Peer Review Privilege

Under State And Federal Law

This memo is intended to discuss the application of Evidence Code §1157, 42 C.F.R. §483.75(o), 42 U.S.C. §1395i-3(b)(1)(B), and 42 U.S.C. §1396r(b)(1)(B). First, it will focus on the history and application of the statutes and the regulation as they pertain to skilled nursing facilities. Second, it will discuss what is necessary to form a "peer review body" or an "organized committee." Third, it will discuss the importance of the subtle distinction between an administrative function and a committee function. Fourth, this memo will discuss what information is and is not subject to discovery.

1. EVIDENCE CODE §1157

Evidence Code §1157 is a legislative response to the court's decision in Kenney v. Superior Court, (1967) 255 Cal.App.2d 106, wherein the court sustained a plaintiff's malpractice claim to discovery of all hospital staff records including those records derived from peer review reports.

Evidence Code §1157(a) states in pertinent part:

> Neither the proceedings nor the records of organized committees … or of a peer review body, as defined in Section 805 of the Business and Professions Code, … having the responsibility of evaluation and improvement of the quality of care, shall be subject to discovery.

It is through the incorporation of §805 of the Business and Professions Code that this privilege is extended to a skilled nursing facility. §805(1)(a) of the Business and Professions Code defines a "peer review body" as:

> medical or professional staff of any health care facility or clinic licensed under Division 2 (commencing with Section 1200) of the Health and Safety Code or of a facility certified to participate in the federal Medicare program as an ambulatory surgical center.

A skilled nursing facility is a health care facility licensed pursuant Health and Safety Code §1250(c). As such, any "peer review body" of the facility will be afforded the discovery protection of Evidence Code §1157.

The rationale behind Evidence Code §1157 is articulated in the seminal case of Matchett v. Superior Court, (1974) 40 Cal.App.3d 623. In Matchett, plaintiff brought a malpractice suit against defendant hospital claiming that the hospital was negligent in admitting and retaining the co-defendant doctor. During discovery, plaintiff sought records of the Hospital's Tissue Committee, Records Committee, Executive Committee,

and Credentials Committee. Ruling in favor of defendant, the court found that Evidence Code §1157:

> expresses a legislative judgment that the public interest in medical staff candor extends beyond damage immunity and requires a degree of confidentiality. 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. … Section 1157 represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence." (Id at 629).

In short, Section 1157 is intended to encourage facilities to create a committee that will be responsible for evaluating the delivery of care without fear that their investigation will end up in the hands of plaintiff's counsel. For Section 1157 to apply, however, such records or proceedings must be those of a "peer review body" or an "organized committee."

2. WHAT CONSTITUTES A "PEER REVIEW BODY" OR AN "ORGANIZED COMMITTEE?"

As stated above, Business and Professions Code §805 defines a "peer review body" to include "medical or professional staff of any health care facility or clinic licensed under Division 2 (commencing with Section 1200) of the Health and Safety Code." While the statute is silent as to what constitutes an "organized committee," case law has offered a little guidance.

In County of Los Angeles v. Superior Court of Los Angeles County (Martinez), (1990) 224 Cal.App. 3d 1446, the court held that a peer review committee can involve all members of a particular department, including licensed and unlicensed staff "[s]o long as the statutory purpose of peer professional evaluation and improvement of the quality of care is served, …, the specific composition of the reviewing body is best left to the health care professionals." (Id. at 1454). In addition, the County of Los Angeles Court held that the statute does not require the peer review committee to keep minutes or any other formal organizational indicia. (Id. at 1453.)

While the court has clearly allowed all staff, both licensed and unlicensed, to serve on a peer review committee, a facility must give great consideration when deciding whether its administrator should serve on that committee, especially when the administrator is charged with an administrative function similar to that of the committee.

3. THE DISTINCTION BETWEEN AN "ADMINISTRATIVE FUNCTION" AND A "COMMITTEE FUNCTION."

In Willits v. Superior Court (1993) 20 Cal.App.4th 90, the court recognized that medical facilities have a dual structure. First, an administrative governing body takes ultimate responsibility for the quality and performance of the medical facility. Second, an organized medical staff entity has responsibility for providing medical services, and is responsible to the governing body for the adequacy, and quality of the medical care rendered to patients in the hospital. (supra at 100.) While the records and proceedings of the "medical staff governing body" are afforded the privilege under Section 1157, **administrative records are not.** (Matchett at 629.) (Emphasis added.)

