mentioned, the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same; that is to say, if the employer directs the making of the report for confidential transmittal by its attorney, the communication may be privileged

Id. at 737, 388 P.2d at 709-10, 36 Cal. Rptr. at 478.

253. *See, e.g., Royal Embassy of Saudi Arabia v. S.S. Mount Dirfys*, 537 F. Supp. 55, 56 n.2 (E.D.N.C. 1981) ("certainly the fact that the attorney representing the insurance carrier of the defendant shipping company would not change this finding that he was an attorney for the corporate entity"); *American Mut. Liab. Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579, 594-95, 113 Cal. Rptr. 561, 572-73 (1974) (refusing disclosure of attorney-client communications even to customer of insurer, whom counsel was retained to represent); *General Accident Fire & Life Assurance Corp. v. Mitchell*, 128 Colo. 11, 23, 259 P.2d 862, 868-69 (1953); *State ex rel. Cain v. Barker*, 540 S.W.2d 50, 53-54 (Mo. 1976); *Dattmore v. Eagan Real Estate, Inc.*, 112 A.D.2d 800, 492 N.Y.S.2d 302 (1985);

If communications made from the employee of a corporate client to the corporation's attorney are confidential, and the same privilege protects information passed on to an insurer who is responsible for defending a particular lawsuit, then a communication from the corporation's employee to the corporation's insurer, or the attorney for the insurer, should be likewise privileged. With this in mind, hospital incident reports, completed by hospital employees acting within the scope of their employment, to be passed along to an insurer for the purpose of defending a lawsuit arguably are protected by the attorney-client privilege. Two cases support this theory.

In a Florida Court of Appeals case, *Sligar v. Tucker*,²⁵⁴ plaintiff sought discovery of hospital incident reports which were sent to the defendant-hospital's liability insurer. The reports in question were on a

standard form provided by the [defendant's] liability insurer, . . . processed routinely by several department heads for staff of the hospital in any situation where it appeared to them that there might be possible action or liability, and . . . then routinely submitted to the administrator who in turn forwarded the same to the liability insurer.²⁵⁵

The Florida court held the reports were not "a part of the hospital's business records . . . but even if they were, they would nevertheless retain their privileged status."²⁵⁶ The court stated,

There is no question but the reports concerned an event which foreseeably could (and in fact subsequently was) made the basis of a claim covered by the respective insurance policies of the hospital and the physicians, and there is no question but that such reports were submitted at the request of the respective insurers, for use in connection with the anticipated settlement or defense of the claim if and when it materialized.²⁵⁷

In another landmark opinion, *Sierra Vista Hospital v. Superior Court*,²⁵⁸ the California Court of Appeals addressed the confidentiality of similar incident reports. *Sierra Vista* involved reports sent by the director of nursing services and the hospital administrator to the hospital's insurer "for the purpose of preparing to defend Sierra Vista Hospital in the event a lawsuit should be filed."²⁵⁹ The reports were written on forms labeled "CONFIDENTIAL REPORT OF INCIDENT (NOT A PART OF MEDICAL RECORD)." The California court stated:

In our opinion the report is protected from discovery by reason of the attorney-client privilege as established by [the California attorney-client privilege statute] which was applicable at the time the trial court

cases cited in Annotation, *Insured-Insurer Communications as Privileged*, 55 A.L.R.4TH 336, 342-351 (1987).

254. 267 So. 2d 54 (Fla. Dist. Ct. App.), cert. denied, 271 So. 2d 146 (Fla. 1972).

255. *Id.* at 55.

256. *Id.*

257. *Id.*

258. 248 Cal. App. 2d 359, 56 Cal. Rptr. 387 (1967).

259. *Id.* at 362, 56 Cal. Rptr. at 389.

made its order It would be equally protected from discovery by reason of the attorney-client privilege established by section 952 of the Evidence Code. This privilege is founded upon the "belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence."²⁶⁰

The court noted that passing the reports on to others acting as agents for the hospital did not automatically cause them to lose their privileged status. The court stated:

There can be no doubt that the incident report involved here fairly meets all these requirements and is privileged. This being so it does not lose its privilege . . . "merely because it was obtained, with the knowledge and consent of the employer, by an agent of the employer acting under such agency For such purpose an insurance company with which the employer carries indemnity insurance, and its duly appointed agents, are agents of the employer corporation; but the extent to which this doctrine may be carried, and the number of hands through which the communication may travel without losing confidentiality must always depend on reason and the particular facts of the case." . . .

