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THE LATEST DEVELOPMENTS IN CALIFORNIA HEALTH LAW

Navigating California Evidence Code Section 1157's Complexities in Hospital Litigation

By Debra Albin-Riley

To encourage participation and candor, California's Legislature enacted several protections and immunities for physicians performing medical staff peer review. Evidence Code Section 1157 ("Section 1157") reflects California's policy that physicians and others performing peer review and related documents be shielded from discovery or compelled testimony in litigation.

However, California hospitals and their medical staffs often face dueling objectives when litigation arises. Hospital attorneys may want to use Section 1157-protected material to defend against malpractice, sexual misconduct, or negligent credentialing claims, while medical staffs want to preserve the confidentiality of peer review materials and discussions. Attorneys advising hospitals and medical staffs should collaborate as early as possible to most effectively navigate the contours of Section 1157. Healthy communication and collaboration between hospital and medical staff counsel can help balance the hospital's desire to present a robust defense in the litigation and the medical staff's need to honor its members' expectations that they will not be subject to depositions and discovery when conducting peer review.

I. What is Section 1157?

In effect since 1968, Section 1157(a) of the California Evidence Code provides that the meetings and records of certain hospital and medical staff committees—specifically those established to evaluate and improve the quality of care—are not subject to discovery in civil litigation.

Subdivision (b) further extends the discovery bar to compelled testimony of any person attending meetings of such committees. Courts have characterized this as a 'nearly absolute' discovery bar, making it exceedingly difficult for plaintiffs to obtain these materials if asserted. [1] Courts have upheld section 1157's discovery bar even if it prevents a plaintiff from obtaining vital evidence needed to support a claim, including claims for negligent credentialing. [2]

II. Section 1157 Benefits

Physicians performing peer review do so expecting consistent and vigorous assertion of Section 1157. For this reason, Section 1157's benefit is not limited to immediate litigation; it also serves to preserve the integrity and candor of future peer review processes. Early assertion of the discovery bar reinforces to medical staff members that their evaluations and discussions will remain confidential and hospital administration respects the medical staff's role in conducting peer review. Compliance with federal standards and maintaining accreditation with organizations such as The Joint Commission requires genuine and effective quality improvement efforts. [3] If reviewers fear their comments may be disclosed in litigation, they may be less forthcoming, omit critical information, or decline to participate altogether. Consistent and vigorous assertion of Section 1157's statutory discovery bar ensures that quality improvement activities remain comprehensive, improving patient safety and potentially reducing the risk of future litigation.

Another significant benefit of asserting Section 1157 is the potential to conserve substantial time and resources. Responding to discovery requests seeking peer review documents and information can be burdensome and frequently results in protracted disputes regarding the scope of the discovery bar. If the hospital promptly asserts Section 1157 in response to discovery, it may avoid extensive litigation over these issues relating to document production, negotiations with opposing counsel, depositions, or in camera judicial review.

III. Section 1157 Challenges

Attorneys defending hospitals in litigation can be frustrated by a medical staff's assertion of Section 1157. In defending the case, hospital counsel may wish to present peer review-protected evidence to show that, following an adverse event, the hospital, through its medical staff, promptly investigated, identified causes, and implemented corrective measures. Medical Staffs, on the other hand, usually are adamantly opposed to disclosure even if it benefits the defense, fearing that even limited use of peer review materials could undermine the confidentiality essential to candid discussions. Hospitals, medical staffs, and their counsel should carefully weigh the risks and benefits collaboratively, as most often the goal will be to enforce the statutory bar.

This issue becomes even more complex in cases involving allegations of negligent credentialing, where the

hospital is accused of permitting an unqualified physician to practice. Here, the tension between hospital attorneys and medical staff is particularly acute: Attorneys may want to reference peer review findings to show that the hospital acted responsibly, while medical staff are wary of any disclosure that could compromise the confidentiality of their deliberations. Plaintiffs frequently argue that the hospital should not be permitted to "hide behind" Section 1157 while simultaneously asserting that it acted responsibly. [4] However, courts have upheld the application of Section 1157 in negligent credentialing cases even if this deprives a plaintiff of evidence necessary to prove its case. [5] Attorneys defending hospitals may not be fully aware of Section 1157's benefits and limitations, highlighting the need to coordinate closely with medical staff attorneys to devise a strong defense while simultaneously protecting peer review confidentiality.

