

1986

West Covina and Its Progeny: Have the California Courts Barricaded the Avenue of Relief Provided for Victims of Hospital Corporate Negligence?

Lisa R. Rohm

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Rohm, Lisa R. (1986) "West Covina and Its Progeny: Have the California Courts Barricaded the Avenue of Relief Provided for Victims of Hospital Corporate Negligence?," *California Western Law Review*. Vol. 22 : No. 2 , Article 6.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol22/iss2/6>

This Comment is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

***West Covina* and Its Progeny: Have the California Courts Barricaded the Avenue of Relief Provided for Victims of Hospital Corporate Negligence?**

INTRODUCTION

Historically, hospitals have been comprised of two separate groups.¹ Hospital administration has been on the one side: responsible only for financial and housekeeping services. On the other side has been the medical personnel, having the responsibility of supplying medical services. This traditional distinction between the responsibilities of the physician and the hospital was, until recently, interpreted by the courts as a limitation on the hospital for the negligent acts of its staff physicians.² Hospitals—whether charitable or for profit—were regarded as mere collections of facilities and manpower and, as such, were for the most part immune from suits.³ Staff physicians were considered independent contractors and thus assumed the sole responsibility for the consequences of their actions. This view has changed in the last decade and will continue to change.⁴

1. For an excellent discussion of the changing responsibilities of hospitals, see Southwick, *The Hospital as an Institution—Expanding Responsibilities Change Its Relationship with the Staff Physician*, 9 CAL. W.L. REV. 429 (1973).

2. A “staff physician” is a private doctor who has been granted medical staff privileges by a hospital to treat his patients in that particular hospital. A physician granted staff privileges at a hospital may admit patients for clinical testing, for general institutional care and supervision, and to perform specified types of surgery depending upon the privileges granted. Thus, a staff physician is to be distinguished from a resident physician who is employed by the hospital and whose negligence may, therefore, be imputed to a hospital under the doctrine of vicarious liability. See *Brown v. La Societe Francaise de Bienfaisance Mutuelle*, 138 Cal. 475, 71 P. 516 (1903) (the first California Supreme Court case to adopt and apply the theory of vicarious liability for the negligence of a resident physician).

The JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS 94 (1984) [hereinafter cited as JCAH ACCREDITATION MANUAL] provides that “staff physicians” are those physicians who have been afforded staff privileges by the institution; normally for a period of not more than two years. Each physician admitting patients to a hospital must be a member of its staff. *Id.* at 32.

3. For an in-depth examination of the evolution of hospital liability, see Southwick, *Hospital Liability—Two Theories Have Been Merged*, 4 J. LEG. MED. 1 (1983); Relman, *The Medical Industrial-Complex*, 303 N. ENG. J. MED. 963 (1980).

4. A recent article providing a thorough discussion of the development of hospital tort liability in California is Comment, *The Hospital's Responsibility for its Medical Staff: Prospects for Corporate Negligence in California*, 8 PAC. L.J. 141 (1977). See also Southwick, *supra* note 1, at 430.

Specifically, in response to changing public perception,⁵ American courts have begun to question whether a hospital may be responsible for the medical care furnished by its staff physicians. The hospital is no longer viewed by the public as merely a building where physicians render medical services.⁶ Indeed, it is perceived as a "unified institution vital to community health, rather than as a mere physical shell in which physicians practice their profession."⁷

Consequently, most jurisdictions have expanded the liability of hospitals by adoption of the "corporate negligence" theory.⁸ The doctrine of hospital corporate negligence recognizes that a hospital, as an institution, has an independent duty to its patients to insure the competence of its medical staff through careful selection and review.⁹ A hospital that breaches this duty may be held directly liable to the patient for the resulting harm.¹⁰

In 1982, a California court expressly adopted the doctrine of hospital corporate negligence for the first time in the case of *Elam v.*

5. Today, the public's perception of a hospital is that of "a multi-faceted health care facility responsible for the quality of medical care and treatment rendered." *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332, 344, 183 Cal. Rptr. 156, 163 (1982). Indeed, as one commentator has observed, "physician 'house calls' are but a distant memory." Comment, *Anatomy of the Conflict Between Hospital Medical Staff Peer Review Confidentiality and Medical Malpractice Plaintiff Recovery: A Case for Legislative Amendment*, 24 SANTA CLARA L. REV. 661 (1984). See also Southwick, *supra* note 1, at 430.

6. The patient admitted to modern health care facilities receives care not only from his admitting physician, but also from a number of individuals performing such important services as: emergency medical care, nutritional care, nuclear medicine procedures, nursing care, pathology and medical laboratory services, pharmaceutical services, physical therapy, speech pathology and audiology, and diagnostic and therapeutic respiratory care services. JCAH ACCREDITATION MANUAL, *supra* note 2, at v-vi.

7. Note, *Independent Duty of a Hospital to Prevent a Physician's Malpractice*, 15 ARIZ. L. REV. 953, 967 (1973). See *infra* note 24 and accompanying text for an analysis of the modern health care facility.

8. *Darling v. Charleston Community Memorial Hosp.*, 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964), *aff'd*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966), is generally credited with the genesis of hospital corporate negligence. See *infra* notes 29-44 and accompanying text for a discussion of the *Darling* decision and *infra* note 22 for a list of those jurisdictions which have adopted the doctrine of hospital corporate negligence.

9. In *Johnson v. Misericordia Community Hosp.*, 99 Wis. 2d 708, 725, 301 N.W.2d 156, 165 (1981), the Wisconsin Supreme Court concisely summarized the doctrine of hospital corporate negligence, when it observed:

[A] hospital has a direct and independent responsibility to its patients, over and above that of physicians and surgeons practicing therein, to take reasonable steps to (1) insure that its medical staff is qualified for the privileges granted and . . . (2) to evaluate the care provided.

10. As set forth *supra* note 2, before the emergence of the doctrine of hospital corporate negligence, hospital liability for the negligence of a staff physician was usually based on the theory of *respondeat superior*. However, inasmuch as staff physicians were viewed as independent contractors, medical malpractice plaintiffs found it extremely difficult to recover on a claim against a hospital. For a further discussion of hospital liability prior to the recognition of the doctrine of hospital corporate negligence, see *infra* notes 21-26 and accompanying text.

College Park Hospital.¹¹ Noting that a hospital has a duty of reasonable care to protect patients from harm,¹² the California Fourth Appellate District provided victims with a corporate negligence cause of action against a hospital for its failure to insure the competence of its medical staff.¹³ The *Elam* court emphasized that hospital corporate liability would underscore the strong public policy of enhancing the quality of medical care by "supplying the hospital with a greater incentive to insure the competence of its medical staff."¹⁴

However, California Evidence Code section 1157 [hereinafter referred to as section 1157], which provides that "[n]either the proceedings nor the records of organized committees of medical . . . staffs in hospitals having the responsibility of evaluation and improvement of the quality of care rendered . . . shall be subject to discovery,"¹⁵ prohibits discovery of the very evidence necessary to prove a hospital failed to insure the competence of its medical

11. *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156, *modified*, 133 Cal. App. 3d 94a, 183 Cal. Rptr. 156 (1982). Prior to *Elam*, the doctrine, although not expressly adopted, had been applied at the trial court level. See *England v. Valley Memorial Hosp.*, Civ. No. 46098-3 (Super. Ct. Alameda County, Cal. Dec. 15, 1977); Memorandum of Decision, *Gonzales v. Nork*, Civ. No. 228566 (Super. Ct. Sacramento County, Cal. Nov. 27, 1973), *rev'd*, 60 Cal. App. 3d 728, 131 Cal. Rptr. 717 (1976), *rev'd and remanded*, 20 Cal. 3d 500, 573 P.2d 458, 143 Cal. Rptr. 240 (1978) (an oft-quoted opinion wherein now retired Superior Court Judge B. Abbott Goldberg summarized the doctrine of hospital corporate negligence) (copies on file in the offices of California Western Law Review). See also *infra* note 51.

12. 132 Cal. App. 3d at 340, 183 Cal. Rptr. at 161 (citing *Rice v. California Lutheran Hosp.*, 27 Cal. 2d 296, 163 P.2d 860 (1945)).

13. 132 Cal. App. 3d at 341, 183 Cal. Rptr. at 161. The opinion originally published in the official advance sheets imposed a duty of "careful selection, review and supervision," but was modified by removal of the term "supervision." 133 Cal. App. 3d 94a.

14. 132 Cal. App. 3d at 345, 183 Cal. Rptr. at 164.

15. Enacted in 1968, CAL. EVID. CODE § 1157 (West Supp. 1986), provides in its entirety:

(a) Neither the proceedings nor the records of organized committees of medical, medical-dental, podiatric, registered dietitian, *psychological*, or veterinary staffs in hospitals having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or medical or dental review or dental hygienist review or chiropractic review or podiatric review or registered dietician review or veterinary review committees of local medical, dental, dental hygienist, podiatric, dietetic, veterinary, or chiropractic societies, or *psychological review committees of state or local psychological associations or societies having the responsibility of evaluation and improvement of the quality of care*, shall be subject to discovery.

(b) Except as hereinafter provided, no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting.

(c) The prohibition relating to discovery or testimony does not apply to the statements made by 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, or to any person requesting hospital

staff.¹⁶ Prior to *Elam*, section 1157 was strictly construed on the grounds that the section manifests a public policy judgment that confidentiality is essential to insure candor and objectivity within the committees, thereby promoting the quality of medicine.¹⁷ Following the *Elam* decision, the public policy of confidentiality underlying section 1157 met head on with the policy of protecting patients from unreasonable harm through careful selection and review of staff physicians, for the first time, in the case of *West Covina Hospital v. Superior Court*.¹⁸ Although both the doctrine of hospital corporate negligence and section 1157 seek to improve the quality

staff privileges, or in any action against an insurance carrier in refusing to accept a settlement offer within the policy limits.

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

(e) The amendments made to this section by Chapter 1081 of the Statutes of 1983, or at the 1985 portion of the 1985-86 Regular Session of the Legislature, *do* not exclude the discovery or use of relevant evidence in a criminal action.

CAL. EVID. CODE § 1157 (West Supp. 1986). The italicized portions reflect the recent amendments to section 1157, stemming from Senate Bill 328, passed by the California Legislature on August 30, 1985, and signed by Governor Deukmejian on September 17, 1985 (Stats. 1985, ch. 725).

16. When used in this Comment, medical staff review committees refer to those committees responsible for performing: (1) credentials screening, which involves scrutinizing applicants for staff privileges, and (2) peer review, which involves evaluating the performance of existing staff physicians. Although the ultimate authority to grant, deny or revoke staff privileges remains with the hospital's governing body, hospitals delegate the duty to make initial investigations regarding an applicant's qualification for staff privileges and the duty to evaluate the performance of existing staff physicians to such medical staff committees. JCAH ACCREDITATION MANUAL, *supra* note 2, at 147.

The Joint Commission on Accreditation of Hospitals [hereinafter cited as JCAH] has been the driving force behind the implementation of these medical staff review, or quality control, committees. The JCAH standards establish that the governing board of the hospital is responsible for the quality of patient care and, thus, requires that each hospital establish a program of quality assurance. *Id.* This program is to be carried out by the medical staff, organized into various committees, acting on behalf of the governing hospital board. *Id.* at 89, 95. The committees are to conduct an ongoing system of review capable of identifying incompetent staff members. *Id.* at 101. Thus, because the responsibility for reviewing the staff's competency is delegated to the medical staff, these committees have been labeled "peer review" committees. Holbrook & Dunn, *Medical Malpractice Litigation: The Discoverability and Use of Hospital's Quality Assurance Committee Records*, 16 WASHBURN L.J. 54, 56-58 (1976); JCAH ACCREDITATION MANUAL, *supra* note 2, at 89-104, 147-49. See also CAL. HEALTH & SAFETY CODE § 32128 (Deering Supp. 1986).

17. *Matchett v. Superior Court*, 40 Cal. App. 3d 623, 115 Cal. Rptr. 317 (1974); *Schulz v. Superior Court*, 66 Cal. App. 3d 440, 136 Cal. Rptr. 67 (1977); *Roseville Community Hosp. v. Superior Court*, 70 Cal. App. 3d 809, 139 Cal. Rptr. 170 (1977); *Henry Mayo Newhall Memorial Hosp. v. Superior Court*, 81 Cal. App. 3d 626, 146 Cal. Rptr. 542 (1978); *County of Kern v. Superior Court*, 82 Cal. App. 3d 396, 147 Cal. Rptr. 248 (1978).

18. *West Covina Hosp. v. Superior Court*, 153 Cal. App. 3d 134, 200 Cal. Rptr. 162 (1984).

of care provided by hospitals, *West Covina* and its progeny¹⁹ have held that the policy of confidentiality embodied in section 1157 is paramount to the policy of protecting a patient from unreasonable harm.²⁰ Consequently, because discovery of peer review proceedings is indispensable to proving whether a hospital has fulfilled its duty of careful selection and review, many commentators believe that the California courts have effectively closed the door on the victims of hospital corporate negligence, thereby providing hospitals with immunity from liability in some instances.

This Comment discusses the impact of the recent California decisions, which uphold the hospital corporate negligence theory while denying plaintiffs access to the very evidence they need to prove such a cause of action—the medical staff committees' files. First, it will trace the development of the corporate negligence theory, in California, as well as in other jurisdictions. Second, it will discuss the impact of section 1157, which provides immunity to hospital committees responsible for selection and retention of staff physicians, on the *Elam* theory of hospital corporate negligence. Third, it will discuss the judiciary's and legislature's common goal, set forth in the *Elam* and *West Covina* decisions, of assuring the quality of health care, while recognizing the conflict between the cases. The conflict being that *West Covina* and section 1157 effectively deny the plaintiffs redress under the doctrine of hospital corporate negligence by shielding proceedings and documents of the peer review committees. This Comment will then demonstrate the need for legislative action by way of either repealing or amending section 1157 to provide for limited discovery, while noting the unlikelihood that the California Legislature will amend the section. And, finally, this Comment will propose alternative methods of proving an *Elam* cause of action.

I. THE DEVELOPMENT OF THE DOCTRINE OF HOSPITAL CORPORATE NEGLIGENCE IN CALIFORNIA

A. *Recognition of the Doctrine in Other Jurisdictions*

Historically, hospitals were not legally liable for the medical treatment rendered by the non-employee physicians who used the

19. *Santa Rosa Memorial Hosp. v. Superior Court*, 174 Cal. App. 3d 711, 220 Cal. Rptr. 236 (1985); *Brown ex rel. Brown v. Superior Court*, 168 Cal. App. 3d 489, 214 Cal. Rptr. 266 (1985); *West Covina v. Superior Court*, 165 Cal. App. 3d 794, 211 Cal. Rptr. 677 (1985), *hearing granted*, — Cal. 3d —, 701 P.2d 1171, 215 Cal. Rptr. 853 (July 12, 1985) (en banc); *Mt. Diablo Hosp. Medical Center v. Superior Court*, 158 Cal. App. 3d 344, 204 Cal. Rptr. 626 (1984); *Saddleback Community Hosp. v. Superior Court*, 158 Cal. App. 3d 206, 204 Cal. Rptr. 598 (1984); *Snell v. Superior Court*, 158 Cal. App. 3d 44, 204 Cal. Rptr. 200 (1984).