. . . "[T]he intent of the employer controls; and unless the insurance carrier (or its agent) has advised the employer that the employee's statement is to be obtained and used in such manner, it cannot be said that the corporation intended the statement to be made as a confidential communication from client to attorney"²⁶¹

If a communication is deemed privileged from the time of its creation, and the privilege is based on the fact that it was created in good faith and under a belief that it was confidential, and made to a person with a corresponding interest, right, or duty, the fact that the hospital kept a copy should make no difference.²⁶² If a person cannot be questioned about an oral communication with an attorney, he should not be compelled to disclose a written one just because he kept a copy for himself. In fact, few businesses send letters to their attorneys without keeping copies for their files. As the *Sierra Vista* court pointed out, however, the more hands the report passes through, the more likely the court will find the privilege destroyed.

Other jurisdictions have held that certain hospital incident reports were not protected by the attorney-client privilege, but the facts of these cases were not

260. *Id.* at 363, 56 Cal. Rptr. at 390 (quoting *City and County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951)).

261. *Id.* at 366, 56 Cal. Rptr. at 392 (quoting *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 738, 388 P.2d 700, 710, 36 Cal. Rptr. 468, 478 (1964)).

262. *Cf. Presnell v. Pell*, 298 N.C. 715, 720, 260 S.E.2d 611, 614 (1979). The *Presnell* court stated:

The defense of qualified or conditional privilege arises in circumstances where (1) a communication is made in *good faith*, (2) the subject and scope of the communication is one in which the party uttering it has a valid interest to uphold, or in reference to which he has a legal right or duty and (3) *the communication is made to a person or persons having a corresponding interest, right, or duty.*

identical to either *Tucker* or *Sierra Vista*. In *St. Louis Little Rock Hospital v. Gaertner*²⁶³ plaintiff sued for wrongful death when the decedent committed suicide by drinking toilet bowl cleanser while a patient at defendant hospital. During discovery, plaintiff sought hospital incident reports completed on forms provided by the hospital's liability insurer. The forms were headed, "PATIENT INCIDENT REPORT—NOT A NOTICE OF LOSS—FOR LOSS PREVENTION PURPOSES ONLY."²⁶⁴ The reports were completed in triplicate; copies were sent to the hospital administrator, the head of the department involved, and the hospital's insurance carrier. The Missouri Court of Appeals noted that this third copy was sent to the insurer, not immediately after the incident, but on a monthly basis. Deciding that the reports were discoverable, the court stated that the attorney-client privilege did not protect the reports because the purpose of the report was not to seek legal advice, but to help the hospital reduce incidents.²⁶⁵ The court noted, however, that for the attorney-client privilege to apply, the documents need not be gathered "in anticipation of litigation," as they would for the work product doctrine to apply. In addition, the court stated:

[T]he fact that the incident report was communicated to relator's insurer rather than directly to relator's attorney does not preclude assertion by relator of the privilege. A communication falls within the attorney-client privilege even though the attorney was not yet actually representing the client, provided that the communication was made between the client as an insured to his liability insurer during the course of an existing insured-insurer relationship.²⁶⁶

The court also noted that "[t]he incident report form called for the nurse to fill in answers coded so that a computer would be able to read the responses. [The reports, therefore, were not] decipherable by the relator's attorneys . . . [even if they] found [their] way into an attorney's hands."²⁶⁷

In a later case before the Missouri Court of Appeals, *Enke v. Anderson*,²⁶⁸

263. 682 S.W.2d 146 (Mo. Ct. App. 1984).

264. *Id.* at 150.

265. *Id.*

266. *Id.*

267. *Id.* at 150-51. A later case from the Missouri Supreme Court indicates that the real reasons for not applying the attorney-client privilege to the incident reports in *Gaertner* were just as the court had stated. In *May Dep't Stores Co. v. Ryan*, 699 S.W.2d 134 (Mo. Ct. App. 1985), plaintiff brought an action for false imprisonment after allegedly being detained for investigation of shoplifting by an employee of the defendant department store. On the same day that the alleged arrest took place, the store security guard completed a report entitled "SECURITY CASE REPORT" with the word "CONFIDENTIAL" beneath the main heading. This report was transmitted to the company's liability insurer. The Missouri Supreme Court held:

An existing insured-insurer relationship, whereby an insured is contractually obligated to report promptly covered incidents to the insurer who in turn is obligated to defend and indemnify the insured, is similar to an attorney-client relationship insofar as discovery is concerned. Any communication between insured and insurer which relates to the former's duty to report incidents and the latter's duty to defend and to indemnify falls within the attorney-client privilege and is excluded from discovery Thus, a report made by an employee to his employer concerning the details of an incident, which is transmitted to the employer's attorney or insurer, is within the confidential communication privilege and is not subject to discovery, absent a waiver.

