

03866-1

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NO. 63866-1-1

COURT OF APPEALS, DIVISION I
THE STATE OF WASHINGTON

LEASA LOWY,

Petitioner,

v.

PEACEHEALTH, a Washington corporation; ST. JOSEPH HOSPITAL;
and UNKNOWN JOHN DOES,

Respondents.

RECEIVED
COURT OF APPEALS
DIVISION I
JAN 11 2007

BRIEF OF RESPONDENTS

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I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly hold, consistent with RCW 70.41.200(3) and RCW 4.24.250, that information and documents, like the “Cubes” database, created specifically for, and collected and maintained by, a St. Joseph Hospital quality improvement committee are not subject to review, disclosure, or discovery in this action?

2. Does the constitutional right of access to the courts, which was held in *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 979, 216 P.3d 3743 (2009), to include “the right of discovery authorized by the civil rules,” preclude the Legislature from enacting, or the trial court from enforcing, statutory privileges, when the discovery authorized by CR 26(b)(1) is “discovery regarding any matter, not privileged” that is relevant to the subject matter of the litigation?

3. Does the legislature’s enactment, or the trial court’s enforcement, of RCW 70.41.200(3) violate the separation of powers doctrine, where the existence or application of statutory privileges does not conflict with any Civil Rule, much less CR 26(b)(1), which limits discovery to matters “not privileged” that are relevant to the subject matter of the litigation?

II. INTRODUCTION AND SUMMARY OF ARGUMENT

In this medical malpractice action arising out of a claimed IV infusion injury, Dr. Leasa Lowy seeks to have a CR 30(b)(6) witness for the Hospital review and mine the Hospital's quality improvement database, "Cubes," and cull out and disclose or investigate whatever information can be found therein about other IV infusion incidents. Under the plain language of RCW 70.41.200(3), however, "[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to *review or disclosure*, except as provided in this section, or discovery or introduction into evidence in any civil action"¹ [Emphasis added.] And, although the statute provides certain exceptions, none of them are applicable here, and none permit the review, search, mining, investigation, or disclosure of the contents of what is indisputably a quality improvement database created specifically for, and collected and maintained by, a hospital quality improvement committee. The trial court properly concluded that the plain language of RCW 70.41.200(3) precluded the discovery Dr. Lowy sought.

¹ Similarly, under RCW 4.24.250, subject to one exception, "reports and written records" of regularly constituted review committees whose duty it is to review and evaluate the quality of patient care "are not subject to review or disclosure, . . . or discovery proceedings in any civil action.

Dr. Lowy has never contended that RCW 70.41.200(3) is ambiguous in any respect. Thus, the plain language of the statute should end the inquiry. Nevertheless, both the legislative history, case law, and sound public policy further reinforce the correctness of the trial court's determination.

Dr. Lowy's assertions that RCW 70.41.200(3), as applied in this case, violates her constitutional right of access to courts, which includes the right to discovery authorized by the Civil Rules, or conflicts with CR 26(b)(6) so as to violate separation of powers, are without merit, especially when CR 26(b)(6) by its terms limits the right to discovery to "discovery regarding any matter, *not privileged*," that is relevant to the subject matter involved in litigation. [Emphasis added.]

III. COUNTERSTATEMENT OF THE CASE

Leasa Lowy, a physician with privileges at St. Joseph Hospital in Bellingham, CP 9, 36 (p.10), an employee of PeaceHealth, and a member of Peace Health's Quality and Patient Safety Team, CP 51 (¶ 3), sued PeaceHealth and St. Joseph's Hospital, claiming that as a result of an IV infusion she received while hospitalized at St. Joseph Hospital, she suffered a neurologic injury to her left arm, CP 6 (¶ 4.1), and can no longer practice as an obstetrician/gynecologist or surgeon, CP 28. St. Joseph Hospital is owned and operated by PeaceHealth. *See* CP 5 (¶ 1.2).

A. Discovery Sought by Dr. Lowy.

Dr. Lowy served interrogatories and requests for production on St. Joseph Hospital seeking “incident reports, adverse outcome reports, sentinel event reports, or other similar reports” regarding complications of IV treatment, as well as the identity of persons employed by defendants who have access to records regarding adverse events associated with IV treatment at the Hospital. *See* CP 16-17. Defendants objected to that discovery on grounds that such documents or information were privileged and immune from discovery under the quality assurance and peer review privileges, RCW 4.24.250 and RCW 70.41.200 *et seq.*² *See* CP 17.

Dr. Lowy did not move the trial court to compel responses to the interrogatories and requests for production, but instead served a “Notice of Videotaped 30(b)(6) Deposition Re: IV Infusions,” CP 20-21, demanding that PeaceHealth d/b/a St. Joseph Hospital designate a representative to testify about various subjects, including “any and all facts and information relating to . . . [i]ncidences of IV infusion complications and/or injuries at St. Joseph’s Hospital for the years 2000-2008.” CP 21.

B. The Hospital’s Motion for Protective Order.

The Hospital moved for a protective order as to that portion of the CR 30(b)(6) deposition notice seeking a witness to testify regarding

² In some of the trial court briefing, RCW 70.41.200 was mistakenly cited as RCW 70.41.200. *See, e.g.*, CP 17, 18.

“incidences of IV infusion complications and/or injuries at St. Joseph’s Hospital for the years 2000-2008,” CP 16-25, on grounds that “[t]he discovery sought was overly broad, unduly burdensome, and subject to and protected by the quality assurance and peer review privileges”, CP 16, specifically RCW 4.24.250 and RCW 70.41.200 *et seq*, CP 18. As the Hospital explained:

[T]o provide a knowledgeable deponent to testify responsively to [the] request would require the deponent to either inspect confidential and privileged peer review and quality assurance documentation on any such injuries or complications or to review 9 years of medical records for all patients at St. Joseph’s Hospital looking for reference to IV infusion injury or complication. [CP 17.]