20. *Id.*

hospital facilities in their individual practices.²¹ In the past two decades, however, a number of jurisdictions have recognized that a hospital may be legally responsible for medical treatment provided to its patients despite the fact that such treatment was rendered by non-employee staff physicians.²² These jurisdictions found that, in addition to a hospital's duty to maintain and operate facilities properly, a hospital owes a duty to patients to insure that only competent physicians practice within the facilities.²³ This is based on the

21. Traditionally, a hospital faced liability only for the negligent acts of its salaried staff members and certain independent contractors. At first, courts held the hospital liable for the negligence of its salaried physicians, under the doctrine of vicarious liability, on the theory that only these physicians were subject to the hospital's control. *Rice v. California Lutheran Hosp.*, 27 Cal. 2d 296, 163 P.2d 860 (1945); *La Societe Francaise*, 138 Cal. 475, 71 P. 516 (1903). Courts eventually extended the hospital's liability to include a few staff physicians, under the theory of ostensible or apparent agency, on the grounds that they were subject to a significant degree of hospital control and were held out by the hospital as apparent agents. See *infra* note 25. However, with respect to most staff physicians, courts treated the hospital as an "empty shell," that merely furnished the staff physicians with the facilities to treat their patients. Courts thus viewed these physicians as independent contractors, beyond the hospital's control and, therefore, did not hold the hospital liable for their negligence. *Moore v. Bd. of Trustees of Carson-Tahoe Hosp.*, 88 Nev. 207, 211-12, 495 P.2d 605, 608, *cert. denied*, 409 U.S. 879 (1972); *Mayers v. Litow*, 154 Cal. App. 2d 413, 316 P.2d 351 (1957); *Schloendorf v. Society of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914) (Cardozo, J.) (the seminal case applying the independent contractor theory). See generally *Southwick, supra* note 1, at 376, 440; Comment, *supra* note 3.

22. See *Pedroza v. Bryant*, 101 Wash. 2d 226, 677 P.2d 166 (1984); *Buckley v. Lovallo*, 2 Conn. App. 579, 481 A.2d 1286 (1984); *Logan v. Greenwich Hosp. Ass'n*, 191 Conn. 282, 465 A.2d 294 (1983); *Elam*, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156, *modified*, 133 Cal. App. 3d 94a, 183 Cal. Rptr. 156 (1982); *Johnson*, 99 Wis. 2d 708, 301 N.W.2d 156 (1981); *Capan v. Divine Providence Hosp.*, 287 Pa. Super. 364, 430 A.2d 647 (1980); *Bost v. Riley*, 44 N.C. App. 638, 262 S.E.2d 391 (1980); *Johnson v. St. Bernard Hosp.*, 79 Ill. App. 3d 709, 399 N.E.2d 198 (1979); *Felice v. St. Agnes Hosp.*, 65 A.D.2d 388, 411 N.Y.S.2d 901 (1978); *Utter v. United Hosp. Centre, Inc.*, 160 W. Va. 703, 236 S.E.2d 213 (1977); *Kitto v. Gilbert*, 39 Colo. App. 374, 570 P.2d 544 (1977); *Tucson Medical Center, Inc. v. Misevch*, 113 Ariz. 34, 545 P.2d 958 (1976); *Ferguson v. Gonyaw*, 64 Mich. App. 685, 236 N.W.2d 543 (1975); *Corleto v. Shore Memorial Hosp.*, 138 N.J. Super. 302, 350 A.2d 534 (1975); *Purcell v. Zimbelman*, 18 Ariz. App. 75, 500 P.2d 335 (1972); *Mitchell County Hosp. Auth. v. Joiner*, 229 Ga. 140, 189 S.E.2d 412 (1972), *aff'g* 125 Ga. App. 1, 186 S.E.2d 307 (1971); *Foley v. Bishop Clarkson Memorial Hosp.*, 185 Neb. 89, 173 N.W.2d 881 (1970); *Gridley v. Johnson*, 476 S.W.2d 475 (Mo. 1972); *Pederson v. Dumouchel*, 72 Wash. 2d 73, 431 P.2d 973 (1967); *Mauer v. Highland Park Hosp. Found.*, 90 Ill. App. 2d 409, 232 N.E.2d 776 (1967); *Darling*, 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964), *aff'd*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966); Annot., 51 A.L.R.3d 981. See *contra*, *Schenck v. Government of Guam*, 609 F.2d 387 (9th Cir. 1979); *Stogsdill v. Manor Convalescent Home, Inc.*, 35 Ill. App. 3d 634, 343 N.E.2d 589 (1976) (a case which limits the doctrine to resident physicians); *Lundahl v. Rockford Memorial Hosp. Ass'n*, 93 Ill. App. 2d 461, 235 N.E.2d 671 (1968) (holding that the *Darling* theory of corporate negligence applies only to physicians employed by the hospital).

23. Since the *Darling* court's recognition of a hospital's liability for its direct negligence in failing to review a patient's treatment and require consultation, the doctrine of hospital corporate negligence has been utilized by the courts to require hospitals to exercise reasonable care to insure that the physicians selected and retained as members of hospital medical staffs are competent. Specifically, in *Purcell*, 18 Ariz. App. 75, 81, 500 P.2d 335, 340 (1972), the court held the defendant hospital liable on the ground

public's perception of a hospital as a corporate institution which assumes the role of a health center ultimately responsible for arranging, coordinating and providing comprehensive health care.²⁴ Therefore, rather than relying on ostensible agency²⁵ or *respondet*

that "[t]he Department of Surgery was acting for and on behalf of the hospital in fulfilling [the duty of supervising the competence of staff doctors] and if the department was negligent in not taking any action against [the physician] or recommending to the board of trustees that action be taken, then the hospital would also be negligent." Accord, *Tucson Medical Center*, 113 Ariz. 34, 36, 545 P.2d 958, 960 (1976) (en banc) (wherein the Arizona Supreme Court approved the *Purcell* decision, stating that "[i]f the medical staff was negligent in the exercise of its duty of supervising its members or in failing to recommend action by the hospital's governing body prior to the case in issue, then the hospital would be negligent"); *Joiner*, 229 Ga. 140, 189 S.E.2d 412 (1972) (holding that a hospital has a duty to investigate, review and pass judgment on a physician's application for staff privileges and cannot rely solely on the fact that he is a state licensed physician who has been recommended by other members of the medical staff). See also *Elam*, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156, modified, 133 Cal. App. 3d 94a, 183 Cal. Rptr. 156 (1982); *Misericordia Community Hosp.*, 99 Wis. 2d 708, 301 N.W.2d 156 (1981); *Ferguson*, 64 Mich. App. 685, 236 N.W.2d 543 (1975); *Corleto*, 138 N.J. Super. 302, 350 A.2d 534 (1975); *Board of Trustees of Carson-Tahoe Hosp.*, 88 Nev. 207, 495 P.2d 605 (1972). See generally *Holbrook & Dunn*, *supra* note 16, at 56.

Additionally, hospitals have been held directly liable for failing to assure that adequate medical histories were taken for patients admitted for treatment (*Foley*, 185 Neb. 89, 173 N.W.2d 881 (1970)), and for failing to insist that a licensed physician be present during surgery (*Pederson*, 72 Wash. 2d 73, 431 P.2d 973).

24. In *Misericordia Community Hosp.*, 99 Wis. 2d 708, 723-24, 301 N.W.2d 156, 164 (1981), the Wisconsin Supreme Court aptly summarized the modern role of health care facilities as follows:

The public is indeed entitled to expect quality care and treatment while a patient in our highly technical and medically computerized hospital complexes. The concept that a hospital does not undertake to treat patients, does not undertake to act through its doctors and nurses, but only procures them to act solely upon their own responsibility, no longer reflects the fact. The complex manner of operation of the modern-day medical institution clearly demonstrates that they furnish far more than mere facilities for treatment. They appoint physicians and surgeons to their medical staffs, as well as regularly employing on a salary basis physicians and surgeons, nurses, administrative and manual workers and they charge patients for medical diagnosis, care, treatment and therapy, receiving payment for such services through privately financed medical insurance policies and government financed programs known as Medicare and Medicaid. Certainly, the person who avails himself of our modern "hospital facilities" . . . expects that the hospital staff will do all it reasonably can to cure him and does not anticipate that its nurses, doctors and other employees will be acting solely on their own responsibility.

25. Successful recovery against a hospital for alleged acts of an ostensible agent requires proof that: (1) the person dealing with the agent did so with a reasonable belief in the agent's authority; (2) the belief was generated by some act or neglect of the hospital sought to be charged; and (3) the third person, in relying on the agent's apparent authority, was not guilty of negligence. *Seneris v. Haas*, 45 Cal. 2d 811, 825, 291 P.2d 915, 927 (1955) (en banc) (quoting *Stanhope v. Los Angeles College of Chiropractic*, 54 Cal. App. 2d 141, 146, 128 P.2d 705, 708 (1942)). See also *Hill v. Citizens Nat'l Trust & Sav. Bank*, 9 Cal. 2d 172, 176, 69 P.2d 853, 855 (1937).

Seneris, 45 Cal. 2d 811, 291 P.2d 915, is the seminal case in California applying ostensible agency to a hospital. In *Seneris*, an action against a hospital and an anesthesiologist for malpractice in the negligent administration of a spinal anesthetic before the birth of the plaintiff's child, the California Supreme Court held that the jury could find an ostensible agency relationship. The court reasoned that the fact that the defendant

*superior*²⁶ theories of liability, these jurisdictions have held the hospital liable in its own right for breaching a duty owed to its patients. This breach of an independent duty of care, resulting in direct hospital liability, has been labeled "corporate negligence."²⁷ To prevail, a plaintiff must show that the defendant hospital's negligent selection or retention of an incompetent staff physician caused the plaintiff's harm.²⁸

The genesis of the doctrine of hospital corporate negligence is attributed to *Darling v. Charleston Memorial Hospital*,²⁹ a case decided by the Supreme Court of Illinois in 1965. The plaintiff in *Darling* was a football player named Dorrence Darling. Darling broke his leg playing college football and was admitted to Charleston Community Memorial Hospital's emergency room, where he was attended by a staff physician, Dr. Alexander.³⁰ The doctor applied no padding and put the cast on too tightly, which caused circulatory difficulties.³¹ The leg became necrotic as a result of the constriction.³² Obvious symptoms included a foul odor,³³ discoloration and loss of sensation. Dr. Alexander failed to call for a consultation as required by medical staff bylaws and, further, nurses with knowledge of the clinical difficulties failed to communicate their observations to the hospital administration.³⁴ Two weeks after admission, Darling's parents had him transferred to another hospital where his right leg had to be amputated below the knee.³⁵

anesthesiologist was one of six anesthetists on the hospital's staff; that he gave anesthetics for no other hospital; that all drugs and equipment used by him were supplied by the hospital; that he had regular "on call" duty at the hospital; and that a hospital nurse summoned him to give the anesthetic in question, was sufficient to establish, *prima facie*, that the anesthesiologist was an agent of the hospital. *Id.* at 832, 291 P.2d at 927.

26. In *Beeck v. Tucson General Hosp.*, 18 Ariz. App. 165, 500 P.2d 1153 (1972), an Arizona court extended a hospital's *respondeat superior* liability. Specifically, the court held the defendant hospital vicariously liable for the negligence of a non-salaried physician who had an exclusive contract with the hospital to provide an essential service. *Id.*

27. *See supra* notes 9 and 23.

28. *Fiorentino v. Wenger*, 19 N.Y.2d 407, 415, 227 N.E.2d 296, 299, 280 N.Y.S.2d 373, 378 (1967); *see also* Goldberg, *The Duty of Hospitals and Hospital Medical Staffs to Regulate the Quality of Patient Care: A Legal Perspective*, 14 PAC. L.J. 55 (1982).

29. *Darling*, 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964), *aff'd*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966).

30. 50 Ill. App. 2d at 266-68, 200 N.E.2d at 157-58.

31. *Id.* at 293, 200 N.E.2d at 170.

32. *Id.* at 290, 200 N.E.2d at 168. "Necrosis" is defined as the "death of living tissue." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 790 (1983).

33. One witness, describing the odor as "an odor of decaying flesh not smelled since World War II," testified that he noticed and discussed this odor with the nurses. *Id.* at 287, 200 N.E.2d at 167.

34. The nurse's record of observations contained numerous notations of "severe pain," "no feeling in toes on being touched," "toes feel cold to touch and slight cyanotic," and "foot very edematous and dark." *Id.* at 270-72, 200 N.E.2d at 159-60.

35. *Id.* at 290, 200 N.E.2d at 169.

The Illinois Supreme Court ultimately held Charleston Memorial Hospital liable on the basis that (1) it was negligent in employing the nurses who failed to call the patient's deteriorating condition to the attention of the hospital administration, and (2) it was negligent in failing "to require consultation with or examination by members of the hospital surgical staff skilled in such treatment; or to review the treatment rendered to the plaintiff and to require consultants to be called in as needed."³⁶

While the first basis of liability involved the application of *respondeat superior*, the second basis was particularly significant in that it used the standards of the Joint Commission on the Accreditation of Hospitals [hereinafter referred to as JCAH],³⁷ the state licensing regulations and the medical staff bylaws in determining the hospital's duty of care.³⁸ Violation of these standards and bylaws by the hospital was found to be evidence of negligence.³⁹ The court concluded that a hospital owes an independent duty to its patients to insure that the physicians practicing with its facilities are competent, reasoning that:

"Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility." . . . The Standards for Hospital Accreditation, the state licensing regulations and the defendant's bylaws demonstrate that the medical profession and other responsible authorities regard it as both desirable and feasible that a hospital assume certain responsibilities for the care of a patient.⁴⁰

36. 33 Ill. 2d at 338, 211 N.E.2d at 260.

37. The JCAH is a voluntary organization, which was founded in 1951. It is sponsored by the American College of Surgeons, the American College of Physicians, the American Hospital Ass'n, the American Medical Ass'n, and the Canadian Medical Ass'n. The JCAH publishes operating criteria for hospitals seeking to acquire or retain accredited status. If a hospital is found to be in substantial compliance with JCAH standards, that hospital is awarded accreditation for three years. JCAH ACCREDITATION MANUAL, *supra* note 2, at xvi.

Today, the JCAH is widely recognized as a standard-setter for hospital practice throughout the United States. Similar quality assurance standards have been expressly adopted in many jurisdictions (*see, e.g.*, CAL. HEALTH & SAFETY CODE § 32128 (West Supp. 1986); KAN. ADMIN. REGS. arts. 28-34-1, 5 (1986)), and are even mandated by Congress as a condition for payment under the Medicare program (42 U.S.C. § 1395x(k), (r), (s) (1983)) and Medicaid program (42 U.S.C. § 1396a(a)(19), (26) (1983)). Indeed, JCAH accreditation is deemed to be *prima facie* compliance with the Medicare requirements. 42 U.S.C. § 1395(bb)(a)(1) (1983). Thus, it has been said that "today, being accredited by the JCAH is nearly as important as being licensed." Love-ridge & Kimball, *Hospital Corporate Negligence Comes to California: Questions in the Wake of Elam v. College Park Hospital*, 14 PAC. L.J. 803, 807 (1983). *See also Matchett*, 40 Cal. App. 3d 623, 627 n.2, 115 Cal. Rptr. 317, 319 n.2 (1974); *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970).

38. 33 Ill. 2d at 332, 211 N.E.2d at 257.

39. *Id.*

40. *Id.* (quoting *Bing v. Thunig*, 2 N.Y.2d 656, 662, 143 N.E.2d 3, 8, 163 N.Y.S.2d

In *Darling*,⁴¹ the point that a hospital may be liable for breaching its duty to review the performance of a staff physician is consistent with the public perception of present-day hospitals as a "unified institution vital to community health, rather than as a mere shell in which physicians practice their profession."⁴² Indeed, the *Darling* decision's corporate responsibility theory has received widespread approval.⁴³ Broadly speaking, it is a recognition of a modern-day hospital's obligation to protect its patients from harm through the hospital's supervision of *all* of the medical care performed within its facilities.⁴⁴

B. Legislative Recognition of a Hospital's Duty to Review the Quality of Medical Care Rendered by Its Staff Physicians

In 1965, the view espoused in *Darling* became embodied in the statutory law of California. First, the California Business and Professions Code was amended to require hospitals' governing bodies to adopt rules providing for the formal organization of medical staffs.⁴⁵ Specifically, what is now California Business and Professions Code section 2282 was enacted to provide that the regular

3, 11 (1957)). *Darling* established the concept that a hospital has an independent responsibility to patients to supervise the medical treatment provided by members of its medical staff. Liability for failure to do so is not founded on respondeat superior, which has been the traditional mode of recovery. Rather, hospital corporate negligence arises out of the hospital-patient relationship, not out of the principle-agent relationship between the hospital and physician-employee.