Id. at 136-37 (citations omitted).

268. 733 S.W.2d 462 (Mo. Ct. App. 1987).

the court held that an incident report prepared by the hospital after the plaintiff's fall while a patient at defendant hospital was not discoverable because the report was sent to defendant's liability insurer and thus was protected by the attorney-client privilege. The court distinguished this case from *Gaertner*, stating:

[T]he *only* purpose of the incident report in [*Gaertner*] was to improve safety conditions in the hospital. Although that purpose may have been an additional one for the incident report in the case at bar, the existence of that commendable purpose did not deprive the incident report of its status as a privileged document²⁶⁹

In a Colorado case, *Kay Laboratories, Inc. v. District Court*,²⁷⁰ plaintiff sought a hospital incident report concerning chemical burns suffered by plaintiff when a chemical ice pack leaked. The reports in question were completed by a nurse following a standard procedure. Such reports were completed on printed forms provided by the hospital's insurer whenever an incident occurred that could lead to litigation with the hospital, and while some of the copies were sent to the hospital's insurer, not all of the copies were. The insurance company used the reports for evaluation of claims and for "statistical analysis for loss prevention."²⁷¹

The Colorado Supreme Court held the reports were not protected by the attorney-client privilege because they were not completed for the purpose of seeking legal advice at the time. Although the court concluded that the reports sent to the insurer for evaluation by the insurer's attorney would be privileged, this privilege was held not to apply to documents in existence before the attorney-client relationship was established. Here, the hospital was self-insured but retained an attorney and an insurance company to process claims on a case-by-case basis.

Holding the reports were not privileged, the *Kay Laboratories* court relied on an earlier case, *Bernardi v. Community Hospital Association*.²⁷² In *Bernardi* plaintiff sought incident reports completed by a hospital nurse. A copy of each report was sent to the hospital administrator and the director of nurses. A third copy was attached to the patient's chart. The hospital claimed the reports were privileged because they were used by an attorney, who was retained by the hospital after the claim arose. The Colorado Supreme Court quickly crushed the attorney-client privilege claim by stating that "it seems rather plain that these incident reports were not prepared for the attorney. Rather, they were prepared for certain administrative officials of the Hospital and they were available to the Hospital's attorney if he wished to see them."²⁷³

In *Clark v. Norris*²⁷⁴ the Montana Supreme Court noted that when persons

269. *Id.* at 469.

270. 653 P.2d 721 (Colo. 1982).

271. *Id.* at 722.

272. 443 P.2d 708 (Colo. 1968).

273. *Id.* at 715.

274. 734 P.2d 182 (Mont. 1987).

are instructed by their employer to complete reports for the employer's attorney, the reports may be protected by the attorney-client privilege. The court then held, however, that the privilege did not apply to an incident report completed by a hospital's nurse, because defendant presented no evidence concerning the purpose of the report.²⁷⁵

These cases as a whole suggest some basic rules surrounding the attorney-client privilege as it relates to hospital incident reports. First, when the primary purpose of the report is to provide information to the hospital's attorney or the liability insurer responsible for defending the hospital, the attorney-client privilege should protect the reports from discovery, at least in states that follow *Upjohn* or a similar version of the attorney-client privilege. This is especially true when employees of the hospital are told the reports are made in complete confidence, thus inviting the same trust a client would have for communications made directly to an attorney. Second, the mere fact that the hospital uses such reports for other purposes should not necessarily destroy the privilege. For example, many hospitals now employ "risk managers" to follow up on problems within the hospital and to reduce the chance of repeated incidents. If a copy of the report is sent to the risk manager either before or after going to the attorney or insurer, the privilege should still be preserved; passing the report on to other employees, especially management personnel involved in the decision-making process of hospital operations, should not destroy the privilege.²⁷⁶ By the same token, reports and other documents sent to an attorney to defend the hospital arguably should remain privileged if sent to another body having a separate privilege, such as a medical review committee. Rather than finding that both the committee privilege and the attorney-client privilege are destroyed by revealing the report to the other, the more logical approach is to let the respective privilege attach to each copy.

The line restricting the attorney-client privilege for hospital records should be carefully drawn, however. Reports that are actually normal business records and used for numerous purposes should not be deemed privileged simply because copies were sent to the hospital's insurer or attorney. Although the party claiming the privilege carries the burden of demonstrating that the privilege applies to particular documents, the burden should shift to the other party to show why the privilege does not apply once a hospital shows that the reports are produced and used primarily for the purpose of communicating with the hospital's attorney to seek legal advice concerning potential claims.²⁷⁷

275. *Id.* at 187.