Since administrative records are not afforded the privilege, a potential problem arises when an administrator, having particular administrative functions, serves on a committee charged with a similar function. This does not mean, however, that an administrator cannot serve on the committee. In fact, the court in Santa Rosa Memorial Hospital v. Superior Court, (1985) 174 Cal.App.3d 711, upheld the privilege even though the administrator's function was similar to that of the peer review committee she served on. The Santa Rosa court, however, warns:

> [I]nformation developed or obtained by hospital administrators or others which does not derive from an investigation into the quality of care or the evaluation thereof by a medical staff committee, and which does not disclose the investigative and evaluative activities of such a committee, is not rendered immune from discovery under Section 1157 merely because it is later placed in the possession of a medical staff committee or made known to committee members; this may be so even if the information in question may be relevant in a general way to the investigative and evaluative functions of the committee. **Hospital Administrators cannot evade their concurrent duty to insure the adequacy of medical care provided patients at their facility simply by purporting to have delegated that entire responsibility to medical staff committees.** The responsibilities of hospital administrators pertaining to the quality of in-hospital care will, of course, usually be related to the similar duties of medical staff committees. (Id. at 724). (Emphasis added.)

Therefore, if an administrator is to serve on a committee, it is vital to understand which activities are considered administrative, and which activities are considered those of the committee. The Santa Rosa Court clarifies this subtle distinction.

In Santa Rosa, plaintiff brought a cause of action against the hospital claiming she suffered injuries as a result of an infection acquired while a resident at the hospital. During discovery, Plaintiff sought information as to the contents of an infection control

committee meeting held subsequent to the injury. The hospital, asserting the records and proceedings of that meeting are afforded a privilege under Section 1157, denied discovery. Plaintiff asserted that because the administrator has a duty pursuant to California Administrative Code §70739 to implement an infection control program, the committee serves purely an administrative function, and is not entitled to the privilege afforded by Section 1157. When the administrator serves on a committee, and the duties of that administrator and the purpose of the committee overlaps, The Santa Rosa court held that:

> The court must explore and determine the extent to which an administrator's responsibilities may be independent of her participation in activities of the infection control committee. Since the immunity afforded by section 1157 applies only to records and proceedings, not to person, it cannot be invoked by the hospital simply because the administrator is a member of a committee whose records and proceedings are protected by the statute. (Id. at 730.)

To solve this problem, the court looked to the source of the administrator's responsibility. In reviewing the code and its incorporation of the American Hospital Association Guidelines and the Joint Commission on Accreditation of Hospitals manual, and the facility's medical staff bylaws, the court was able to determine that the administrator had duties and responsibilities independent and apart from those of the infection control committee. Essentially, the hospital had a duty to establish and implement an adequate infection control program, while the committee was to monitor the effectiveness of that program. Thus, documents concerning the implementation of the program would be subject to discovery, while documents concerning the effectiveness of that program would not (Id. at 725).

Santa Rosa demonstrates the importance of the facility to have a clear understanding of the administrator's legal duty, because it would then be able to craft a set of medical staff bylaws that clearly segregates the administrative duty and the committee duty. It is important to remember that when asserting the privilege, the burden of proof rests with the facility. (Matchett v. Superior Court, supra, 40 Cal. App.3d at 627.) If it is not clear to the court whether the committee is administrative or peer review, an "in camera" hearing would likely be required. (Santa Rosa v. Superior Court (1985) 174 Cal.App.3d. 711; Hinson v. Clairemont Community Hospital, (1990) 218 Cal.App.3d 1110.)

4. INFORMATION SUBJECT TO DISCOVERY

As used in the context of Evidence Code §1157, the term discovery means the "formal exchange of evidentiary information between parties to a pending action." Arnett v. Dal Cielo, (1996) 14 Cal. 4th 4. This definition, however "does not include a subpoena issued … by an administrative agency for purely investigative purposes." (id. at 24.) This rule allows administrative agencies, such as the Department of Health Services, to seek information ordinarily protected by the committee. As the decision in

Fox v. Kramer, (2000) 22 Cal.4th 531 points out, disclosure of peer review materials to the DHS, does not constitute a waiver.