41. *Id.*

42. See Note, *supra* note 7, at 967.

43. See *supra* note 22 and accompanying text. See also Hollowell, *Does Hospital Corporate Liability Law Extend to Medical Staff Supervision?*, L. MED. & HEALTH CARE, Oct. 1982, at 225-27 (discussing the impact of corporate liability).

44. See cases cited and discussed *supra* notes 22 and 23.

45. CAL. BUS. & PROF. CODE § 2282 (West Supp. 1986) (emphasis added) provides:

The regular practice of medicine in a licensed general or specialized hospital having five or more physicians and surgeons on the medical staff, which does not have rules established by the board of directors thereof to govern the operation of the hospital, which rules include, among other provisions, all the following, constitutes unprofessional conduct:

(a) Provision for the organization of physicians and surgeons licensed to practice in this state who are permitted to practice in the hospital into a formal medical staff with appropriate officers and bylaws and with staff appointments on an annual or biennial basis.

(b) Provision that membership on the medical staff shall be restricted to physicians and surgeons and other licensed practitioners competent in their respective fields and worthy in professional ethics. In this respect the division of profits from professional fees in any manner shall be prohibited and any such division shall be cause for exclusion from the staff.

(c) Provision that the medical staff shall be self-governing with respect to the professional work performed in the hospital; that the medical staff shall meet periodically and review and analyze at regular intervals their clinical expe-

practice of medicine in a hospital which does not have rules established by the governing body, including a provision for a self-governing medical staff which meets periodically to review patient medical records, constitutes unprofessional conduct.⁴⁶ The California Health and Safety Code was also amended to incorporate the JCAH model of procedures for the appointment and ongoing review of medical staffs into the hospital licensing regulations.⁴⁷ In addition, the California Administrative Code set out detailed standards for quality assurance of medical care through utilization of the peer review system.⁴⁸ These standards include a provision that each hospital's governing body shall require that all physicians periodically "demonstrate their ability to perform surgical and other

rience; that the medical records of patients shall be the basis for such review and analysis.

(d) Provision that adequate and accurate medical records be prepared and maintained for all patients.

46. *Id.* (CAL. BUS. & PROF. CODE § 2282 was formerly CAL. BUS. & PROF. CODE § 2392.5).

47. Amended in 1970 to provide that the staff shall meet in accordance with the JCAH requirements, CAL. HEALTH & SAFETY CODE § 32128 (West 1973 & Supp. 1986) (emphasis added) provides in part:

The rules of the hospital, established by the board of directors pursuant to this article, shall include:

1. Provision for the organization of physicians and surgeons, podiatrists, and dentists licensed to practice in this state who are permitted to practice in the hospital into a formal medical staff, with appropriate officers and bylaws and with staff appointments on an annual or biennial basis;

2. Provision for procedure for appointment and reappointment of medical staff as provided by the standards of the Joint Committee on Accreditation of Hospitals;

3. * * * Provisions that the medical staff shall be self-governing with respect to the professional work performed in the hospital; *that the medical staff shall meet in accordance with the minimum requirements of the Joint Committee on Accreditation of Hospitals; and that the medical records of the patients shall be the basis for such review and analysis;*

4. Provision that accurate and complete medical records be prepared and maintained for all patients (medical records to include identification data, personal and family history, history of present illness, physical examination, special examinations, professional or working diagnoses, treatment, gross and microscopic pathological findings, progress notes, final diagnosis, condition on discharge, and such other matters as the medical staff shall determine); and,

5. Such limitations with respect to the practice of medicine and surgery in the hospital as the board of directors may find to be in the best interest of the public health and welfare

See also CAL. HEALTH & SAFETY CODE § 1250 (West Supp. 1986) (which states that a hospital shall have "a governing administrative body with overall administrative and professional responsibility") and CAL. HEALTH & SAFETY CODE § 32125 (West Supp. 1986) (which confers upon the board of directors the responsibility of its operation in accordance with "the best interests of the public health," including the power to enact and enforce rules and regulations necessary for the administration of the hospital).

48. Title 22, § 70701, of the California Administrative Code provides in part:

(a) The governing body shall:

(1) Adopt written bylaws in accordance with legal requirements and its

procedures competently and to the satisfaction of an appropriate

community responsibility which shall include but not be limited to provision for:

(A) Identification of the purposes of the hospital and the means of fulfilling them.

(B) Appointment and reappointment of members of the medical staff.

(C) Appointment and reappointment of one or more dentists, podiatrists, and/or clinical psychologists to the medical staff respectively, when dental, podiatric, and/or clinical psychological services are provided.

(D) Formal organization of the medical staff with appropriate officers and bylaws.

(E) Membership on the medical staff which shall be restricted to physicians, dentists, podiatrists, and clinical psychologists competent in their respective fields, worthy in character and in professional ethics. . . .

(F) Self-government by the medical staff with respect to the professional work performed in the hospital, periodic meetings of the medical staff to review and analyze at regular intervals their clinical experience and requirement that the medical records of the patients shall be the basis for such review and analysis.

(G) Preparation and maintenance of adequate and accurate medical records for all patients.

. . .

(7) *Require that the medical staff establish controls that are designed to ensure the achievement and maintenance of high standards of professional ethical practices including provision that all members of the medical staff be required to demonstrate their ability to perform surgical and/or other procedures competently and to the satisfaction of an appropriate committee or committees of the staff, at the time of original application for appointment to the staff and at least every two years thereafter.*

(8) Assure that medical staff by-laws, rules and regulations are subject to governing body approval, which approval shall not be withheld unreasonably.

CAL. ADMIN. CODE tit. 22, § 70701 (1983) (emphasis added).

Title 22, § 70703, of the California Administrative Code further elaborates on the duty of a hospital. CAL. ADMIN. CODE tit. 22, § 70703 (1983). That section provides in pertinent part:

(a) *Each hospital shall have an organized medical staff responsible to the governing body for the adequacy and quality of the medical care rendered to patients in the hospital.*

(1) The medical staff shall be composed of physicians and, where dental or podiatric services are provided, dentists or podiatrists.

. . .

(b) The medical staff by vote of the members and with the approval of the governing body, shall adopt written by-laws which provide formal procedures for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate.

(c) The medical staff shall meet regularly. Minutes of each meeting shall be retained and filed at the hospital.

(d) The medical staff shall provide in its bylaws, rules and regulations for the functions to be performed by the following committees: executive credentials, medical records, tissue, utilization review, infections and pharmacy and therapeutics. In those hospitals where appropriate, these functions may be performed by a committee of the whole or its equivalent. These committees shall make reports of their activities and recommendations to the executive

committee or committees of the staff."⁴⁹ Furthermore, the California Administrative Code requires hospitals to "have an organized medical staff responsible to the governing body for the fitness, adequacy, and quality of the medical care rendered to patients in the hospital."⁵⁰ Thus, just as under the JCAH regulatory scheme, California law delegates the quality assurance function within a hospital to peer review committees.

C. *Judicial Adoption of Hospital Corporate Negligence in California—Elam v. College Park Hospital*

In May of 1982, a California court applied the doctrine of hospital corporate negligence for the first time in the case of *Elam v. College Park Hospital*.⁵¹ The court held that the doctrine of hospi-

committee and the governing body as frequently as necessary and at least quarterly.

...
(f) The medical staff shall provide for availability of a staff physician for emergencies among the in-hospital population in the event that the attending physician or his alternate is not available.

...
(i) The medical staff shall develop criteria under which consultation will be required. These criteria shall not preclude the requirement for consultations on any patient when the director of the service, chairman of a department or the chief of staff determines a patient will benefit from such consultation.

Id. (emphasis added).

49. CAL. ADMIN. CODE tit. 22, § 70701(a)(7) (1983).

50. CAL. ADMIN. CODE tit. 22, § 70703(a) (1983).

51. *Elam*, 132 Cal. App. 3d at 337, 183 Cal. Rptr. at 159 (1982). See Memorandum of Decision, *Gonzales v. Nork*, Civ. No. 228566 (Sup. Ct. of Sacramento County, Cal. Nov. 27, 1973), *rev'd*, 60 Cal. App. 3d 728, 131 Cal. Rptr. 717 (1976), *rev'd and remanded*, 20 Cal. 3d 500, 573 P.2d 458, 143 Cal. Rptr. 240 (1978) (copy on file in the offices of the California Western Law Review), a case indicating that California was prepared to impose a direct duty of care upon a hospital in its selection and supervision of a staff physician as early as 1973. Indeed, Superior Court Judge B. Abbott Goldberg's "opinion in *Nork* is said to 'articulate almost precisely the same standard as the *Elam* opinion.'" Goldberg, *The Duty of Hospitals and Hospital Medical Staffs to Regulate the Quality of Patient Care: A Legal Perspective*, 14 PAC. L.J. 55, 75 n.119 (1982) (quoting CALIFORNIA MALPRACTICE TOPICS n.3 (D. Rubsamen ed. June 1982)). However, the hospital defendant in the *Nork* case settled out of court so that the court's proposed memorandum of decision was not binding.

In *Nork*, a patient sued Mercy Hospital and its staff physician, Dr. John Nork, alleging medical malpractice and fraud. The patient claimed that he had sustained injuries resulting from back surgery performed by Dr. Nork. The evidence indicated that Dr. Nork had previously performed more than three dozen incompetent, and, in some cases even unnecessary, back surgeries; that his medical reports contained fictitious entries; and that of the more than 60 lawsuits filed in Sacramento County against Dr. Nork, many of those were also lawsuits against Mercy Hospital. *Id.* at 15-58. Further, although Dr. Nork was not a board-certified orthopedic surgeon, he was, nevertheless, allowed to perform orthopedic surgery. *Id.*

Judge Goldberg determined that the hospital had no actual knowledge of Nork's misconduct and that the hospital had complied with the JCAH standards for peer review committees. *Id.* at 148. Still, he found that the hospital was not immunized from liabil-

tal corporate negligence was a valid basis to establish hospital liability for a patient's injury caused by the negligence of a staff physician, on the grounds that the hospital breached its duty "to insure the competence of its medical staff through careful selection and review."⁵²

Elam asserted that College Park Hospital breached its duty to insure the competence of its staff physicians.⁵³ Elam sought damages from the hospital because its "Medical Care Evaluation Committee" had reviewed the medical charts of her podiatrist, Dr. Schur, and had failed to report suspicion of his incompetence to the hospital administration. Three malpractice actions had been brought against him as a result of similar surgeries.⁵⁴ The hospital admitted that it had learned of one of the malpractice suits against Schur approximately four and one-half months before Elam's surgery.⁵⁵ Based on that knowledge, Elam alleged that the hospital had breached its independent duty to insure the quality of treatment

ity merely because it had complied with the applicable JCAH standards and functioned through a medical staff. *Id.* at 194. Judge Goldberg, in writing the proposed memorandum, made it clear that hospitals in California would be held liable for their own negligence in supervising staff physicians. Indeed, Judge Goldberg's exhaustive opinion defined the duty of a hospital with respect to its staff physicians as follows:

Mercy Hospital had no actual knowledge of Dr. Nork's propensity to commit malpractice, but it was negligent in not knowing. It was negligent in not knowing because it did not . . . use the knowledge available to it properly; it failed to investigate . . . [the basis for a prior malpractice suit] . . . which would have given it knowledge; and it cannot excuse itself on the ground that its medical staff did not inform it.

Id.

Judge Goldberg concluded by succinctly stating what has come to be known as the doctrine of hospital corporate negligence:

I have reached the conclusion that the hospital is liable with great reluctance, because I am sure that the Sisters of Mercy have done everything within their power to run a proper institution. But they like every hospital governing board, are corporately responsible for the conduct of their medical staff.

Id.

52. *Elam*, 132 Cal. App. 3d at 340-41, 183 Cal. Rptr. 161.

53. *Id.* at 337, 183 Cal. Rptr. at 158-59. The complaint alleged:

"During said period of time the defendants COLLEGE PARK HOSPITAL and DOES . . . so negligently and carelessly cared for, treated and rendered medical services upon the person and body of the plaintiff and so negligently and carelessly operated, managed, controlled and conducted their services, activities and supervision in connection with plaintiff's care and treatment, and so negligently and carelessly failed to properly ensure the character, quality, ability and competence of individuals treating patients in said hospital that as a direct and proximate result thereof plaintiff was caused to and did suffer the injuries hereinafter alleged."

Id. at 335 n.1, 183 Cal. Rptr. at 158 n.1 (emphasis added).

54. 132 Cal. App. 3d at 336-37, 183 Cal. Rptr. at 158. The three cases were: *Earlywine v. Schur*, No. 359278 (Super. Ct. of San Diego County, Cal. filed October 22, 1974), *Perez v. Schur*, No. 354963 (Super. Ct. of San Diego County, Cal. filed June 17, 1974), and *Bailey v. Schur*, No. 383533 (Super. Ct. of San Diego County, Cal. filed June 17, 1976).

55. *Id.* at 337, 183 Cal. Rptr. at 158.

afforded her by failing to conduct a continuing review of Schur.⁵⁶ The trial court disagreed and granted defendant hospital's motion for summary judgment.⁵⁷

The question presented on appeal was "whether a hospital [can be held] liable to a patient under the doctrine of corporate negligence for negligent conduct of independent physicians and surgeons who, as members of the hospital staff, avail themselves of the hospital facilities, but who are neither employees nor agents of the hospital."⁵⁸ The court noted that it found "no appellate decision of this state addressing precisely this application of the doctrine of corporate hospital liability . . . nor 'considering tort liability of a hospital for negligent selection or retention of staff practitioners.'"⁵⁹ Thus, the court was presented with an opportunity to follow the lead of the Illinois Supreme Court in *Darling*,⁶⁰ and that of several other jurisdictions,⁶¹ in imposing upon a hospital a direct and independent responsibility to its patients of insuring the competency of its medical staff and the quality of medical care provided through the "prudent selection, review and continuing evaluation of the physicians granted staff privileges."⁶²

The threshold question of whether a duty was owed to Elam was commenced with a discussion of the fundamental policy embodied in section 1714 of the California Civil Code [hereinafter referred to as section 1714].⁶³ Noting that a duty is presumed under section 1714, the court stated that departure from this fundamental principle involves balancing of the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff did in fact suffer injury, the moral blame attributable to the defendant's conduct, the burden to the defendant, the policy of preventing future harm, the consequences to the community of imposing a duty, and the availability and cost of insurance.⁶⁴ Concluding that the imposition of liability

56. *Id.* at 337, 183 Cal. Rptr. at 158-59.

57. *Id.* at 335, 183 Cal. Rptr. at 158.

58. *Id.* at 335, 183 Cal. Rptr. at 157.

59. *Id.* at 337-38, 183 Cal. Rptr. at 159 (citing *Matchett*, 40 Cal App. 3d 623, 629 n.4, 115 Cal. Rptr. 317, 321 n.4 (1974), and Comment, *Prospects for Corporate Negligence in California*, *supra* note 4, at 142). See also *supra* notes 11 and 51.

60. 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *aff'g* 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964), *cert. denied*, 383 U.S. 946 (1966).

61. See *supra* notes 8, 9 and 22.

62. 132 Cal. App. 3d at 346, 183 Cal. Rptr. at 164.