276. An alternative argument for protecting documents sent to a "risk manager" is made by analogy to the general public policy against introducing subsequent remedial measures into evidence to prove negligence. *See, e.g.,* FED. R. EVID. 407. The reasoning is that if evidence of correcting a problem can be used against a defendant in a civil action, it will tend to discourage potential defendants from taking such remedial action, thus leaving a risk of further injuries. If the purpose of having a risk manager is to ensure remedial measures are taken to prevent a repeat of the incident, then this same rationale might apply. Similarly, if such reports by hospital employees are subject to discovery and may be introduced as evidence to prove negligence, the employees will be less likely to be candid, and the measures needed to prevent reoccurrence of the incident are less likely to be taken.

277. *Cf. Guy v. Avery County Bank*, 206 N.C. 322, 323, 173 S.E. 600, 601 (1934) ("Although

In addition to the attorney-client privilege, some hospital incident reports have been held protected by the attorney work product immunity. For those jurisdictions that have adopted some version of the Federal Rules of Civil Procedure, the attorney work product doctrine is codified in Rule 26(b)(3).²⁷⁸ The federal rule was drafted from the guidelines set forth by the United States Supreme Court in *Hickman v. Taylor*,²⁷⁹ and the version adopted by most states is identical to the federal version. Because of this, state courts often turn to federal decisions for guidance in applying the work product doctrine.²⁸⁰

While some jurisdictions have held that material gathered in anticipation of a particular litigation is protected as "work product," others adopted the rule that "any materials prepared in anticipation for any litigation by the party from whom discovery is sought are protected under Rule 26(b)(3)."²⁸¹ However, under federal decisions, records kept in the ordinary course of business are generally excluded from the work product protection.²⁸² Thus, a major issue in determining whether hospital incident reports are protected by the attorney work product immunity is whether they are ordinary business records or documents truly prepared in anticipation of litigation.

In *Sligar v. Tucker*²⁸³ the Florida Court of Appeals found the hospital incident reports at issue were prepared for use by the hospital's insurer to defend the hospital against a claim. As such, the several reports were privileged and not subject to discovery. Although the court did not specify whether the reports were protected based on the attorney-client privilege or attorney work product

the burden of showing that the communication is privileged rests on the one asserting the facts, whenever the communication relates to a matter so connected with the employment as attorney as to afford a presumption that it was drawn out by the relation of attorney and client, it is privileged from disclosure." (quoting B. JONES, JONES ON EVIDENCE § 749 (2d ed. 1908)).

278. *E.g.*, N.C. R. Civ. P. 26(b)(3). The rule in part provides:

Trial Preparation; Materials—Subject to the provisions of subsection (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.

Id.

279. 329 U.S. 495 (1947). In *Hickman* an attorney representing the owner of a tugboat interviewed the survivors of an accident "with an eye toward the anticipated litigation." *Id.* at 498. Later, plaintiff attempted to discover the attorney's written memoranda of the interviews. The United States Supreme Court held that the memoranda sought were not protected by the attorney-client privilege, but were protected as the work product of an attorney and could not be discovered unless they were "essential to the preparation of one's case." *Id.* at 511.

280. *See, e.g.*, *Willoughby v. Wilkins*, 65 N.C. App. 626, 641, 310 S.E.2d 90, 99 (1983), *cert. denied*, 310 N.C. 631, 315 S.E.2d 697 (1984).

281. *Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E.2d 191, 201 (1976).

282. *See, e.g.*, *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45, 52 (4th Cir. 1963); *Rakus v. Erie-Lackawanna R.R.*, 76 F.R.D. 145, 146 (W.D.N.Y. 1977).

283. 267 So. 2d 54 (Fla. Dist. Ct. App.), *cert. denied*, 271 So. 2d 146 (Fla. 1972); *see supra* notes 254-55 and accompanying text.

immunity, it did find the reports were "not a part of the hospital business records."²⁸⁴ Moreover, the court stated that even if the reports were business records, "they would nonetheless retain their privileged status."²⁸⁵ This type of broad protection, however, was rejected by courts in New York, Alabama, and Colorado.²⁸⁶

Even if documents are protected by the work product immunity, a plaintiff can still discover protected reports with a showing of substantial need and undue hardship in obtaining the documents' equivalent.²⁸⁷ Hospitals may counter such arguments by claiming the employees completing such reports are available for deposition and testimony at trial. However, such questions need to be addressed on a case-by-case basis considering the availability of hospital employees, the length of time since the reports were filed, and the length of time since the incident occurred.²⁸⁸

284. *Id.* at 55.