In Fox v. Kramer, (2000) 22 Cal.4th 531, the DHS sent an "expert" to investigate a claim that a surgery was performed at the hospital after the patient withdrew her consent. During the course of the investigation, the DHS requested, and received numerous materials relating to a peer review committee meeting held subsequent to the surgery. It was from the records of this committee meeting, the DHS formed its opinion. Subsequently, Plaintiffs issued a trial subpoena requesting the report. The DHS provided a significantly redacted version of the report along with a declaration indicating that the majority of the report was based on peer review material and was subsequently protected by a privilege the DHS did not have authority to waive. In asking the court to compel production, Plaintiffs brought forth three contentions: (1) the privilege was waived when the hospital provided the records to the Department; (2) Plaintiffs could still subpoena the investigator to testify as to he found; and, (3) The privilege only applies to discovery, it does not apply to trial subpoenas.

First, the court held the "hospital peer review committee records did not lose their immunity from discovery simply because they were reviewed in the course of an administrative investigation." (Id. at 540). Second, the court held that "when an expert has relied on privileged material to formulate an opinion, the court may exclude his testimony or report as necessary to enforce the privilege." (Id. at 541.) In a footnote, the court stated that "it would contradict legislative intent to permit the parties to manipulate the DHS investigative process in order to accomplish an end run around the discovery bar of Evidence Code §1157." (Id. at 541, n. 1). Third, the court held "the purpose of the provision would clearly be undermined if a party to a civil action could obtain through a trial subpoena the same evidence that it was prohibited from obtaining through a pretrial discovery request." (Id. at 542).

Although not addressed by the court, Fox provides an additional lesson. In Fox, one of the plaintiffs was also a doctor at the defendant facility and was permitted to attend the committee meeting. The practice of allowing an injured party to attend such a meeting can prove to be problematic as the courts have routinely held that the privilege can be voluntarily waived by any member attending such a meeting. (Matchett v. Superior Court, (1974) 40 Cal.App.3d 623; Santa Rosa v. Superior Court, (1985) 174 Cal.App.3d 711; West Covina Hospital v. Superior Court (Tyus), (1986) 41 Cal.3d 846.) Since the plaintiff doctor attended the committee meeting, he is free to testify as to what transpired at the meeting. To avoid this potential conflict, it is recommended that potential plaintiffs be excused from the committee meetings.

It is important to remember, however, plaintiffs do not have the right to seek the identity of the committee members as "it would be an incongruous result if the statute protected the work product of the review committee but exposed the identity of the evaluating committee members whose candor the statute seeks to promote." Willits v. Superior Court, (1993) 20 Cal. App. 4th 90, 97.

Documents created for the exclusive use of the committee, although created outside the actual committee meeting were afforded the privilege in Matchett v. Superior Court (1974) 40 Cal.App.3d 623.

5. THE FEDERAL PEER REVIEW PRIVILEGE

A Federal Peer Review Privilege exists for skilled nursing facilities that receive benefits under the Medicare program (42 U.S.C. §1395i-3(b)(1)(B)) and/or Medicaid program (42 U.S.C. §1396r(b)(1)(B)). Additionally, the code of Federal Regulations under 42 C.F.R. §483.75(o), contains a peer review privilege. All three bodies of law are identical in content and provide:

> (1) A facility must maintain a quality assessment and assurance committee consisting of--
> (i) The director of nursing services;
> (ii) A physician designated by the facility; and
> (iii) At least 3 other members of the facility's staff.
> (2) The quality assessment and assurance committee--
> (iv) Meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary; and
> (v) Develops and implements appropriate plans of action to correct identified quality deficiencies.
> (3) **A State or the Secretary may not require disclosure of the records of such committee except in so far as such disclosure is related to the compliance of such committee with the requirements of this section.** (Emphasis added.)
> (4) Good faith attempts by the committee to identify and correct quality deficiencies will not be used as a basis for sanctions.