Management of Section 1157 documents presents another challenge in hospital litigation. Section 1157 protects records generated as part of the peer review process. If documents are distributed outside the peer review process or are incorporated into general administrative files, the risk increases that such documents will be either inadvertently disclosed or held to not be protected. Courts have cautioned that merely placing in a medical staff file a document developed or obtained by hospital administrators does not automatically obtain Section 1157 protection. [6] However, if such administrative records reflect or reference the immune proceedings, the hospital can confidently assert Section 1157 protections and redact or withhold documents. [7] Accordingly, hospitals and medical staffs must take care to keep peer review materials confidential, clearly label such documents, and restrict access to authorized individuals. [8]

IV. Section 1157 Bars Discovery and Compelled Testimony – It Is Not a Privilege

Many attorneys misunderstand Section 1157, likening it to an evidentiary privilege. Not so. Plaintiffs' counsel often raise common privilege issues such as waiver assertions and demand privilege logs to substantiate Section 1157 objections. But Section 1157 is not a privilege; rather it shields the information from written discovery and compelled testimony. Unlike the attorney-client privilege (Section 954), the spousal privilege (Sections 1010-1027), or the many other privileges featured in Division 8 of the Evidence Code Sections 930-1093, Section 1157 is featured in Chapter 3, "Other Evidence Affected or Excluded by Extrinsic Policies," reflecting California's legislative policy to encourage peer review by offering its participants immunity from discovery and depositions.

A. Privilege Logs Not Feasible or Required

When a defendant hospital asserts Section 1157 in response to document requests, plaintiff's counsel will usually demand a privilege log. A privilege log is a common practice when asserting a privilege because it allows the parties and the court to determine whether a privilege exists in the first instance. [9] But disclosing such a list would often defeat the purpose of asserting immunity. For example, if a medical staff requests documents from another facility as part of its credentialing process, revealing the identity of the responding facility in a privilege log or list would necessarily reveal information the peer review committee deemed necessary to its investigation and evaluation.

Rather than prepare a privilege log, hospital attorneys should consider offering to submit Section 1157 protected material to a court for in camera review in any instance where a dispute arises in discovery motion practice regarding whether documents refer to the immune proceedings. [10]

B. No Waiver Under California Evidence Code Section 912

Because Section 1157 is a discovery bar and not a privilege, hospital and medical staff counsel should vigorously oppose any claim of waiver. In University of Southern California v. Superior Court, the court concluded that Evidence Code Section 912 addressing waiver of privileges did not apply to Section 1157 because the discovery bar is not a "privilege." [11]

The Court noted that even if waiver could be asserted, all those with an interest in the material protected by Section 1157 would have to "waive" the discovery bar. [12] This issue can arise in various ways if some peer review records are disclosed, whether in other types of litigation, or through voluntary testimony by peer review participants. However, hospital and medical staff counsel should continue to vigorously assert Section 1157 and resist strenuously any attempt to discover additional documents or testimony even if some testimony or documents have been discovered.

Courts have found that no waiver exists if peer review protected documents are disclosed to state agencies or other entities involved in assessing and maintaining quality of care. In fact, Business and Professions Code section 805(b) requires a report to the Medical Board of California and the National Practitioner Data Bank whenever privileges are denied, revoked, or restricted for a medical disciplinary cause or reason. [13] Section 805(g) specifically provides that reporting shall not act as a waiver of confidentiality of medical records and committee reports.

C. Voluntary Testimony Allowed

At times hospitals and medical staffs may need to grapple with the complexities presented if a current or former peer review participant voluntarily discloses information in litigation. In West Covina Hospital v. Superior Court, the California Supreme Court held a witness could voluntarily testify as to events in medical staff peer review committee meetings. [15] [16]

Such voluntary testimony presents unique challenges. Most medical staff bylaws address a medical staff member's duty and obligation to preserve the confidentiality of peer review records. Some may allow medical staff leadership to impose or recommend disciplinary action for disclosing Section 1157-protected information. While it may be more difficult to obtain a protective order forbidding a peer review participant from voluntarily testifying about immune events or activities, hospitals and medical staffs should strongly consider applying for a protective order demanding return of protected documents. [17]

V. Section 1157 Now Protects Pre-Hospital Care by Paramedics and EMTs

The Legislature recently amended Section 1157 to extend its protections to the proceedings and records of pre-hospital emergency care providers, such as paramedics and emergency medical technicians. This amendment recognizes the critical role that pre-hospital providers play in patient care and the importance of candid quality improvement processes in the pre-hospital setting. Now, quality review committees and peer review activities conducted by pre-hospital emergency care providers are also protected from discovery in litigation, provided those activities were undertaken for the purpose of evaluating and improving the quality of pre-hospital emergency medical services.