285. *Id.*; see also *May Dep't Stores Co. v. Ryan*, 699 S.W.2d 134 (Mo. Ct. App. 1984) (confidential report completed by security guard working for defendant department store and submitted to the store's liability insurer was protected as an attorney-client communication and attorney work product immunity); *Thomas v. Harrison*, 634 P.2d 328 (Wyo. 1981) (hospital incident reports protected by both the attorney-client privilege and the attorney work product immunity).

286. In *Vandenburg v. Columbia Memorial Hosp.*, 91 A.D.2d 710, 457 N.Y.S.2d 591 (1982), the New York Appellate Division refused to apply the work-product doctrine to hospital incident reports, finding they were regular business records. The court took the more narrow view and determined that in order to be privileged, the reports had to be "prepared exclusively for litigation." *Id.* at 711, 457 N.Y.S.2d at 592. In *Vandenburg* the reports were prepared as a requirement of the state health code. Under current New York law, however, incident reports and individuals who prepare them are covered by the New York medical review privilege if the reports are "required by the department of public health." N.Y. EDUC. LAW § 6527 (McKinney Supp. 1988).

The Alabama Supreme Court took up the work product issue involving a hospital incident report in *Sims v. Knollwood Park Hosp.*, 511 So. 2d 154 (Ala. 1987). *Sims* involved an incident report that was completed by a hospital employee after plaintiff fell from her wheelchair and fractured her hip. The report form was labeled, "Confidential—For Attorney's Use Only." The court found the report was not protected by the work product immunity, because the reports were prepared routinely whenever incidents occurred. *Id.* at 157.

In *Kay Laboratories, Inc. v. District Court*, 653 P.2d 721 (Colo. 1982), see discussion *supra* note 270-83 and accompanying text, the Colorado Supreme Court refused to apply the work product doctrine to protect hospital incident reports. The *Kay Laboratories* court relied on an earlier case, *Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982), which held such reports were not protected unless they were "prepared or obtained in order to defend the specific claim which already had arisen and, when the documents were prepared or obtained, there was a substantial probability of imminent litigation over the claim or a lawsuit had already been filed." *Id.* at 1379. The language and reasoning in these cases indicates there might be a contrary result in jurisdictions in which the work product immunity attaches to any documents prepared or gathered in anticipation for any contemplated litigation. See, e.g., *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976). The *Willis* court stated:

Although some cases have held that the trial preparation immunity should not extend to materials prepared for litigation terminated prior to the pending case if the earlier litigation was between different parties, we believe the better rule is that any materials prepared in anticipation for any litigation by the party from whom discovery is sought are protected under Rule 26(b)(3).

Id. at 36-37, 229 S.E.2d at 201 (citations omitted).

287. See FED. R. CIV. P. 26(b)(3).

288. Cf. *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962) (denying discovery of records protected by work product immunity because counsel seeking discovery had interviewed the witness who completed the report within a short period of time following the accident), *cert. denied*, 375 U.S. 985 (1964). *Contra* *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963) (distinguishing *Guilford* based on the length of time that passed since the incident occurred).

In determining the confidentiality of hospital incident reports, courts should take several factors into consideration. First, the court should consider whether the reports are labeled in such a way as to indicate they are intended as confidential communications, especially if they use language that would lead a reasonable employee to believe he is making a confidential communication to an attorney. This should be especially true if the reports are addressed to an attorney or an insurance carrier. Second, the court should note whether the reports serve numerous other purposes and whether they are widely distributed throughout the hospital. The more hands the report passes through, the less likely it was intended as a confidential communication. The court should also note whether the other purposes for which the report is used enjoy a similar privilege, such as the medical review privilege. Finally, in applying the work product immunity, the court should always consider whether the same information is available from other sources, such as from less confidential documents or depositions of employee-witnesses.