63. *Id.* at 339, 183 Cal. Rptr. at 160. Section 1714 of the California Civil Code provides in part: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . ." CAL. CIV. CODE § 1714 (West Supp. 1986).

64. 132 Cal. App. 3d at 339-40, 183 Cal. Rptr. at 160 (citing *Rowland v. Christian*, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968) (en banc)).

is determined largely by the foreseeability of risk,⁶⁵ the *Elam* court found that harm was indeed foreseeable in the physician-patient relationship and that, therefore, a hospital has a duty to exercise reasonable care in protecting its patients from an "unreasonable risk of harm."⁶⁶

The court noted that its conclusion was consistent with the public's perception of the modern hospital as a comprehensive health care facility.⁶⁷ Moreover, the court stated that the imposition of a corporate duty upon the hospital would have the effect of supplementing the California Legislature's efforts.⁶⁸ Indeed, the court said that it would provide the hospital with a greater incentive to insure the competence of the medical staff within its facilities.⁶⁹

The court then summarized its reasons for adopting the corporate negligence theory:

[T]he articulated public policy considerations support the imposition of this general duty Moreover, imposing hospital-corporate liability does not interfere with the Legislature's comprehensive efforts to ameliorate the integrity and quality of the health care system . . . but rather supplements the efforts by encouraging hospitals to actively oversee the competence of their medical staff and the quality of the medical treatment rendered on their premises, while providing victims with an additional avenue for relief.⁷⁰

The *Elam* court's decision is particularly significant in that it highlights the importance of modern hospital systems designed to monitor and evaluate the quality of *all* medical care furnished hospital patients, thus imposing a direct duty upon California hospitals to insure the competence of its medical staff by careful selection and continuing review of those physicians granted staff privileges.

II. THE IMPACT OF THE *ELAM* DECISION ON MEDICAL MALPRACTICE PLAINTIFFS' ACCESS TO PEER REVIEW COMMITTEE RECORDS

While the ultimate authority to grant, deny, or suspend staff privileges remains with the hospital administration, the duty to make

65. 132 Cal. App. 3d at 340, 183 Cal. Rptr. at 160-61 (*citing* Weirum v. RKO General, Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975) and Dillon v. Legg, 68 Cal. 2d 728, 734, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968) (en banc)).

66. 132 Cal. App. 3d at 340-41, 183 Cal. Rptr. at 161.

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

68. *Id.* at 347, 183 Cal. Rptr. at 165. Specifically, the court noted that "the underlying statutory intent of [CAL. HEALTH & SAFETY CODE §§ 1250, 32125, 32128, CAL. BUS. & PROF. CODE § 2282 and CAL. ADMIN. CODE tit. 22, §§ 70701 & 70703] is the protection and furtherance of the health care interest of the patient." *Id.*

69. *Id.* at 345, 183 Cal. Rptr. at 164.

70. *Id.* at 346-47, 183 Cal. Rptr. at 165 (emphasis added).

initial investigations, reviews, and recommendations concerning a physician's staff privileges is delegated to medical staff committees.⁷¹ Thus, a hospital must defend itself against a charge of corporate negligence by showing that the committees did, in fact, carefully investigate and review a physician's qualifications and performance. The plaintiff will want to show that they did not. However, the degree of access a plaintiff has to committee records is clear.

Section 1157 prevents the discovery of the proceedings and records of medical staff committees that are performing these quality assurance functions.⁷² Additionally, those persons in attendance at medical staff committee meetings cannot be compelled to testify or disclose what transpired during the review proceedings.⁷³ This section *is believed* to evince a legislative judgment that confidential treatment of committee records will promote the quality of in-hospital medical practice.⁷⁴ As a result, the door opened by *Elam* to provide redress to victims of hospital corporate negligence has, effectively, been closed.

A. Access to Peer Review Committee Records Prior to the Elam Decision

Prior to *Elam*,⁷⁵ section 1157 and the relatively few cases that had construed it⁷⁶ clearly prevented the discovery of medical staff proceedings in plaintiffs' malpractice actions. The espoused public interest in maintaining the confidentiality of these peer review committees was set aside only to permit discovery in suits by doctors claiming wrongful or arbitrary exclusion from hospital staff privileges.⁷⁷

Apparently section 1157 was enacted in 1968, in response to the

71. CAL. ADMIN. CODE tit. 22, §§ 70701, 70703 (1983); CAL. HEALTH & SAFETY CODE §§ 32125, 32128 (West Supp. 1986).

72. For entire text of section 1157, see *supra* note 15.

73. CAL. EVID. CODE § 1157 (West Supp. 1986). The question of whether a physician in attendance at these meetings can voluntarily testify as to what transpired thereat was answered in the negative by the California Second Appellate District. *West Covina Hosp. v. Superior Court*, 165 Cal. App. 3d 794, 211 Cal. Rptr. 677, *hearing granted*, — Cal. 3d —, 701 P.2d 1171, 215 Cal. Rptr. 853 (July 12, 1985). See *infra* notes 179-84 and accompanying text.

74. *Matchett*, 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317, 320 (1974).

75. *Elam*, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156 (1982).

76. In addition to *Matchett*, *Schulz*, *Roseville*, and *Henry Mayo* (discussed *infra* notes 83-127), see *County of Kern v. Superior Court*, 82 Cal. App. 3d 396, 147 Cal. Rptr. 248 (1978) and *American Mutual Liability Insur. Co. v. Superior Court*, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561 (1974), which briefly cite section 1157 as preventing discovery of peer review committee records and proceedings.

77. *Henry Mayo*, 81 Cal. App. 3d 626, 635, 146 Cal. Rptr. 542, 547 (1978); *Roseville*, 70 Cal. App. 3d 809, 814, 139 Cal. Rptr. 170, 172 (1977).

decision of *Kenney v. Superior Court*.⁷⁸ In *Kenny*, a medical malpractice case, the court ordered production of hospital records dealing with information regarding the competence of the defendant doctor.⁷⁹ By allowing the malpractice plaintiff access to the medical files revealing peer review committee investigations and appraisals, the court determined that the right of the plaintiff to have access outweighed the committee's need for confidentiality.⁸⁰ The California Legislature disagreed and enacted section 1157, supposedly finding that external access to investigations by peers comprising hospital staff committees would inhibit effective participation.⁸¹ The section, therefore, is advocated as manifesting a public policy judgment that confidentiality is essential to insure the candor and objectivity of these committees, thereby promoting the quality of in-hospital medical practice.⁸²

The leading case in California interpreting section 1157 is *Matchett v. Superior Court*.⁸³ This case squarely addressed the question of the discovery of medical staff committee records and proceedings. Matchett was a plaintiff in a medical malpractice action against Rideout Memorial Hospital and Dr. Malcom Petaway, a doctor on its staff. The plaintiff alleged that he suffered injuries, while in the hospital, resulting from Dr. Petaway's negligent treatment and from Rideout Hospital's negligence in granting Dr. Petaway staff privileges and retaining him on its staff without adequate inquiry or control over his competence.⁸⁴ In reality, the plaintiff's complaint stated a cause of action similar to the corporate negligence cause of action adopted nearly a decade later in *Elam*.

During the discovery phase of the lawsuit, Matchett sought pre-trial discovery of hospital personnel and peer review committee

78. 255 Cal. App. 2d 106, 63 Cal. Rptr. 84 (1967); see also *Matchett*, 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320.

79. 255 Cal. App. 2d 106, 63 Cal. Rptr. 84.

80. 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320.

81. *Id.* See also *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970) ("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."); *Auld v. Holly*, 418 So. 2d 1020, 1024 (Fla. Dist. Ct. App. 1982), *quashed in part on other grounds*, 450 So. 2d 217 (Fla. 1984) ("[T]he medical community [will] not enthusiastically engage in self-policing as a means to improve health care if the self-policing efforts could later be used in medical malpractice cases."); *Gates v. Brewer*, 2 Ohio App. 3d 347, 349, 442 N.E.2d 72, 75 (1981) ("If [the] proceedings [of disciplinary and review committees become] the subject of discovery, the candid and conscientious opinions or evaluations necessary to the success of such a review [will] remain hidden for fear of their use in a civil action brought against a hospital or colleague.").

82. 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320. *Accord*, *Straube v. Larson*, 287 Or. 357, 362, 600 P.2d 371, 375 (1979) (wherein the plaintiff argued that "[t]he discussions at such committee meetings, to be of any value, must be frank, even brutal").

83. *Matchett*, 40 Cal. App. 3d 623, 115 Cal. Rptr. 317 (1974).

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

records pertaining to Dr. Petaway's selection and retention, including records of the credentials committee, executive committee, tissue committee, and records committee.⁸⁵ The trial court, pursuant to section 1157, denied Matchett's discovery request.⁸⁶ On appeal, Matchett argued that the portion of section 1157 which provides that the prohibition relating to discovery or testimony shall not apply "to any person requesting hospital staff privileges,"⁸⁷ was an exception which applied, since his lawsuit charged the hospital with negligent selection or retention of a "person requesting staff privileges."⁸⁸

The appellate court disagreed with Matchett's position. It found that Matchett's interpretation was inconsistent with the objective of section 1157.⁸⁹ The court chronicled the history and application of section 1157,⁹⁰ determining the objective of section 1157 to be as follows:

In an accredited hospital, the organized medical staff is responsible to the hospital governing body for the quality of in-hospital medical care; it evaluates the qualifications of applicants and holders of staff privileges; it recommends appointment, reappointment, curtailment and exclusion from staff privileges; it provides peer group methods for reviewing basic medical, surgical and obstetrical functions. . . . When medical staff committees bear delegated responsibility for the competence of staff practitioners, the quality of in-hospital medical care depends heavily upon the committee members' frankness in evaluating their associates' medical skills and their objectivity in regulating staff privileges. Section 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality.⁹¹

After recognizing that the immunity provided by section 1157 exacts a social cost because it "might seriously jeopardize or even prevent the plaintiff's recovery,"⁹² the court held that the exception "for any person requesting hospital staff privileges" only permitted discovery in suits initiated by a physician claiming wrongful or arbitrary exclusion from hospital staff privileges.⁹³ The court then concluded by noting that "[s]ection 1157 represents a legislative choice

85. *Id.*

86. *Id.*

87. CAL. EVID. CODE § 1157(c) (West Supp. 1986).

88. 40 Cal. App. 3d at 628, 115 Cal. Rptr. at 320. *See supra* note 15 for text of section 1157.

89. *Id.*

90. *Id.* at 628-30, 115 Cal. Rptr. at 320-21.

91. *Id.* at 628-29, 115 Cal. Rptr. at 320 (emphasis added).

92. *Id.* at 629, 115 Cal. Rptr. at 321.

93. *Id.* at 629-30, 115 Cal. Rptr. at 321.

between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence."⁹⁴

Still, the specific finding of the *Matchett* court was that the trial court's order denying all of the plaintiff's requested discovery was "too sweeping."⁹⁵ Specifically, the court explained that "the medical staff immunity described in section 1157 extends to, first, the proceedings, and second, the records of the described staff committees. *It does not embrace the files of the hospital administration . . .*"⁹⁶

Like *Matchett*, the plaintiff in *Schulz v. Superior Court*⁹⁷ sought to achieve a judicial construction of an exclusionary clause in section 1157. That clause provides for the discovery of "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 that meeting . . ."⁹⁸

In *Schulz*, the patient-plaintiff's medical malpractice action arose out of surgery performed in Woodland Memorial Hospital by Dr. Paul H. Stavig.⁹⁹ Kathleen Schulz sought pretrial discovery of documents concerning: (1) any statements made regarding a decision by the medical advisory board to revoke Stavig's surgical privileges; (2) a letter from Stavig to the medical advisory board; and (3) statements made by any person who was a party to the subject action who attended any meeting wherein members discussed curtailment of Stavig's surgical privileges.¹⁰⁰ Following a refusal to produce the requested documents on authority of section 1157, Schulz filed a motion to compel. She asserted that the statutory exception to section 1157 for "any person in attendance . . . who is a party to an action or proceeding the subject matter of which was reviewed" at the meeting vitiates the privilege, since both Woodland Memorial Hospital and Dr. Stavig were defendants in her malpractice action.¹⁰¹

The appellate court disagreed with Schulz, stating that the mere filing of an action against the doctor reviewed does not "open to discovery [those] hospital staff records containing medical committee investigation reports and peer appraisals."¹⁰² The court empha-

94. *Id.* at 629, 115 Cal. Rptr. at 321.

95. *Id.* at 628, 115 Cal. Rptr. at 319.

96. *Id.* at 628, 115 Cal. Rptr. at 319-20 (emphasis added).

97. *Schulz*, 66 Cal. App. 3d 440, 136 Cal. Rptr. 67 (1977).

98. CAL. EVID. CODE § 1157(c) (West Supp. 1986). See *supra* note 15 for text of section 1157.

99. 66 Cal. App. 3d at 442, 136 Cal. Rptr. at 68.

100. *Id.* at 442-43, 136 Cal. Rptr. at 68.

101. *Id.* at 445, 136 Cal. Rptr. at 70.

102. *Id.* at 446, 136 Cal. Rptr. at 70.

sized that if it were to conclude "that the immunity is to be set aside when either the staff doctor or the hospital are parties to the malpractice proceeding would not only achieve an absurd result, but would render sterile the immunity provisions of the statute."¹⁰³ The court pointed out that the exception applies only to permit discovery in suits by doctors claiming wrongful or arbitrary exclusion from hospital staff privileges.¹⁰⁴ Nevertheless, the court stressed that section 1157 applies only to the records and proceedings *before medical investigative committees*. "It is," the court observed, "conceivable that the records of the hospital administrative staff do not contain reference to *proceedings* of the medical advisory board and, to that extent, are not within the protection of section 1157."¹⁰⁵ The appellate court thus directed the trial court to reconsider those portions of the pretrial discovery motion which were directed at hospital administration files.¹⁰⁶

Section 1157's exception, relating to "any person requesting hospital staff privileges,"¹⁰⁷ was again the focus of a California court in *Roseville Community Hospital v. Superior Court*.¹⁰⁸ *Roseville* was the first case in which a court applied the exception to section 1157's immunity and, thus, granted a plaintiff access to medical staff committee records.¹⁰⁹

In *Roseville*, Physician's Consulting Laboratories, a partnership of pathologists, brought an action against Roseville Community Hospital for breach of a contract naming the partnership as the exclusive clinical pathologist for the hospital.¹¹⁰ *Roseville* terminated the contract based upon the recommendations of the medical staff.¹¹¹ The trial court ordered the hospital to produce certain records of the executive committee of the medical staff and of the professional standards committee.¹¹² In response, the hospital sought, by writ of prohibition, to have the order set aside.¹¹³ The hospital argued that the order violated section 1157.¹¹⁴

103. *Id.* at 445, 136 Cal. Rptr. at 70.

104. *Id.* at 446, 136 Cal. Rptr. at 70.

105. *Id.* at 446, 136 Cal. Rptr. at 71.

106. *Id.* Thus, like *Matchett*, the *Schulz* court noted that § 1157 does not provide immunity to a hospital's administration files. *Accord* *Saddleback Community Hosp. v. Superior Court*, 158 Cal. App. 3d 206, 204 Cal. Rptr. 598 (1984) (where the court relied on *Schulz* in ordering an in camera inspection of personnel files to determine whether files contained any matter immune from discovery under § 1157 as product of staff evaluation).

107. CAL. EVID. CODE § 1157(c) (West Supp. 1986).

108. *Roseville*, 70 Cal. App. 3d 809, 139 Cal. Rptr. 170 (1977).

109. *Id.* at 816, 139 Cal. Rptr. at 173.

110. *Id.* at 812, 139 Cal. Rptr. at 171.