This change is intended to foster the same candor and thoroughness in pre-hospital peer review as has long been encouraged within hospitals, ensuring that pre-hospital providers can participate in quality improvement without fear that their discussions or records will be used against them in court.

VI. Practical Tips

- Hospital defense counsel and medical staff counsel should confer and communicate as early as practicable in cases where Section 1157 issues may arise.
- Consider a common interest/joint defense agreement between the hospital and medical staff. These agreements can establish attorney-client privilege and attorney work product protection for material shared between hospital and medical staff leadership and their counsel. In litigation attacking a physician's practice at the hospital, medical staffs and hospitals have a common interest in preserving confidentiality and assessing the facts to defend the case. Medical staff members should be assured that these agreements do not mandate that information be shared with administration, but serve to protect any information that is shared.
- Determine if other, non-Section 1157 protected records exist that the hospital can use in its defense without affecting the discovery bar.
- Hospital counsel should consider proactively seeking protective orders when discovery issues arise. Motions for protective orders allow for more fulsome briefing than oppositions to motions to compel.

- Consider offering an in camera review of documents to establish Section 1157's application, if necessary.
- Consider other ways to use the attorney-client privilege and work product doctrine to supply further protection to shared information.

VII. Conclusion

Section 1157's discovery bar can cause tension between hospital attorneys, who may see strategic value in using protected peer review information to defend against litigation, and medical staff peer reviewers, who are committed to preserving the confidentiality that underpins effective quality improvement. Navigating this tension requires careful collaboration and clear protocols: Hospital attorneys must respect the discovery bar applicable to medical staff and peer review documents and deliberations while advocating for the hospital, and medical staffs and their counsel should understand the hospital's need to present a vigorous defense. By fostering open communication and mutual understanding, hospitals and medical staffs can strike a balance that protects both their legal interests and the integrity of the peer review process.

Endnotes

[1] Snell v. Superior Court (1984) 158 Cal.App.3d 44, 49; Roseville Community Hospital v. Superior Court (1977) 70 Cal.App.3d 809, 813; Scripps Memorial Hospital v. Superior Court (1995) 37 Cal.App.4th 1720, 1724.
[2] Snell v. Superior Court (1984) 158 Cal.App.3d 44, 48-49; Alexander v. Superior Court (1993) 5 Cal.4th 1218, 1227–1228.
[3] https://www.jointcommission.org/standards/about-our-standards/
[4] Matchett v. Superior Court (1974) 40 Cal.App.3d 623, 628.
[5] Snell v. Superior Court (1984) 158 Cal.App.3d 44, 48-49.
[6] Santa Rosa Memorial Hospital v. Superior Court (1985) 174 Cal.App.3d 711, 724.
[7] Saddleback Community Hospital v. Superior Court (1984) 158 Cal.App.3d 206, 208-209.
[8] Saddleback Community Hospital v. Superior Court (1984) 158 Cal.App.3d 206, 208–209.
[9] Code Civ. Proc., § 2031.240.
[10] Saddleback Community Hospital v. Superior Court (1984) 158 Cal.App.3d 206, 208–209.
[11] University of Southern California v. Superior Court (1996) 45 Cal.App.4th 1283, 1292.
[12] Id.
[13] Bus. & Prof. Code, § 805(b).
[14] Bus. & Prof. Code, § 805(g).
[15] West Covina Hospital v. Superior Court (1986) 41 Cal.3d 846, 854-855.
[16] Justice Panelli vigorously dissented from the majority holding in West Covina, joined by Justices Grodin and Lucas. West Covina Hospital v. Superior Court (1986) 41 Cal.3d 846, 855-860.
[17] The West Covina Court did not address the protections in Section 1157(a) pertaining specifically to “proceedings” and “records.”

Rated among the “Top Health Care Lawyers” and “Top Women Lawyers” in California by Daily Journal, Debra Albin-Riley guides clients through sophisticated and cutting-edge health care litigation matters involving hospitals, medical staffs, and peer review. She represents many of California’s largest hospitals, health systems, and medical staffs and has served as the lead attorney on numerous high-profile federal, state, and appellate matters in courts and tribunals across the country, including the California Supreme Court and the California Court of Appeals.

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