VII. CONCLUSIONS

The foregoing discussions are intended to explain some of the law concerning the protection of hospital medical review records, as well as certain other hospital reports. This Comment has attempted to draw several conclusions which may be summarized as follows:

(1) Courts should view the medical review privilege in light of the case under consideration and realize that the nature of the parties and their cause of action helps to determine the permissible, as well as the desirable, scope of the privilege. In cases involving malpractice claims by patients, the privilege should be given its broadest interpretation and the court should always be careful not to destroy the legislative purpose behind it by casting doubt on the confidentiality of the review process. While this will mean that some malpractice plaintiffs must do without the best information otherwise available, the legislature, in enacting the statute, decided the interests of the state would be better served by a policy fostering open and candid review proceedings. However, in cases in which the review process is itself under attack, such as in claims brought by physicians or other health care professionals alleging the committee acted in bad faith and thereby injured the plaintiff, the plaintiff's interests cannot be abrogated simply on policy grounds. The courts and the legislatures must balance the constitutional rights of plaintiffs against the needs of hospitals for confidential review.

(2) Courts and attorneys should be aware that other privileges may also apply to other hospital reports, especially the attorney-client privilege and the attorney work product immunity. In deciding the discoverability of such records, courts should examine the true purpose behind the creation of the records and apply the appropriate standard based on general principles surrounding the privilege in each jurisdiction.

(3) As stated in the introduction to this Comment, nothing is worse than a half-hearted privilege. When the courts or the legislature attempt to give a

privilege too narrow a scope, they may destroy its reason for existing. When this happens, those relying on the privilege lose confidence in the trust they once felt and may become less willing to participate in the free discussion the privilege seeks to promote. If so, all that will remain of the privilege will be those unfortunate instances in which a plaintiff is denied access to important information that could make or break the cause of action. Society pays a heavy price for privileges, but if the courts give too narrow an interpretation to them, society may pay the price but be cheated of the benefits.

The day may come when the trend toward protecting such information is reversed and all plaintiffs are again allowed free and open access to records needed to prove a case. Until then, however, the policy should be given every possible chance to succeed. If the end result is improved health care, the cost to society will be justified.

CHARLES DAVID CREECH

APPENDIX

Protection of Medical Review Records: The
North Carolina Approach

The North Carolina medical review committee privilege is codified at North Carolina General Statutes section 131E-95.²⁸⁹ The statute provides that a person in attendance at a medical review committee meeting cannot be compelled to testify in any civil action regarding evidence or other matters produced or presented during the proceedings of the meeting. The statute also provides, however, that "information, documents, or records otherwise available are not immune from discovery or use in civil action merely because they were presented during the proceedings of the committee."²⁹⁰

Thus far North Carolina's appellate courts have addressed the scope of the medical review committee statute on only three occasions. In *Cameron v. New Hanover Memorial Hospital*²⁹¹ the North Carolina Court of Appeals first defined the scope of the statute, then codified at North Carolina General Statutes section 131-170.²⁹² *Cameron* involved an action by two podiatrists against a public hospital and two staff doctors alleging wrongful denial of hospital staff

289. The section reads:

(a) A member of a duly appointed medical review committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement or proceeding undertaken, made, or performed within the scope of the functions of the committee.

(b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, "Public Records defined," and shall not be subject to discovery or introduction into evidence in any civil action against a hospital or a provider of professional health services which results from matters which are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings.

N.C. GEN. STAT. § 131E-95 (1986). "Medical review committee" is defined as a committee of a state or local professional society, of a medical staff of a licensed hospital or a committee of a peer review corporation or organization which is formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing.

N.C. GEN. STAT. § 131E-76 (1986).

290. N.C. GEN. STAT. § 131E-95 (1986). In addition to this statute, North Carolina has also chosen to take advantage of the early opt-in provision in the Health Care Quality Improvement Act of 1986. Act of August 19, 1987, ch. 859, § 19, 1987 N.C. Sess. Laws 2121, 2121 (codified at N.C. GEN. STAT. § 90-21.23 (Supp. 1987)); see *supra* note 125 (discussing state's early opt-in provision).

291. 58 N.C. App. 414, 293 S.E.2d 901, *cert. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982).

292. The statute provided:

The proceedings of, records and materials produced by, and the materials considered by a committee are not subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of matters which are the subject of evaluation and review by the committee . . .

N.C. GEN. STAT. § 131-170 (repealed 1983).

privileges. Among numerous other claims, plaintiffs alleged defendant doctors conspired to exclude them from practicing in the hospital and that the conspiracy constituted a "group boycott" and an unfair trade practice in violation of state law.²⁹³

Plaintiffs appealed a directed verdict against them, claiming, among other things, the trial court erred in not compelling discovery of the minutes of a staff medical meeting and the minutes of meetings of committees of the hospital's board of trustees. Defendants claimed the minutes of the medical staff meeting were privileged and that the meetings of the trustees' committees were protected by the attorney-client privilege because counsel was present during the meetings.²⁹⁴