111. *Id.* at 815, 139 Cal. Rptr. at 173.

112. *Id.* at 812, 139 Cal. Rptr. at 171.

113. *Id.*

114. *Id.*

The appellate court disagreed with the hospital, noting that in *Matchett*,¹¹⁵ and *Schulz*,¹¹⁶ the court anticipated that situations would arise in which doctors had allegedly been wrongfully terminated or excluded from staff privileges and would, therefore, seek access to committee files.¹¹⁷ It was to just such situations that the court in *Roseville* held section 1157's exception relating to "any person requesting hospital staff privileges" was intended to apply.¹¹⁸

In *Henry Mayo Newhall Memorial Hospital v. Superior Court*,¹¹⁹ the Second Appellate District was confronted with another interpretation of section 1157. In *Henry Mayo*, a medical malpractice plaintiff alleged that the hospital had waived the immunity provided in section 1157 by lodging a transcript of its staff committee hearing in a separate administrative mandamus action, wherein the allegedly incompetent physician, Dr. Beauchamp, was seeking to overturn a 120-day suspension.¹²⁰ The appellate court followed the strict interpretation given section 1157 in the *Matchett*¹²¹ and *Schulz*¹²² decisions in concluding that:

[T]he benefits of section 1157 were not waived because to hold otherwise would (1) render hollow immunity provided in section 1157 and subvert the underlying public policy of section 1157 as articulated in *Matchett v. Superior Court*, . . . and (2) undermine the legislative scheme and mechanism which affords a doctor, who has had sanctions imposed, the opportunity to seek an effective judicial review by way of a mandamus proceeding.¹²³

The court in *Henry Mayo* stressed, nevertheless, that section 1157 "applies only to records of . . . proceedings before medical investigative committees."¹²⁴ Indeed, the court pointed that out because one of the interrogatories, requesting the identification of the hospital's records regarding the granting or curtailing of Dr. Beauchamp's staff and surgical privileges, appeared to be outside the immunity provided by section 1157.¹²⁵

In sum, prior to *Elam*,¹²⁶ section 1157 and the relatively few cases that had construed it clearly prevented the discovery of medical staff committee proceedings, thereby upholding the espoused

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

116. *Schulz*, 66 Cal. App. 3d 440, 136 Cal. Rptr. 67 (1977).

117. *Roseville*, 70 Cal. App. 3d at 814, 139 Cal. Rptr. at 172.

118. *Id.* (stating that *Matchett* "prophesized the exact issue we now face," and is, therefore, "no longer dictum").

119. *Henry Mayo*, 81 Cal. App. 3d 626, 146 Cal. Rptr. 542 (1978).

120. *Id.* at 628-29, 146 Cal. Rptr. 543-44.

121. *Matchett*, 40 Cal. App. 3d 623, 115 Cal. Rptr. 317 (1974).

122. *Schulz*, 66 Cal. App. 3d 440, 136 Cal. Rptr. 67 (1977).

123. *Henry Mayo*, 81 Cal. App. 3d at 635, 146 Cal. Rptr. at 547.

124. *Id.* at 636, 146 Cal. Rptr. at 548 (emphasis added).

125. *Id.*

126. 132 Cal. App. 3d 332, 183 Cal. Rptr. 156 (1982).

public interest in maintaining the confidentiality of peer review committees. It is beyond question that peer review committees play a critical role in furthering the health care interest of the patient and, that at the time of its enactment, the immunity provided by section 1157 was consistent with California law concerning hospital liability.¹²⁷ Thus, this author does not dispute the importance of providing such committees with *some* measure of confidentiality. However, now, the *Elam* theory of hospital corporate negligence will also serve to enhance the quality of medicine. By forcing hospitals to assume responsibility for their failure to adequately screen and review staff physicians, *Elam* has provided hospitals with a financial incentive to insure the competency of their medical staffs. The question thus arose in the legal and medical communities as to whether the *Elam* decision had eroded the protection afforded by section 1157.

*B. Access to Peer Review Proceedings After the Elam Decision:
West Covina and Its Progeny*

Under the corporate negligence theory adopted by the *Elam* court, a medical malpractice plaintiff can maintain a claim against a hospital when harmed as a result of (1) a medical staff committee's failure to properly review the competency of a staff physician or (2) a hospital's failure to monitor the activities of the peer review committees. As set forth above, while the responsibility for insuring the competency of the medical staff ultimately remains with the hospital, traditionally, the duty to select, recommend and review staff physicians has been delegated to medical staff committees.¹²⁸ Thus, it is meaningless to recognize corporate negligence as a cause of action providing recovery against hospitals when the evidence necessary to prove it—the medical staff committee file—is not available to the plaintiffs. As such, subsequent to *Elam*, plaintiffs bringing an action against a hospital for corporate negligence argued that the *Elam* decision had eroded the protection afforded hospital committees by section 1157.¹²⁹

The Second Appellate District was the first court to confront this precise issue in the case of *West Covina Hospital v. Superior Court*.¹³⁰ In *West Covina*, the plaintiff based her action on the

127. *Matchett*, 40 Cal. App. 3d at 628-29, 115 Cal. Rptr. at 320.

128. *See supra* note 71.

129. *Mt. Diablo Hosp. Medical Center v. Superior Court*, 158 Cal. App. 3d 344, 204 Cal. Rptr. 626 (1984); *Saddleback Community Hosp. v. Superior Court*, 158 Cal. App. 3d 206, 204 Cal. Rptr. 598 (1984); *Snell v. Superior Court*, 158 Cal. App. 3d 44, 204 Cal. Rptr. 200 (1984); *West Covina Hosp. v. Superior Court*, 153 Cal. App. 3d 134, 200 Cal. Rptr. 162 (1984).

130. *West Covina*, 153 Cal. App. 3d 134, 200 Cal. Rptr. 162 (1984).

Elam theory of hospital corporate negligence.¹³¹ Specifically, patient Terri Jo Tyus brought an action against West Covina Hospital for the negligent selection and retention of its staff physician, Dr. McCowan.¹³² The trial court granted plaintiff's discovery requests for records indicating at which hospital committee meetings Dr. McCowan's work had been discussed and whether Dr. McCowan served upon any hospital committees.¹³³ In so doing, the trial court compelled the hospital to produce the attendance records of the medical staff and compelled the deposition of a hospital employee with medical staff committee minutes and attendance sheets.¹³⁴ The trial court held that this information was necessary for the plaintiff to establish the requisite foundation for seeking discovery of the contents of the meetings under the exception now contained in subsection (d) of section 1157. That paragraph states that section 1157's prohibitions do not apply "if any person serves upon the committee when his or her own conduct or practice is being reviewed."¹³⁵ Defendant hospital petitioned for a writ of mandate to compel the trial court to vacate and set aside the discovery orders.¹³⁶

Thus, the question presented on appeal was whether the exception contained in the fourth paragraph of section 1157 allowed discovery of hospital committee proceedings if the doctor involved in the malpractice action was a member of the committee whose records were being sought at the time his conduct was being reviewed by it.¹³⁷ The Second Appellate District held that the trial court had misread the statute.¹³⁸ The court explained that the statute refers to two separate types of committees: (1) those of a hospital staff and (2) those of a medical society.¹³⁹ The court interpreted the statutory exception plaintiff relied upon as applying only to

131. *Id.* at 138-39, 200 Cal. Rptr. at 165.

132. *Id.* at 136, 200 Cal. Rptr. at 163.

133. *Id.* at 137, 200 Cal. Rptr. at 163.

134. *Id.* at 139, 200 Cal. Rptr. at 165.

135. *Id.* at 137, 200 Cal. Rptr. at 164. Section 1157 was amended in Sept. 1985 by dividing the statute into five subsections. *See supra* note 15. Prior thereto, the statute contained no divisions and was, therefore, subject to different interpretations. At the time of the *West Covina* decision, the subject exception, although nearly identical to its 1985 amendment, read:

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

CAL. EVID. CODE § 1157 (West Supp. 1984).

136. 153 Cal. App. 3d at 136, 200 Cal. Rptr. at 163.

137. *Id.* at 137, 200 Cal. Rptr. at 164-65.

138. *Id.* at 138, 200 Cal. Rptr. at 165.

139. *Id.*

medical society committees, not to hospital staff committees.¹⁴⁰

Plaintiff also contended that the attendance records of peer review committees were relevant to a malpractice action based on hospital corporate negligence.¹⁴¹ The appellate court agreed with the plaintiff's statement concerning the relevancy of the evidence, but stated that relevancy could not serve to validate the error of misapplication by the trial court of the exclusions described in the fourth paragraph of section 1157 to a situation to which only the first three paragraphs apply.¹⁴² The court directed the trial court to vacate and set aside its discovery order,¹⁴³ thus following the narrow judicial interpretation given section 1157 by the *Matchett* court.¹⁴⁴ The court reasoned as follows:

[T]he Legislature has made the judgment call that an even more important societal interest is served by declaring such evidence "off limits." No appellate case construing Evidence Code section 1157 since *Elam* has been brought to our attention. Nothing in the prior cases interpreting the statutes suggest a different result in the case at bar.

. . . [N]othing in *Elam* holds or even suggests a result contrary to that reached in [*Henry Mayo; Roseville; Schulz; or Matchett*].¹⁴⁵

Shortly thereafter, the Third Appellate District confronted the conflict between section 1157 and the *Elam* theory of hospital corporate negligence in the case of *Snell v. Superior Court*.¹⁴⁶ In *Snell*, the plaintiff-patient Linda Snell brought a motion to compel production of Marshall Hospital's personnel files, including Dr. William Colliflower's and Dr. Robert Carter's applications for surgical privileges.¹⁴⁷ Snell asserted that the hospital personnel files, maintained by the hospital administration, were not immune from discovery under section 1157 on the ground that section 1157 only provides immunity to medical investigative committees' records.¹⁴⁸ Marshall Hospital's opposition was based on the declaration of the hospital administrator, Frank Nachtman, in which he stated that

140. *Id.*

141. *Id.*

142. *Id.* at 139, 200 Cal. Rptr. at 165.

143. *Id.* at 139 n.4, 200 Cal. Rptr. at 166 n.4. In its order to the trial court, the appellate court noted that it was simply voiding the lower court's ruling since it would result in the discovery of statutorily defined non-discoverable matter. The court pointed out that it was not directing the lower court to either reword and limit its order, or provide for in camera inspection to determine which matters were discoverable and which were protected by section 1157. The court was simply declaring the trial court's discovery order void. *Id.*

144. *Id.* at 139, 200 Cal. Rptr. at 166.

145. *Id.* at 138-39, 200 Cal. Rptr. at 165.

146. *Snell v. Superior Court*, 158 Cal. App. 3d 44, 204 Cal. Rptr. 200 (1984).

147. *Id.* at 46, 204 Cal. Rptr. at 201.

148. *Id.*

the personnel files of the doctors were not files of the hospital administration, but were files of the quality assurance committee.¹⁴⁹ The trial court denied Snell's motion to compel.¹⁵⁰

Snell's argument on appeal was twofold. First, she argued that the *Elam* decision constituted a substantial change in the scope of the application of section 1157.¹⁵¹ The court disagreed,¹⁵² holding that *Matchett*, was essentially a hospital corporate negligence action and, thus, controlled.¹⁵³ Therefore, the court stated:

We fail to discern anything in *Elam* which holds or even suggests a result contrary to that reached in prior cases interpreting or construing Evidence Code section 1157 The relevance of a hospital's records to show its conduct, whether careful or negligent, cannot serve as an implied exception to the clear, absolute immunity legislatively established in Evidence Code section 1157.¹⁵⁴

Second, Snell argued that while *Matchett* held peer review committee records immune from discovery under section 1157, *Matchett* had also stated that section 1157 did not embrace the files of the hospital administration as distinguished from the peer review committee.¹⁵⁵ In particular, the *Matchett* court noted that "[t]he trial court should have inquired into the existence of a hospital administration file concerning the doctor and, if such a file existed, should have permitted its inspection, excluding any portions which reflected the proceedings of staff committees conforming to the specifications of the immunity statute."¹⁵⁶ Therefore, Snell argued that the hospital personnel file was discoverable.

Nevertheless, the Third Appellate District denied Snell's petition for peremptory writ of mandate.¹⁵⁷ The court agreed that the immunity provided by section 1157 did not embrace the files of the hospital administration.¹⁵⁸ However, the court pointed out that the hospital administrator's declaration stated that the hospital admin-

149. *Id.*

150. *Id.*

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

152. *Id.*

153. *Id.* at 49 n.1, 204 Cal. Rptr. at 202 n.1. *Schulz, supra*, 66 Cal. App. 3d at 445, 136 Cal. Rptr. at 70, was also essentially an action involving the negligent selection and retention of a staff physician. The *Schulz* court stated as follows: "To declare that the immunity is to be set aside when either the staff doctor or the hospital are parties to the malpractice proceeding would not only achieve an absurd result, but would render sterile the immunity provisions of the statute." *Id.*

154. 158 Cal. App. 3d at 48-49, 204 Cal. Rptr. at 202-03.

155. *Id.* at 49, 204 Cal. Rptr. at 203.

156. *Id.* (quoting *Matchett*, 40 Cal. App. 3d at 628, 115 Cal. Rptr. at 320). *Accord Saddleback Community Hosp. v. Superior Court*, 158 Cal. App. 3d 206, 204 Cal. Rptr. 598 (1984).

157. 158 Cal. App. 3d at 51, 204 Cal. Rptr. at 204.

158. *Id.* at 49, 204 Cal. Rptr. at 203.

istration did not maintain personnel files on the two doctors.¹⁵⁹ The declaration stated that the personnel files only contained files of the quality assurance committee, which were immune from discovery.¹⁶⁰ Plaintiffs did not produce any evidence to the contrary. Thus, the only evidence presented was that the hospital did not maintain administration files concerning the doctors and did not have in its possession applications for surgical privileges.¹⁶¹ Thus, the appellate court noted that while the trial court had a duty to inquire into the existence of personnel files, because the petitioner failed to provide a transcript of the hearing on the motion to compel, the record was inadequate to determine whether there was an abuse of discretion in that regard.¹⁶² The appellate court was, therefore, compelled to deny Snell's petition by reason of lack of evidence.¹⁶³

Fifteen days after the *Snell* decision, the Fourth Appellate District announced its decision in the next case involving the *Elam*-section 1157 conflict, *Saddleback Community Hospital v. Superior Court*.¹⁶⁴ In *Saddleback*, Brett Harvey, by his guardian *ad litem*, Michael Harvey, filed an action against Saddleback Community Hospital and two doctors, seeking damages for mishandling Brett's fractured femur.¹⁶⁵ During the discovery phase of the lawsuit, Brett sought specific documents from the personnel files of thirty-seven individuals who had cared for him.¹⁶⁶ The trial court ordered production.

On appeal, the Fourth Appellate District concluded that the trial court erred in allowing the blanket inspection of all of the requested files, relying on the *Matchett* court's interpretation of section

159. *Id.*

160. *Id.*

161. *Id.* at 50, 204 Cal. Rptr. at 203.

162. *Id.* at 49, 204 Cal. Rptr. at 203.

163. *Id.* at 49-50, 204 Cal. Rptr. at 203. Specifically, the court noted that:

"In the absence of a transcript [a] reviewing court [has] no way of knowing in many cases what grounds were advanced, what arguments were made and what facts may have been admitted, mutually assumed or judicially noticed at the hearing. In such a case, no abuse of discretion can be found except on the basis of speculation."

Id. at 49, 204 Cal. Rptr. at 203 (quoting *Lemelle v. Superior Court*, 77 Cal. App. 3d 148, 156-57, 143 Cal. Rptr. 450, 455 (1978)).

164. *Saddleback*, 158 Cal. App. 3d 206, 204 Cal. Rptr. 598 (1984), *hearing denied*, (Kaus, Broussard and Reynoso, J.J., dissenting).