Initially, it is important to note that unlike the California privilege, the Federal privilege contains minimum requirements in terms of which staff members must serve on the committee, and how often this committee must meet. Past this mandate, case law interpreting this privilege is scarce. In fact, as recently February 25, 2003, the New York Court of Appeals recognized that no "federal court has previously interpreted this statutory exemption." In the matter of Subpoena Duces Tecum to Jane Doe (2003) 99 N.Y.2d 434, 439. Moreover, the State of California has yet to interpret this federal exemption. Therefore, we must look to other state courts for guidance.

The first state court to interpret the federal statute was the Supreme Court of Missouri, in the matter of State of Missouri Ex Rel. Boone Retirement Center, Inc. v. Honorable Gene Hamilton, (1997) 946 S.W.2d 740. In State of Missouri, the Attorney General initiated a criminal investigation of the "Boone" skilled nursing facility in an effort to determine whether the residents of the facility were the victims of criminal neglect under state statute. As part of the Attorney General investigation, a subpoena was issued requiring "Boone" to produce "any and all quality assurance records, and/or attachments, reflecting materials generated by or presented to the Boone Retirement

Center Quality Assurance Committee." (Id. at 741) "Boone" subsequently filed a motion to quash, claiming 42 U.S.C. §1395i-3(a)(b)(1)(B) prohibited the State from seeking disclosure.

In reaching a conclusion, the court found it important to focus Congress' intended definition of the term "State." To decipher, the court turned to 42 U.S.C. §1395x(x) and 42 U.S.C. §410, where the court held that the "Congressional definition is territorially focused, not functionally limiting; it intends to include within "State" the whole of the functional, legal entity organized to act as a government within a territory of land recognized by the federal government for that purpose." (Id. at 742.) With this definition in mind, the privilege would "prohibit a state grand jury from commanding disclosure of records of quality assurance committees formed pursuant to those statutes." (Id. at 742.) This holding would suggest that all arms of the State, civil and criminal, are prohibited from compelling disclosure of peer review materials. An exception, of course, would apply to those agencies charged with the responsibility of enforcing the Medicare and Medicaid programs.

It is also important to note that in dictum, the State of Missouri Court provided:

> The statute limits the scope of the privilege to "records of such committee." This statutory privilege is exceedingly narrow. It protects the committee's own records – its minutes or internal working papers or statements of conclusions – from discovery. No honest reading of the statute, however, can extend the statute's privilege to records and materials generated or created outside the committee and submitted to the committee for its review. (Id. at 743.)

In the only other case interpreting this statute, In the Matter of Subpoena Duces Tecum to Jane Doe (2003) 99 N.Y.2d 434, the New York Court of Appeals had a different opinion.

While acknowledging the court's opinion in State of Missouri, the Jane Doe court held:

> The federal statute does not restrict quality assurance records to only those reports created by quality assurance committee members themselves. We read the language "records of such committee" as encompassing within its parameters **any** reports generated by **or at the behest** of a quality assurance committee for quality assurance purposes. Of course, where the committee simply duplicates existing records from clinical files, no privilege will attach. However, compilations, studies, or comparisons of clinical data derived from multiple records, created by or at the request of committee personnel for committee use, are "records of such committee" and are entitled to protection from disclosure pursuant to federal law. (Id. at 441) (emphasis added.)

Moreover, in determining the scope of the privilege, the court found it important to note that:

> Where facilities are compelled by a statutory or regulatory dictate to maintain a particular record or report that is not expressly related to quality assurance, the fact that a quality assurance committee reviews such information for quality assurance purposes does not change the essential purpose of the document. A facility may not create a privilege where none would otherwise exist merely by assigning the duty for compliance or compilation to a quality assurance committee. (Id. at 441)

This presents an interesting issue. In requiring disclosure, the Jane Doe Court reasoned that since the State is charged with enforcement of the Federal Nursing Home Reform Act (42 U.S.C. §1396r(b)(1)(B)(ii)), it is necessary for the State, in the course of its investigation, to obtain documents that the Act requires the facility to maintain. What if, however, the documents are sought in the course of a medical malpractice claim? Can the state mandate disclosure? The New York court's holding would seem to suggest yes, however, their rationale - based on the State's requirement to enforce the act - would no longer apply.

6. CONCLUSION

While very little litigation exists concerning the Federal privilege, the California privilege has extensive case law interpreting it. However, if the facility would like to have the protection of both privileges it may consider reviewing the federal privilege and require its committees to have the mandatory members.