The court of appeals first noted that the meetings took place prior to the enactment of the medical review committee statute. However, the court found that the privilege statute protecting communications during a hospital staff meeting was "grounded in our common law."²⁹⁵ The court noted that under the North Carolina common law a privileged communication arises when

- (1) a communication is made in *good faith*, (2) the subject and scope of the communication is one in which the party uttering it has a valid interest to uphold, or in reference to which he has a legal right or duty, and (3) *the communication is made to a person or persons having a corresponding interest, right, or duty.*²⁹⁶

The court then concluded that the trial court correctly excluded documents based on the hospital's general assertion of privilege, but not on the hospital's claim of attorney-client privilege as the hospital had asserted at trial.²⁹⁷

Neither raised nor discussed in *Cameron* were the constitutional issues that have surrounded similar actions brought by doctors in other jurisdictions.²⁹⁸ However, both plaintiffs in *Cameron* had access to some evidence, in particular the staff meetings they attended and the meetings of the trustees committees in which their staff privileges were discussed. Thus the medical review privilege did not act to bar completely their claim against the hospital and the committee member defendants in that case.

The North Carolina Supreme Court's interpretation of section 131E-95 came in *Shelton v. Morehead Memorial Hospital*.²⁹⁹ Plaintiffs in a medical malpractice action alleging corporate negligence sought to obtain copies of certain records of defendant hospital and the former chief executive officer pertaining to defendant physicians. The court of appeals had held that the records of the hospital's review committee and former chief executive officer were protected by

293. *Cameron*, 58 N.C. App. at 416-17, 293 S.E.2d at 903-04; see N.C. GEN. STAT. §§ 75-1, 75-1.1 (1985).

294. *Cameron*, 58 N.C. App. at 435, 293 S.E.2d at 914.

295. *Id.* at 437, 293 S.E.2d at 915.

296. *Id.* at 436, 293 S.E.2d at 915 (quoting *Presnell v. Pell*, 298 N.C. 715, 720, 260 S.E.2d 611, 614 (1979)).

297. *Id.* at 437, 293 S.E.2d at 915.

298. See *supra* notes 151-83 and accompanying text.

299. 318 N.C. 76, 347 S.E.2d 824 (1986).

statute, but that records of the hospital board of trustees were not.³⁰⁰

The supreme court reached several conclusions regarding discoverability of these hospital records. First, while information produced and used by a hospital medical review committee is not subject to discovery under section 131E-95, this immunity does not extend to documents available from original sources that would be discoverable but for the existence of the review committee.³⁰¹ Second, the minutes of the hospital board of trustees were not protected by the review privilege.³⁰² Third, the review privilege prevents discovery of medical review proceedings and the record materials the committee considers, even when the plaintiff is suing for corporate negligence.³⁰³ Finally, based on the bylaws of the hospital and its description of the hospital's chief executive officer, any documents within the possession of the CEO were not protected by the statute.³⁰⁴

The court then ordered the trial court to compel discovery of

- (a) all direct complaints, and all direct allegations of misbehavior, unprofessional conduct, professional negligence or incompetence regarding [defendant physicians] received by the witness from any person; . . .
- (b) all incident reports concerning [defendant physicians'] treatment of any patient; . . . [and] (e) [minutes of] all meetings or hearings of the Board of Trustees or any members of the Board of Trustees relating to [defendant physicians].³⁰⁵

The supreme court also determined that all disciplinary investigations and hearings, all peer review evaluations and recommendations, personnel information, credentials evaluations, and all recommendations to grant, continue, or discontinue staff privileges of defendant physicians were protected from discovery by the statute. In addition, the court found the statute also protected "all meetings or hearings of the Executive Committee of the Medical Staff, or any other medical staff committee relating to [defendant physicians]."³⁰⁶

In *Cameron* the court of appeals had found that the medical review privilege was "grounded in our common law."³⁰⁷ The same court in *Shelton* concluded that "whatever common law privilege existed in North Carolina 'has been codified in section [131E-95].'"³⁰⁸ The supreme court in *Shelton* indicated that it "agree[d] with this conclusion."³⁰⁹ However, in finding that the former privilege statute codified the common law, the *Cameron* court seemed to be indicating there was a common-law privilege outside the statute and applied it to a case that arose prior to the enactment of the statute. Turning this conclusion on

300. *Shelton*, 76 N.C. App. 253, 256-57, 332 S.E.2d 499, 501-02 (1985), cert. granted, 315 N.C. 185, 337 S.E.2d 860 (1985).

301. *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829.

302. *Id.* at 87, 347 S.E.2d at 831.