165. *Id.* at 207-08, 204 Cal. Rptr. at 599.

166. *Id.* at 208 n.1, 204 Cal. Rptr. at 599 n.1. Specifically, Brett requested the following documents from each individual's personnel file:

1157.¹⁶⁷ Nevertheless, in issuing a peremptory writ of mandate, it directed the trial court to enter an order in accordance with the dictates of its opinion, specifically holding that:

To protect both parties in this instance, there must be an in camera hearing by the trial court, reviewing each item of evidence requested and acting "upon those portions of petitioner's pretrial discovery motion which are directed only at hospital administration files not resulting from [any] investigation conducted by [an] advisory board."¹⁶⁸

Less than one month later, the First Appellate District confronted the conflict. In *Mt. Diablo Hospital Medical Center v. Superior Court*,¹⁶⁹ patient James Pope brought a medical malpractice action against Mt. Diablo Hospital for alleged malpractice by a doctor given staff privileges by the hospital.¹⁷⁰ During the discovery stage of the lawsuit, Pope propounded interrogatories asking for information regarding: (1) any action taken on the doctor's application for staff privileges; (2) any action taken to revoke his staff privileges; (3) any investigation or evaluation of his qualifications during his tenure on the hospital staff; (4) the existence of a peer review committee; and (5) the identity of certain peer review committee members.¹⁷¹ In response, Mt. Diablo Hospital asserted the privilege provided by section 1157.¹⁷² The trial court granted Pope's motion to compel answers on the grounds that the *Elam*

-
- (a) Employment applications;
 - (b) Resumes and letters of recommendation or evaluation;
 - (c) Inquiries concerning verification of employment application and all responses thereto;
 - (d) Tests given to the employees and all results thereof;
 - (e) Evaluations, reviews, critiques and ratings;
 - (f) Complaints and all responses thereto;
 - (g) Commendations or awards;
 - (h) Any evidence of training and/or education;
 - (i) Any indicia of authority to render services (licenses, etc.);
 - (j) Writings concerning promotions or the denial thereof;
 - (k) Writings concerning demotions, reassignments, or transfers;
 - (l) Writings concerning discipline, suspensions, dismissals and/or reprimands;
 - (m) Medical and psychiatric histories;
 - (n) Schedules, work loads, shift assignments, and writings concerning vacation or absenteeism; and
 - (o) All other writings pertaining to work performance.

Id.

167. *Id.* at 208, 204 Cal. Rptr. at 599-600.

168. *Id.* at 209, 204 Cal. Rptr. at 600 (quoting *Schulz*, 66 Cal. App. 3d at 447, 136 Cal. Rptr. at 71, and citing *Henry Mayo*, 81 Cal. App. 3d at 636-37, 146 Cal. Rptr. at 548).

169. 158 Cal. App. 3d 344, 204 Cal. Rptr. 626 (1984).

170. *Id.* at 345-46, 204 Cal. Rptr. at 626.

171. *Id.* at 346, 204 Cal. Rptr. at 626.

172. *Id.* at 346, 204 Cal. Rptr. at 626-27.

decision diminished the protection provided by section 1157.¹⁷³

On review, the First Appellate District noted that the argument made by Pope, and accepted by the trial court, had been made and rejected in *West Covina*.¹⁷⁴ The court agreed with the *West Covina* court's holding that the *Elam* decision had not diminished the protection provided by section 1157.¹⁷⁵ Further, the court did not agree with the plaintiff's argument that section 1157 abridges the plaintiff's rights to due process and equal protection.¹⁷⁶ It concluded with the following often quoted passage from *Matchett*:

"Section 1157 represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor [in appraising their peers to improve the quality of in-hospital medical practice] at the cost of impairing plaintiffs' access to evidence [revealing the incompetency of a hospital's staff]."¹⁷⁷

The court issued a peremptory writ of mandate directing the trial court to reconsider the motion to compel answers and to determine whether the hospital, as to each question asked, could not respond without "divulging the 'proceedings [or] the records' of the medical staff committees to which section 1157 refers."¹⁷⁸

Nearly one year after the Second Appellate District Court's well-known decision in *West Covina*, the medical malpractice case involving plaintiff Terri Jo Tyus was once again the subject of a petition for writ of mandate. Specifically, in *West Covina v. Superior Court* [hereinafter referred to as *West Covina II*],¹⁷⁹ Tyus sought to call as a witness at trial a physician, Dr. Anwar, who served on a medical staff committee of the hospital when the committee evaluated Dr. McGowan, to testify about specific details of that evaluation.¹⁸⁰ Over objections by the hospital, the trial court held that

173. *Id.* at 346, 204 Cal. Rptr. at 627.

174. *Id.*

175. *Id.* at 347, 204 Cal. Rptr. at 627.

176. *Id.*

177. *Id.* at 347, 204 Cal. Rptr. at 627 (citing *Matchett*, 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320). See also *Saddleback*, 158 Cal. App. 3d at 208, 204 Cal. Rptr. at 599-600.

178. 158 Cal. App. 3d at 347-48, 204 Cal. Rptr. at 628.

179. *West Covina Hosp. v. Superior Court*, 165 Cal. App. 3d 794, 211 Cal. Rptr. 677, review granted, — Cal. 3d —, 701 P.2d 1171, 215 Cal. Rptr. 853 (1985) [hereinafter cited as *West Covina II*]. In reality, this is plaintiff Terri Jo Tyus' third attempt to overcome what has become a common practice of many hospitals; relying on section 1157 as a subterfuge. Her first attempt was rejected by the trial court judge; subsequent petitions to the Second Appellate District Court and California Supreme Court being denied. *West Covina II*, 165 Cal. App. 3d at 796, 211 Cal. Rptr. at 678.

180. On review before the California Supreme Court, one of Petitioner on Review Tyus' arguments was that § 1157 did not apply because "the committee which evaluated Dr. McGowan was not a properly constituted medical staff committee but was 'stacked' on this occasion, i.e., it was not an 'organized' committee of the Hospital's medical staff within the meaning of § 1157." Petitioner on Review's Reply Brief and Response to the California Medical Association's Amicus Brief at 15, *West Covina II*,

“ ‘a committee member may waive the exclusion of 1157 [B]y that I mean that a committee member can come into court and tell us of the entire proceeding in a medical staff committee.’ ”¹⁸¹

The precise issue confronted on appeal was whether section 1157, which provides in relevant part that no person in attendance at a meeting of a medical staff committee shall be “required” to testify as to what transpired at that meeting, prevents a concerned physician-member of the committee from testifying *voluntarily* for the plaintiff as to what occurred at the meeting.¹⁸² The Second Appellate District Court, completely ignoring the plain language of section 1157,¹⁸³ relied again on the legislative intent espoused by the *Matchett* court in reversing the trial court and held that to permit unrestricted trial testimony would “punch a judicially created and legislatively unintended hole in the crucial shield of confidentiality provided to medical staff committees in medical malpractice actions.”¹⁸⁴

supra note 179, No. L.A. 32083, *review granted*, — Cal. 3d —, 701 P.2d 1171, 215 Cal. Rptr. 853, *reviewing*, 165 Cal. App. 3d 794, 211 Cal. Rptr. 677 (1985) [hereinafter cited as Petitioner on Review’s Reply Brief] (copy on file in the offices of the California Western Law Review). Tysus pointed out that that threshold inquiry concerning § 1157’s application is “whether the committee whose proceedings are sought to be protected is a regularly constituted committee within the meaning of the statute, and that the burden of proof is on the party resisting disclosure.” *Id.* (citing *Matchett*, 40 Cal. Rptr. 317 (1974); *Franco v. District Court*, 641 P.2d 922 (Colo. 1982); *Monty v. Warren Hosp. Corp.*, 422 Mich. 138, 366 N.W.2d 198 (1985); *Anderson v. Breda*, 103 Wash. 2d 901, 700 P.2d 737 (1985); *Coburn v. Seda*, 101 Wash. 2d 270, 677 P.2d 173 (1984)).

181. *West Covina II*, 165 Cal. App. 3d at 796, 211 Cal. Rptr. at 678.

182. *Id.* at 795, 211 Cal. Rptr. at 677. *See also* CAL. EVID. CODE § 1157(b) (West Supp. 1986); Petitioner’s Opening Brief on the Merits at 1-2, *West Covina II*, *supra* note 179, No. L.A. 32083, *review granted*, — Cal. 3d —, 701 P.2d 1171, 215 Cal. Rptr. 853, *reviewing*, 165 Cal. App. 3d 794, 211 Cal. Rptr. 677 (1985) [hereinafter cited as Petitioner’s Opening Brief] (copy on file in the offices of the California Western Law Review).

183. CAL. EVID. CODE § 1157(b) (West Supp. 1986) (emphasis added) clearly states:

(b) Except as hereinafter provided, no person in attendance at a meeting of any of those committees shall be *required* to testify as to what transpired at that meeting.

This language *is* clear and unambiguous. It states that no person in attendance at the meaning shall be “required,” i.e., compelled, to testify. *Id.* It does not say that no one in attendance “shall testify.” *Id.* Nevertheless, the California Supreme Court will probably affirm the appellate court’s decision inasmuch as in the recent case of *People v. Aston*, 39 Cal. 3d 481, 489, 703 P.2d 111, 114, 216 Cal. Rptr. 771, 774 (1985), the California Supreme Court stated:

This court has emphasized time and time again that the fundamental rule of statutory interpretation is to “ascertain the intent of the Legislature so as to effectuate the purpose of the law.” In ascertaining the legislative intent, courts should consider not only the words used, but “the object in view, the evils to be remedied, the legislative history [and] public policy”

Id. (citations omitted).

184. *West Covina II*, 165 Cal. App. 3d at 796, 211 Cal. Rptr. at 678. On July 12, 1985, the California Supreme Court granted review of the *West Covina II* decision.

In summary, subsequent to the Fourth Appellate District's holding in *Elam v. College Park Hospital*, the First, Second, Third, and Fourth Appellate Districts have continued to limit the discoverability of medical staff committee proceedings, relying on the legislative intent espoused by *Matchett*. The courts have thereby prevented plaintiffs from obtaining important evidence which they need to prove hospital corporate negligence. Consequently, although the courts opened the door to plaintiffs by adopting hospital corporate negligence, by strictly construing section 1157, the courts have effectively denied plaintiffs' redress for a hospital's negligent selection and review of staff physicians. Moreover, in some instances, the courts may have even provided negligent hospitals with immunity from liability. Indeed, as stated by now retired Superior Court Judge B. Abbott Goldberg:

The actual result of the [section 1157] privilege is to protect hospitals and doctors from liability to their patients; the frequently espoused goal of fostering candor has proven to be a dissimulation. . . . [I]n reality the privilege serves as a . . . barrier to the disclosure of ineffective peer review.¹⁸⁵

III. THE CONFLICT: *ELAM* AND *WEST COVINA*

Clearly, both section 1157 and the *Elam* hospital corporate negligence theory of liability have the same goal of high quality medical care in mind. However, as construed by the courts, section 1157 presents a conflict in that it denies victims the very evidence they need to prove a corporate negligence cause of action.

The conflict between *Elam* and *West Covina* results from a difference in approach taken by the judiciary in *Elam* and the legislature in section 1157. Section 1157 attempts to improve the quality of medical practice by providing an immunity to the proceedings of peer review committees. The *Matchett* court advocated that the section evinces a legislative judgment that candor and objectivity will only flourish where staff investigators know that their opinions will be kept confidential. On the other hand, although *Elam* manifests the same policy of improving the quality of medical practice, *Elam* does so by holding a hospital accountable for its failure to either review its staff physicians or monitor the activities of its peer review committees. *Elam* demonstrates a focus on improving the quality of medicine through holding a hospital accountable. It seeks to secure a proper screening of the competency of hospital

West Covina II, — Cal. 3d —, 701 P.2d 1171, 215 Cal. Rptr. 853 (1985). The California Supreme Court has not heretofore construed the scope of § 1157. *Santa Rosa*, 174 Cal. App. 3d at 719 & n.6, 220 Cal. Rptr. at 241 & n.6 (1985).

185. Goldberg, *The Peer Review Privilege: A Law in Search of a Valid Policy*, 10 AM. J.L. & MED. 151, 156, 162 (1984).

physicians through the imposition of a legal duty on the hospital corporate entity, rather than through reliance on physicians to voluntarily improve the quality of medicine themselves.

Clearly, both section 1157 and the *Elam* hospital corporate negligence theory of liability have the same goal of high quality medical care in mind. As the opinion in *West Covina* points out, section 1157 “evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality.”¹⁸⁶ Similarly, the *Elam* court stated that “imposing the duty of care upon a hospital should have the ‘prophylactic’ effect of supplying the hospital with a greater incentive to assure the competence of its medical staff and the quality care rendered within its walls.”¹⁸⁷ Both the doctrine of hospital corporate liability and section 1157 seek to improve the quality of care provided by hospitals; however, the doctrine of hospital corporate liability does so by exposing the hospital’s peer review committees to judicial scrutiny for failure to comply with professional norms, while section 1157 does so by shielding peer review committee proceedings from discovery.

IV. RECONCILIATION OF THE CONFLICT: LEGISLATIVE ACTION

Two premises support peer review protection: first, that special privileges and immunities do, in fact, result in increased peer review activities; and second, that increased peer review activity results in the enhancement of the quality of medicine. However, no empirical evidence has been provided to date proving that the peer review system is actually working to insure high quality medical care in hospitals—not even by the California Medical Association.¹⁸⁸ Further, the *Elam* court’s adoption of the corporate negligence theory of liability has undermined the legislature’s determination that the best way to improve the quality of medicine is to provide peer re-

186. 153 Cal. App. 3d at 136, 200 Cal. Rptr. at 163 (quoting *Matchett*, 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317, 320).

187. 132 Cal. App.3d 332, 345, 183 Cal. Rptr. 156, 164.

188. Petitioner on Review’s Reply Brief, *supra* note 180, at 12. Indeed, it has been reported that a senior officer of the JCAH, which conducts accrediting investigations of over 5000 hospitals nationwide, said, “At least 85 percent of our recommendations to hospitals after surveys are relative to medical staff activities, primarily physician monitoring functions.” Brinkley, *Shakeup in Medical Malpractice: ‘System’ Ill-Protects Public from Unqualified Doctors*, L.A. Daily J., Sept. 10, 1985, § 1, at 4, col. 1. The ineffectiveness of the peer review system is illustrated by the following case. In 1980, Dr. John R. Bongiovanni lost his eyesight, but is reported to have performed surgery on eight more patients. *Id.* The hospital’s administrator claimed that the procedures Dr. Bongiovanni performed “had been the sort for which a surgeon relies on the sense of touch.” *Id.* The New York Board of Regents fined the hospital \$4000 for allowing him to practice. *Id.*

view committees with protection. For the *Elam* theory of hospital corporate negligence will be more effective in promoting the quality of health than section 1157. It will provide hospitals with a greater incentive for monitoring the peer review process, by holding a hospital liable for its failure to do so, thereby insuring staff committee effectiveness. Indeed, as has been so aptly stated:

[T]here is no question that the threat of malpractice suits is an inducement to elevate the diligence of medical performance. Since most such suits involve the management of serious cases in the hospitals, the influence is felt strongly on the organization of medical staffs and other components of hospital operation.¹⁸⁹

Consequently, *Elam* must be made viable in order to enhance the quality of medical care. Section 1157 must be either amended or repealed. Such legislative action is necessary because while *Elam* recognized an independent duty owed by a hospital to its patients to protect them from harm, without such action, an injured plaintiff's recovery for a breach of this duty is extremely doubtful. Specifically, a peer review committee which fails to evaluate and review its staff physicians, or a hospital which ignores a recommendation of a peer review committee to terminate an incompetent physician, may escape liability for the resulting harm which a patient incurs. As a result, negligently run hospitals will be shielded by section 1157.