303. *Id.* at 86-87, 347 S.E.2d at 831.

304. *Id.* at 84, 347 S.E.2d at 830.

305. *Id.* at 88, 347 S.E.2d at 832.

306. *Id.* at 88, 347 S.E.2d at 832.

307. *Cameron*, 58 N.C. App. at 437, 293 S.E.2d at 915.

308. *Shelton*, 318 N.C. at 86, 347 S.E.2d at 830-31 (quoting *Shelton*, 76 N.C. App. at 258, 332 S.E.2d at 503).

309. *Id.*

its head, both *Shelton* courts concluded that whatever common-law privilege existed was now codified. While the difference here seems inconsequential, it could be significant. Some courts continue to strictly construe statutes that they view as contrary to the common law.³¹⁰ Thus, instead of viewing the medical review privilege contained in a body of common law that amplifies the statute, as the court of appeals did in *Cameron*, the supreme court appears to be restricting the privilege to the words of the statute. With this in mind, hospitals and their attorneys would be unwise to rely on any type of common-law privilege to protect any hospital records.

If the supreme court does strictly construe the medical privilege statute, it runs the risk of undermining the basic policy objectives served by the privilege.³¹¹ In deciding how far to extend the medical review privilege, the supreme court should attempt to promote the policy objectives of the general assembly. In so doing, the court should be wary of exposing any documents that exist only because people made disclosures relying on a promise of complete confidentiality.

In *Shelton* the supreme court made an apparently broad ruling on a wide range of documents, some of which may not have been at issue in the case.³¹² Such a broad ruling could undermine the general assembly's policy objectives. However, in a more recent case, the court of appeals seemed to follow the general theme of protecting all records if their disclosure would damage the privilege's basic policy objectives. In *Whisenhunt v. Zammit*³¹³ a patient brought a negligence action alleging defendant doctor failed to monitor the effects of prescription medication. On appeal, she claimed the trial court erred in not allowing her to discover the "credentialing records" of Forsyth Memorial Hospital as they pertained to defendant doctor. Plaintiff contended that the "credentialing records" were not medical review records and therefore not protected by section 131E-95.

The court of appeals disagreed. Finding some authority in *Shelton*, the court stated, "Plaintiffs cannot carve out an exception to [section] 95 by claiming they want to review credentialing records of defendant 'in their entirety.' The purpose of [section] 95 is to promote candor in peer review proceedings, and we will not undercut that purpose."³¹⁴ While this language represents no radical departure from *Shelton*, it does indicate the court of appeals is sensitive to the underlying policy objectives of the medical review statute. By giving serious consideration to these objectives, the court shows a willingness to yield to legislative intent and allow the privilege to prove itself worthy of the costs of having it, or to fail on its own merits.

The North Carolina courts have yet to address directly issues surrounding

310. See, e.g., cases cited *supra* notes 87-88 and accompanying text.

311. See *supra* note 87 and accompanying text.

312. For example, the court ordered the release of any hospital incident reports concerning the treatment of the plaintiffs. *Shelton*, 318 N.C. at 88, 347 S.E.2d at 832. However, nothing in the case indicates to what type of reports the court was referring.

313. 86 N.C. App. 425, 358 S.E.2d 114 (1987).

314. *Id.* at 428, 358 S.E.2d at 116.

the attorney-client privilege or attorney work product immunity as they apply to hospital records. However, the North Carolina Supreme Court views the attorney-client privilege as "identical in scope to the traditional privilege,"³¹⁵ and North Carolina courts may be receptive to the United States Supreme Court's application of the corporate employee-attorney privilege.³¹⁶ If so, hospital reports completed for employees for the purpose of communicating information needed to obtain legal advice from the hospital's attorney should be privileged. In making this determination, the courts should look to the same factors discussed earlier in this Comment.³¹⁷ In addition, the North Carolina Supreme Court has adopted the "better rule" that "any materials prepared in anticipation for any litigation by a party from whom discovery is sought are protected under Rule 26(b)(3)."³¹⁸ Thus, the court may also be willing to follow the lead of the California and Florida courts in finding that hospital incident reports, when used to gather information by an attorney or insurer, are protected by the attorney work product doctrine.³¹⁹

315. *Willis v. Duke Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976).

316. *See Upjohn v. United States*, 449 U.S. 383 (1981); *see also supra* notes 247-50 and accompanying text.

317. *See supra* text accompanying note 296.

318. *Willis*, 291 N.C. at 36, 229 S.E.2d at 201.

319. *See supra* notes 252-60 and accompanying text.