Indeed, hospitals are relying on section 1157 as a subterfuge. They are asserting the privilege with respect to information not within the exclusive province of the activities of a protected medical staff committee for the improper purpose of obstructing discovery of work actually undertaken by the hospital administration. This fact is illustrated in the recent case of *Brown ex rel. Brown v. Superior Court*, wherein Los Angeles Superior Court Judge Ricardo Torres expressed his frustration:

"I think it's a little on the outrageous side that all of the hospitals are no longer holding [the information] in administrative files and putting everything in those committees and everything is going there, but 1157 says that is privilege. . . . There is no question in the court's mind . . . that the hospitals are abusing 1157, but I can't do anything about that."¹⁹⁰

Moreover, the view espoused in *Matchett*, specifically, that "[s]ection 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity,"¹⁹¹ is belied by the actual operation of the stat-

189. Roemer, *Controlling and Promoting Quality in Medical Care*, 35 L. & CONTEMP. PROB. 284, 297 (1970).

190. *Brown ex rel. Brown v. Superior Court*, 168 Cal. App. 3d 489, 495, 214 Cal. Rptr. 266, 270 (1985).

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

ute. Particularly, whenever a disgruntled physician challenges the action taken by a peer review committee concerning his staff privileges, section 1157 permits the shield of confidentiality to be pierced.¹⁹² In such a case, the prohibitions of the statute do not apply at all:

(c) The prohibition relating to discovery 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, *or to any person requesting hospital staff privileges*¹⁹³

Since members of medical staff committees are obviously aware that the entire proceedings are available to a physician who challenges their decision, it should not “stifle candor or inhibit objectivity” just because an *Elam* plaintiff may also be entitled to information concerning the proceedings. Clearly, the legislature could not have felt that the need to protect committees’ confidentiality is greater when the plaintiff is an injured patient, than when the plaintiff is a staff physician seeking review of, or redress for, a committee decision. The committee members have no need to fear a plaintiff; members of hospital staff committees are immune from liability.¹⁹⁴ Thus, the real threat to a committee member’s objectivity and candor lies not with an injured patient, but with a disgruntled colleague who has *complete* access to the records, testimony and proceedings of hospital staff committees. It is no wonder that there is no empirical data evidencing the effectiveness of section 1157 when the legislature has given the wrong plaintiff access to the evidence. The legislature’s real fear was that plaintiffs would use the information to hold a hospital liable.

192. *Roseville*, 70 Cal. App. 3d 809, 139 Cal. Rptr. 170.

193. CAL. EVID. CODE § 1157(b) (West Supp. 1986) (emphasis added). *See supra* note 15 for the entire text of § 1157.

194. CAL. CIV. CODE § 43.7 (West Supp. 1986) provides in relevant part:

(b) There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, . . . any member of a duly appointed committee of a professional staff of a licensed hospital . . . for any act or proceeding undertaken to be performed within the scope of the functions of any such committee . . . or any member of any peer review committee whose purpose is to review the quality of medical, dental, dietetic, chiropractic, optometric, or veterinary services . . . or any member of the governing board of a hospital in reviewing the quality of medical services rendered by members of the staff if such professional society, committee, or board member acts without malice, has made a reasonable effort to obtain the facts . . . and acts in reasonable belief

See also CAL. CIV. CODE § 43.8 (West Supp. 1986) (providing a conditional immunity to those who communicate information to a hospital, hospital medical staff or professional society); CAL. CIV. CODE § 47 (West Supp. 1986) (providing an absolute privilege for “any publication or broadcast” made in any “proceeding authorized by law and reviewable” by way of administrative mandamus).

Additionally, the statute itself contains inherent weaknesses. One such weakness is that section 1157 does not expressly prohibit the admissibility of medical staff committee records or proceedings.¹⁹⁵ By contrast, section 1156,¹⁹⁶ which pertains to the records of medical staff committees engaged in research for the purpose of reducing morbidity and mortality, expressly declares those records not discoverable and inadmissible.¹⁹⁷ Although the California Medical Association takes the position that sections 1156 and 1157 should be read together to make all medical staff committee records nondiscoverable and inadmissible,¹⁹⁸ arguably, if the legislature had desired to render the proceedings and the records of section 1157 inadmissible, it would not have left such an important fact to inference, but would have used appropriate language.¹⁹⁹ The specific question, not yet addressed then, is whether a defendant hospital, after refusing to produce section 1157 records during the discovery phase of a lawsuit may, nevertheless, admit the evidence at trial in its defense and to the detriment of the plaintiff.

A second weakness is found in subsection (b). A literal construction of subsection (b), which provides that "no person in attendance at a meeting . . . shall be required to testify as to what transpired at the meeting,"²⁰⁰ would find that this prohibition against *compelled* testimony does not apply (1) to anyone *not* in attendance at the

195. See text of § 1157, *supra* note 15.

196. CAL. EVID. CODE § 1156 (West Supp. 1986) provides in pertinent part:

(a) In-hospital medical or medical-dental staff committees of a licensed hospital may engage in research and medical or dental study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. Except as provided in subdivision (b), the written records of interviews, reports, statements, or memoranda of such in-hospital medical or medical-dental staff committees relating to such medical or dental studies are subject to Section 2016 to 2036, inclusive, of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

197. *Id.* This inherent weakness in the language of section 1157 was pointed out by the *Matchett* court:

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

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

198. Request for Leave to File an Amicus Curiae Brief in Support of West Covina Hosp. and Amicus Curiae on Behalf of the California Medical Ass'n in Support of Petitioner [sic] West Covina Hosp. at 15-16, *West Covina II*, *supra* note 179, No. L.A. 32083, *review granted*, — Cal. 3d —, 701 P.2d 1171, 215 Cal. Rptr. 853, *reviewing*, 165 Cal. App. 3d 794, 211 Cal. Rptr. 677 (1985) [hereinafter cited as CMA Amicus Curiae Brief] (copy on file in the offices of the California Western Law Review).

199. Petitioner on Review's Reply Brief, *supra* note 180, at 11-12.

200. CAL. EVID. CODE § 1157(b) (West Supp. 1986). See *supra* note 15 for entire text of § 1157.

meeting and (2) to anyone who *volunteers* testimony.²⁰¹ Arguably, voluntary testimony by a physician, at least as to what he said at the meeting, will not impair other members' candor and objectivity.

Clearly, legislative action is necessary to address the inconsistencies in the statute itself, as well as the apparent hospital abuse. Section 1157 must be amended either to provide complete discovery to medical malpractice plaintiffs or to provide, at a minimum, for discovery concerning the fact of whether an evaluation of the physician was conducted, the evaluation dates, any document supplied to the committee by an independent source that is not otherwise privileged, the fact and contents of any recommendation made by the peer review committee to the hospital administration, and a description of what, if any, action was taken by the hospital. In this manner, plaintiffs may determine whether hospitals are fulfilling their duty of reviewing and monitoring staff physicians. As a result, the public interest in peer review participation and candor will be preserved, as will the public interest in protecting patients from unreasonable harm.

V. THE ROUTE AROUND SECTION 1157'S BARRIERS

Faced with the recent legislative amendment to section 1157, extending its protections to hospital psychological staff committees and to review committees of psychological associations and societies,²⁰² it is unlikely that the California Legislature will amend or repeal section 1157 in the near future. For, it is a well-established principle of statutory construction that when the legislature amends a statute without altering portions that have been previously judicially construed, "the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment."²⁰³ Thus, medical malpractice plaintiffs should focus their energy on pursuing ways around the 1157 restrictions.

201. The California Supreme Court heard oral arguments on Jan. 7, 1986, as to whether section 1157 prohibits a physician-member of a committee from testifying voluntarily as to what occurred at a committee meeting. *West Covina II*, *supra* note 179, — Cal. 3d —, 701 P.2d 1171, 215 Cal. Rptr. 853 (1985). This issue actually presents two questions: (1) Whether a physician-member can voluntarily testify as to what statements he made and/or records he reviewed; and (2) whether a physician-member can testify as to what other persons in attendance at the meeting said and what records they reviewed. The Second Appellate District Court failed to distinguish these issues in *West Covina II*. *West Covina II*, *supra* note 179, 165 Cal. App. 3d 794, 211 Cal. Rptr. 677 (1985).

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

203. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 734, 640 P.2d 115, 123, 180 Cal. Rptr. 496, 504-05 (en banc), *cert. denied*, 459 U.S. 858 (1982).

The recent case of *Brown ex rel. Brown v. Superior Court*²⁰⁴ provided significant inroads for *Elam* plaintiffs. In *Brown*, petitioner Michelle Brown, through her guardian *ad litem* Morris Brown, sought discovery of certain information relevant to the action she filed against Dr. Robert Grant and West Hills Medical Center for hospital corporate negligence, fraud and intentional misrepresentation of compliance with JCAH standards.²⁰⁵ Specifically, Brown sought to compel the hospital to admit or deny whether it had, in fact, reviewed Dr. Grant and to produce certain requested documents.²⁰⁶

The Second Appellate District held that a medical malpractice plaintiff is entitled to discover whether or not a defendant hospital evaluated a physician.²⁰⁷ The court noted that this information, as distinguished from a question directed as to whether a particular patient's care was reviewed by the committee, does not constitute either "records or proceedings" of a peer review committee.

Of equal importance is the fact that when the *Brown* court reviewed the discoverability of plaintiff's other requests, it noted that "[t]he burden of establishing entitlement to nondisclosure [rests] with the party resisting disclosure, not the party seeking it."²⁰⁸ Specifically, in determining that the trial court may have unnecessarily restricted some discovery, the court directed the trial court to review the discovery requests with the following standard in mind:

That the request "may include materials generated by hospital committees" . . . is not enough. Hospital, which is resisting discovery in trying to show entitlement to nondisclosure, must sufficiently establish "that an answer cannot be given without divulging the 'proceedings (or) the records' of the medical staff committees to which section 1157 refers."²⁰⁹

Thus, under *Brown*, a plaintiff may request whether, in fact, a committee evaluated the subject physician, and if so, on what dates the

204. *Brown ex rel. Brown v. Superior Court*, 168 Cal. App. 3d 489, 214 Cal. Rptr. 266 (1985).

205. *Id.* at 492, 214 Cal. Rptr. at 268. The complaint specifically alleged that "Dr. Grant had more than 85 malpractice lawsuits against him. In seven of those cases between 1970 and 1975 Hospital was a codefendant; between 1975 and 1980, Hospital was a codefendant with Dr. Grant in 22 1/2 percent of all cases . . . against Hospital." *Id.* at 492 n.1, 214 Cal. Rptr. at 268 n.1.

206. *Id.* at 494, 214 Cal. Rptr. at 270. Brown's request for production of documents included the following: blank medical staff applications; Dr. Grant's reapplications; the rules, bylaws and regulations of the hospital, and memos, notes, reports and letters regarding Dr. Grant's professional conduct that had been exchanged between the Board of Governors and the administration of the hospital. *Id.*

207. *Id.* at 501, 214 Cal. Rptr. at 274-75.

208. *Id.* at 500-01, 214 Cal. Rptr. at 274 (citing *Matchett*, 40 Cal. App. 3d at 627, 115 Cal. Rptr. at 319).

209. *Id.* at 501, 214 Cal. Rptr. at 274 (quoting *Mt. Diablo*, 158 Cal. App. 3d at 348, 204 Cal. Rptr. at 628).

physician was evaluated. Additionally, plaintiffs should try to ascertain the identity of the committee, the identity of the physicians involved in the review, as well as what action was taken following the review, arguing that responses will not "divulge either the proceedings or the records of the committee."

Further, plaintiffs should (1) request those documents concerning the subject doctor in the committee file, which derive from an independent source, not from the investigation of the committee, and (2) inquire as to whether the plaintiff's treatment was reviewed by the records committee. For, although the *Brown* court held that a request, as to whether a particular plaintiff's treatment was evaluated, seeks to determine the factual content of a committee meeting and is, therefore, excluded,²¹⁰ a recent decision by the First Appellate District has indicated otherwise.

*Santa Rosa Memorial Hospital v. Superior Court*²¹¹ was decided in November of 1985. In *Santa Rosa*, Victoria Leary brought an action as a result of an infection which she allegedly acquired while in the hospital.²¹² Her complaint alleged that the hospital negligently employed and staffed the hospital with incapable employees and agents whose "carelessness, negligence or lack of ability or training caused Leary's injury and damage."²¹³

During the deposition of Vicki Vogler, a nurse epidemiologist and a member of the Infection Control Committee, Vogler refused to answer eighteen questions; the hospital claimed a blanket immunity from discovery under section 1157.²¹⁴ The trial court granted the plaintiff's motion to compel and the appellate court affirmed.

210. *Id.* at 496-97, 214 Cal. Rptr. 271.

211. *Santa Rosa Memorial Hosp. v. Superior Court*, 174 Cal. App. 3d 711, 220 Cal. Rptr. 236 (1985).

212. *Id.* at 715, 220 Cal. Rptr. at 238.

213. *Id.*

214. *Id.* at 714, 220 Cal. Rptr. at 238. The eighteen questions at issue were:

1. "What has the return rate been on those cards [which physicians are asked to mail to the hospital if a patient develops an infection after discharge] in terms of its effectiveness, if you know?"
2. "Has Victoria Leary's care and treatment ever been reviewed by the Infection Control Committee?"
3. "In terms of Mrs. Leary, have you ever reviewed her chart?"
4. "Are you aware that Mrs. Leary had a Jackson Pratt drain at the time that she was hospitalized at Santa Rosa Memorial?"
5. "Are you aware that the Jackson Pratt drain that Mrs. Leary had was having some difficulty in draining?"
6. "In terms of the national statistic, do you know whether in 1982, that Santa Rosa Memorial Hospital had a higher percentage rate as far as the Class One clean wound infections?"
7. "Do you know whether Santa Rosa Memorial Hospital in 1982 had a higher than the national statistical standard for contaminated wound infections?"
8. "In 1978, do you know whether Santa Rosa Memorial Hospital had a

First, the appellate court reviewed the history and application of section 1157, noting that while *Elam* does not justify reduction of the privilege afforded by section 1157, “neither does the interest of defendant hospitals in frustrating those needs justify enlargement of the protection afforded.”²¹⁵

Significantly, the court next observed that information which does not derive from the investigation of a committee is not rendered immune from discovery “merely because it is placed in the possession of a medical staff committee or made known to committee members.”²¹⁶ The court arrived at this conclusion by analogizing the peer review privilege to the attorney-client privilege, observing:

Just as a “‘party cannot [under the attorney-client privilege] conceal a fact merely by revealing it to his lawyer’” . . . a hospital cannot render its files immune from discovery simply by disclosing them to a medical staff committee. *Hospital administrators cannot, in other words, evade their concurrent duty to insure the adequacy of medical care provided patients at their facility—the duty articulated in Elam—simply by purporting to have delegated that entire responsibility to medical staff committees.*²¹⁷

The court thus noted that, since the responsibilities of hospital

higher percentage than the national average for the dirty and infected wounds?”

9. “How about 1982?”

10. “Do you know what type of a unit Mrs. Leary was admitted to in April of 1982, whether it was a medical unit, a surgical unit, isolation, whatever?”

11. “Could you tell me whether in connection with Victoria Leary you did any such tabulation [record of number of patients of a physician with wound infections] in connection with Dr. Morris in any increased incidents (sic) of wound infection concerning his patients?”

12. “Do you have any information about how they [Santa Rosa Memorial and other hospitals] do compare [with respect to wound infections]?”

13. “Do you know how many pseudomonas infections patients acquired in the hospital at Santa Rosa Memorial in the year 1982?”

14. “Do you know how many patients acquired staff (sic) infections at Santa Rosa Memorial Hospital during their hospitalization in the year 1982?”

15. “Did you ever undertake to specifically try to ascertain the cause of any infection involving Victoria Leary?”

16. “Have you ever been asked to write up in any fashion any information or facts or opinions that you have concerning the source of infection on Victoria Leary?”

17. “Do you know how many times Victoria Leary has been admitted to Santa Rosa Memorial Hospital in connection with a wound infection?”

18. “Do you know whether Dr. Morris reported Mrs. Leary’s infection to the head nurse of the units that she was discharged from?”

Id. at 716, 220 Cal. Rptr. at 239.

215. *Id.* at 724, 220 Cal. Rptr. at 245.

216. *Id.*

217. *Id.* (emphasis added). “[T]he responsibilities of hospital administrators are independent of those resting with medical staff committees.” *Id.*

administrators pertaining to in-hospital care are independent of those resting with medical staff committees,²¹⁸ "section 1157 does not shield from discovery administrative activities which, while related to, are independent of the investigative and evaluative activities of medical staff committees."²¹⁹

The court narrowed the scope of section 1157 further when it held that a hospital should be required to disclose whether a patient's care has been reviewed, unless the hospital can show that disclosure of the fact of review would be prejudicial to an interest protected by section 1157, in that such review would not be undertaken as a matter of course.²²⁰ The court qualified its holding by noting that if the committee regularly reviews the care of randomly selected patients, a response would not indicate a dereliction and, therefore, the mere fact of a committee review would not constitute a record or proceeding of that committee.²²¹

It is thus apparent that section 1157 is not a complete barrier to discovery of medical staff records. As indicated in *Santa Rosa*, it acts only like a privilege.²²² Therefore, plaintiffs' attorneys must approach a section 1157 claim of immunity just as they would an attorney/client or physician/patient objection; forcing the objector to establish the elements of the privilege. The burden is on the hospital to show entitlement to nondisclosure.²²³ "That the request 'may include materials generated by hospital committees' is not enough."²²⁴ As such, at the very least, plaintiffs' attorneys should request an *in camera* review by the trial judge of the requested documents.

Further, peer review records are not the only method of building a case. Plaintiffs' attorneys, proceeding on a strict *Elam* cause of action, should promptly ascertain whether the physician has had his privileges revoked, or restricted, at another hospital. If the physician has been denied staff privileges elsewhere, or removed from a medical staff for more than forty-five days, plaintiffs should attempt to find out whether a defendant hospital has complied with section 805.5 of the California Business and Professions Code.²²⁵ Section

218. *Id.* at 724, 220 Cal. Rptr. at 245-46.

219. *Id.* at 726, 220 Cal. Rptr. at 247.

220. *Id.* at 729, 220 Cal. Rptr. at 249.

221. *Id.*

222. See *supra* note 217 and accompanying text.

223. See *supra* notes 208-09 and accompanying text.

224. *Id.*

225. CAL. BUS. & PROF. CODE § 805.5 (West Supp. 1986) provides:

(a) Prior to granting or renewing staff privileges for any physician and surgeon, clinical psychologist, podiatrist, or dentist, any health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, or any health care service plan or medical care foundation, or the medical staff of any such institution, shall request a report from the

805.5 provides in part that:

(a) Prior to granting or renewing staff privileges for any physician and surgeon, . . . any health facility . . . shall request a report from the Board of Medical Quality Assurance . . . to determine if any report has been made pursuant to Section 805 indicating that the applying physician . . . has been denied staff privileges, been removed from a medical staff, or had his staff privileges restricted as provided in Section 805.²²⁶

Thus, California law requires hospitals *granting or renewing* staff privileges to first obtain a copy of any section 805 "Disciplinary Reports," which concern the subject physician. Section 805 Disciplinary Reports are reports made by the chief executive officer and the chief of the medical staff, and are required to be filed with the Board of Medical Quality Assurance [hereinafter referred to as BMQA],²²⁷ whenever any licensed physician is "denied staff privi-

Board of Medical Quality Assurance, the Board of Osteopathic Examiners, or the Board of Dental Examiners to determine if any report has been made pursuant to Section 805 indicating that the applying physician and surgeon, clinical psychologist, podiatrist, or dentist has been denied staff privileges, been removed from a medical staff, or had his staff privileges restricted as provided in Section 805. The request shall include the name and California license number of the physician and surgeon, clinical psychologist, podiatrist, or dentist. Furnishing of a copy of the 805 report shall not cause the 805 report to be a public record.

(b) Upon a request made by an institution described in subdivision (a) or its medical staff, which is received on or after January 1, 1980, the board shall furnish a copy of any report made pursuant to Section 805. However, the board shall not send a copy of a report where the denial, removal, or restriction was imposed solely because of the failure to complete medical records.

In the event that the board fails to advise such institution within 30 working days following its request for a report required by this section, the institution may grant or renew staff privileges for the physician and surgeon, clinical psychologist, podiatrist, or dentist.

(c) Any institution described in subdivision (a) or its medical staff which violates the provisions of subdivision (a) is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars (\$200) nor more than one thousand two hundred dollars (\$1,200).

226. *Id.*

227. The Board of Medical Quality Assurance [hereinafter cited as BMQA] is an administrative agency within the State Department of Consumer Affairs. Its focus is to use the regulatory process to protect the health and safety of the public. The Board has adopted the following mission statement:

The Board of Medical Quality Assurance, as advocate for the public interest, shall influence the quality of health care of the people of the State of California, and shall address public policy issues in which it may have significant impact. The Board shall assure that the licensees under its jurisdiction are qualified and competent to practice their professions safely and effectively with accountability to the public through (1) the maintenance of appropriate entry standards into the profession; (2) the assurance of continuing competence of the licensees; and (3) the reduction of substandard care.

The Board consists of nineteen members (twelve physician and seven public members), appointed by the Governor to four year terms. The Board is divided into three autonomous divisions. BOARD OF MEDICAL QUALITY ASSURANCE, ANNUAL REPORT OF THE BOARD OF MEDICAL QUALITY ASSURANCE 2 (1982).

leges, removed from the medical staff of such institution or [has] his staff privileges . . . restricted for a total of 45 days in any calendar year for any medical disciplinary cause or reason."²²⁸ If the BMQA does not respond within thirty working days, the hospital may grant or renew staff privileges. Thus, although decisions regarding staff privileges remain entirely at the discretion of the institution, the law requires that information from the BMQA regarding disciplinary reports from other institutions be requested before a final decision is made. Failure of a hospital to request such information is a misdemeanor.²²⁹ Therefore, if a plaintiff can show that the defendant hospital failed to request section 805 reports prior to granting or renewing the defendant physician's privileges, and the defendant physician had, in fact, had his privileges denied or suspended at another institution, then the violation of section 805.5 may be negligence *per se*.²³⁰ Further, if the hospital did request and obtain section 805 reports, and a plaintiff can discover the contents of such

228. CAL. BUS. & PROF. CODE § 805 (West Supp. 1986) provides:

The chief executive officer and the chief of the medical staff, where one exists, of any health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, or any health care service or medical care foundation shall report to the agency which issued the license, certificate or similar authority when any licensed physician and surgeon, clinical psychologist, podiatrist, or dentist is denied staff privileges, removed from the medical staff of such institution or if his staff privileges are restricted for a cumulative total of 45 days in any calendar year for any medical disciplinary cause or reason. Such reports shall be made within 20 working days following such removal or restriction, shall be certified as true and correct by the chief executive officer and the chief of the medical staff, where one exists, and shall contain a statement detailing the nature of the action, its date and all of the reasons for, and circumstances surrounding, such action. If the removal or restriction is by resignation or other voluntary action that was requested or bargained for in lieu of medical disciplinary action, the report shall so state.

The reporting required herein shall not act as a waiver of confidentiality of medical records and committee reports. The information reported or disclosed shall be kept confidential except as provided in subdivision (c) of Section 800, provided that a copy of the report containing the information required by this section may be disclosed as required by Section 805.5 with respect to reports received on or after January 1, 1976. The Board of Medical Quality Assurance, the Board of Osteopathic Examiners, and the Board of Dental Examiners shall disclose such reports as required by Section 805.5. A file containing reports received pursuant to this section shall be maintained by the agency receiving the reports for a minimum of five years after receipt.

Failure to make a report pursuant to this section shall be a misdemeanor punishable by a fine of not less than two hundred dollars (\$200) nor more than one thousand two hundred dollars (\$1,200).

229. *Id.*

230. CAL. EVID. CODE § 669 (West Supp. 1986). Specifically, section 669 states in relevant part:

reports,²³¹ then the plaintiff may be able to show that the hospital knew, or should have known, of a physician's incompetence.

For other alternatives outside the peer review privilege, plaintiffs should examine court records to determine how many lawsuits were filed against the defendant physician and how many times the hos-

- (a) The failure of a person to exercise due care is presumed if:
- (1) He violated a statute, ordinance, or regulation of a public entity;
 - (2) The violation proximately caused death or injury to person or property;
 - (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance or regulation was designed to prevent; and
 - (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance or regulation was adopted.

Id.

231. To date, no California appellate decision has confronted the issue of the discoverability of section 805 reports. As set forth *supra* note 228, section 805 provides that reports by the chief executive officer and chief of staff to the BMQA "shall be kept confidential except as provided in subdivision (c) of Section 800." Section 800(c) provides in pertinent part:

- (c) The contents of any [BMQA] file which are not public records under any other provision of law shall be confidential except that it may be reviewed (1) by the licensee involved or his or her counsel or representative who may but is not required to submit any additional exculpatory or explanatory statements or other information, which statements or other information must be included in the file, (2) by any district attorney or representative or investigator thereof who has been assigned to review the activities of a healing arts licensee, (3) by any representative of the Attorney General's office or investigator thereof who has been assigned to review the activities of a healing arts licensee, or (4) by any investigator of the department * * * or a healing arts board referred to in this section, who has been assigned to review the activities of a healing arts licensee. Such licensee may, but is not required to submit any additional exculpatory or explanatory statements or other information which statements or other information must be included in the file.

CAL. BUS. & PROF. CODE § 800(c) (West Supp. 1986).

The precise issue is, therefore, whether "confidential," as used in sections 800 and 805, means that section 805 reports are privileged, subject to subpoena, and/or otherwise discoverable. An argument can be made that section 805 reports are discoverable and are subject to subpoena based on an analogy to the language of CAL. BUS. & PROF. CODE §§ 828, 1698, 2294 & 2355 (West Supp. 1986), which state that certain records "shall be kept confidential and are not subject to discovery or subpoena." See also CAL. BUS. & PROF. CODE § 2392 (West Supp. 1986), which pertains to the Bureau of Medical Statistics, and provides that "[s]uch reports and any data not privileged or confidential under state law shall also be available to the public." Similarly, as used in the context of privileges, a confidential communication is not synonymous with a privileged communication. It is merely one element required to be shown in order to prevail on an attorney/client, physician/patient or psychotherapist/patient privilege.

Nevertheless, section 805 reports may be immune from discovery if: (1) the court finds that the information cannot be obtained without divulging the proceedings or the records of a hospital committee responsible for the evaluation of care (CAL. EVID. CODE § 1157 (West Supp. 1986)); (2) the court finds the BMQA to be a "professional standards review organization" to which section 1157's immunity is applicable (CAL. EVID. CODE § 1157.5 (West Supp. 1986)); (3) CAL. EVID. CODE § 1040 (West Supp. 1986) official information privilege is found to apply; or (4) the court determines that the reports are not discoverable public documents pursuant to the California Public Records Act, CAL. GOV'T CODE §§ 6250-60 (West 1980 & Supp. 1986).

pital was a codefendant. This is clearly evidence of notice on the part of the hospital.

Additionally, plaintiffs should request a copy of the hospital by-laws, and check to see whether there have been any violations such as those in the *Darling* case. With regard to the JCAH standards, plaintiffs should obtain a copy of the current manual and the manual that was in force at the time of the subject incident. Copies of all surveys conducted of the hospital by the JCAH should also be requested. Although no California appellate decision has confronted the issue of whether JCAH reports are discoverable, clearly section 1157 does not apply inasmuch as the JCAH is not an organized committee of (1) a medical staff in a hospital or (2) a local medical society to which section 1157 refers.²³²

Further, interrogatories should be propounded inquiring into the average occupancy rate of the hospital for the five years preceding the subject incident, also asking how many patients were admitted by the defendant physician during each of those years and what the total income was to the defendant hospital for the care and treatment of patients whose primary treating physician was the defendant physician. If the physician maintained a high occupancy rate, a plaintiff may be able to make out a case that the governing body had no incentive to review the physician's qualifications.

Moreover, if the peer review information is still held privileged by the court at the trial, then plaintiffs should make a motion *in limine* to prohibit the use of such information by the defendant hospital. If the hospital intends to use the information, plaintiffs should argue that it must be discoverable prior to trial.

In sum, although the California courts have strictly interpreted section 1157, there are other ways, albeit difficult, to obtain the evidence to establish hospital corporate liability. Plaintiffs must force hospitals to prove that they have fulfilled their duty of conducting peer reviews. This can be done by requesting, and having the court inspect *in camera* if need be, the administrative files, by-laws, membership applications, surgical privileges documentation, and reapplications for staff membership, and by digging into the hospital's compliance with the JCAH standards and the BMQA reporting procedures.

CONCLUSION

In *Elam*, California adopted the doctrine of hospital corporate negligence in order to provide victims with an avenue of relief. Under this theory, a hospital owes its patients an independent duty

232. See *supra* note 139 and accompanying text.

to exercise reasonable care in selecting and reviewing the competency of its staff physicians. However, the immunity provided by *West Covina* and section 1157 to the proceedings and records of those hospital committees responsible for the selection and review of physicians has effectively barricaded the very avenue of relief the judiciary provided in *Elam*.

The premises underlying peer review protection are unsupported by empirical evidence. In fact, time has proven the policy underlying section 1157 to be wrong. Staff members' candor and objectivity is impaired by the fact that disgruntled colleagues have access to the records and proceedings. Further, hospitals are using section 1157 as a subterfuge and the statute contains inherent weaknesses that must be remedied. Therefore, section 1157 must be either repealed or amended to provide for some measure of discovery in actions based upon a hospital's negligent selection or retention of a hospital staff member.

Legislative action is justified in that the confidentiality provided by section 1157 can no longer be viewed as the sole means to enhance quality control in hospitals. Today, the *Elam* doctrine of hospital corporate negligence also exists as a method of improving the quality of health care by providing hospitals with a financial incentive to insure the competency of hospital staff physicians. By amendment, section 1157 and *Elam* will be reconciled so that they may act in concert to elevate the quality of in-hospital medical practice, thereby protecting and furthering the health care interest of the patient, rather than shielding a hospital from liability when it has failed to take measures which would have protected a patient from unreasonable harm. Indeed, "[t]he only thing necessary for the triumph of evil is for good men to do nothing."²³³

*Lisa R. Rohm**

233. The actual quote is taken from now retired Judge B. Abbott Goldberg's famous Memorandum of Decision, *Gonzales v. Nork*, Civ. No. 228566 (Super. Ct. of Sacramento County, Cal. Nov. 27, 1983), in response to the Mercy Hospital medical staff committee members' knowledge of the more than 60 lawsuits alleging incompetency against Dr. Nork:

As for the doctors on the Mercy staff, two thoughts keep going through my mind. The one is from Dr. Jones: "No one told me anything." The other is from Edmund Burke:

"The only thing necessary for the triumph of evil is for good men to do nothing."

Id. (quoting Edmund Burke).

* I dedicate this publication to my parents, Bev and Joe, whose love, support and encouragement has inspired me to pursue, and enabled me to achieve, my goals and dreams.