In support of its motion for protective order, the Hospital submitted the declaration of Mary Whealdon, CP 25, the Risk Manager at St. Joseph’s Hospital, in which she explained, with respect to that portion of the deposition notice requesting a witness to testify concerning incidences of IV infusion complications and/or injuries for the years 2000-2008, that:

3. I have investigated whether any non-privileged documents or medical record database exists which could produce responsive information to this deposition request. While St. Joseph Hospital has an electronic medical record system, that system does not have search filed capability to query and retrieve the information requested from patient records. Consequently, months of man and woman power would be required to be expended to go page-by-page through many thousands of St. Joseph Hospital patient records over that 8-year period of time to look for an

indication in the medical records of a complication or injury potentially associated with IV infusion.

4. There are no documents, other than quality assurance and peer review records, which may contain responsive information for a witness to provide testimony in response to the 30(b)(6) . . . question.

5. All such documents maintained by the quality assurance and peer review committees of St. Joseph Hospital were sent to and maintained by confidentially by such committees in accordance with the quality assurance and peer review statutes, and are confidential from any dissemination, pursuant to those statutes. [CP 25.]

In response to the Hospital's motion for a protective order, CP 26-44, Dr. Lowy did not contest that it would be unduly burdensome for the hospital to have to conduct a record by record search of medical records to identify complications or injuries potentially associated with IV infusions over the requested 8-year period.³ Rather, she claimed that the quality assurance and peer review statutes relied upon by the Hospital, do not "prohibit a defendant from reviewing its QA [quality assurance]⁴ files in order to determine whether the files contain documents which were not created specifically for the committee." CP 32. She asserted that: "If there are medical records in the [quality assurance] file, or information

³ Dr. Lowy concedes on appeal, *App. Br. at 6*, that she did not contest the claim that such a search would be unduly burdensome. Nor has she maintained or shown that "incidences of IV infusion complications and/or injuries" would be reflected in patient medical records in a form that would enable a person reviewing the thousands of patient medical records to identify them as such.

⁴ The terms "quality assurance" or "QA" and "quality improvement" or "QI" have been used interchangeably in the parties' briefing.

from original sources in the file, then those records and that information are not privileged and must be produced.” CP 33.

Citing her own deposition testimony, CP 41, Dr. Lowy also claimed that, Dr. Stephanie Jackson, the Medical Director of Patient Safety (who, along with Dr. Lowy, is a member of the Quality and Safety Leadership Team), had shown her “a computer program utilizing a list format which depicted prior incidences of IV injury at St. Joseph,” CP 29, which could be reviewed and the knowledge gained from it used to produce responsive non-privileged information at the CR 30(b)(6) deposition. CP 33-34.

In its reply, CP 45-52, the Hospital explained that the database, known as the “Cubes” database, that Dr. Lowy alleged would synthesize the information she sought consisted of materials “created, kept and maintained for the sole purposes of quality assurance and peer review,” and “derived from incident reports, which are themselves quality assurance and peer review documents.” CP 46-47, CP 51-52. As Dr. Stephanie Jackson explained in her declaration, CP 51-52, submitted in support of the Hospital’s reply:

4. I have been informed that Dr. Lisa Lowy testified I showed her information on my laptop computer concerning IV infusion incidents at PeaceHealth.
5. Dr. Lowy asked me whether PeaceHealth tracked IV infusion incidents. Since Dr. Lowy is also a member of

the Quality and Safety Leadership Team at PeaceHealth and entitled to access Quality Assurance documents, I told her that such tracking does occur and showed her a screen on my computer from the Quality Assurance database with an example of the tracking format. I told Dr. Lowy that the screen I showed her was part of the PeaceHealth "Cubes" database and is material created, kept and maintained for the sole purposes of quality assurance and peer review.

6. The information in the Cubes database is derived from incident reports, which are themselves quality assurance and peer review documents.

7. Other than quality assurance and peer review documents, there is no source of information about IV infusion incidents at St. Joseph's Hospital or PeaceHealth available, other than patient medical records. [CP 51-52.]

The Hospital reiterated in its reply that the only way to access the nine years' worth of information Dr. Lowy sought, without breaching the quality improvement database, was to physically search through thousands of patient medical records. CP 47-48.

The trial court initially denied the Hospital's motion for protective order and ordered a designated agent of the Hospital to "review all relevant records of the quality assurance and peer review committee for the period January 1, 2003 through March 31, 2009," and to disclose the "underlying facts and explanatory circumstances charted in hospital records relating to alleged injuries, complications, malfunctions or adverse events associated with any IV infusions." CP 54.

C. The Hospital's Motion for Reconsideration.

The Hospital moved for reconsideration, CP 55-82, *see also* CP 96-101, explaining that the actions the trial court had mandated in its initial order – to “review all relevant records of the quality assurance and peer review committee” to search for and obtain data about IV infusion incidents, and then to disclose the underlying facts and explanatory circumstances charted in hospital records relating to alleged injuries, complications, malfunctions or adverse events associated with any IV infusions – were in direct contravention of the statutory mandate of RCW 70.41.200(3) that, subject to certain exceptions not applicable in this case, “[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by a quality improvement committee are not subject to review or disclosure, . . . or discovery or introduction into evidence in any civil action,” as well as the mandate of RCW 4.24.250 that, again subject to an inapplicable exception, “reports, and written records” of regularly constituted hospital review committees whose duty it is to review and evaluate the quality of patient care “are not subject to review or disclosure, . . . or discovery proceedings in any civil action.” CP 59-62.

In support of its motion for reconsideration, the Hospital submitted another declaration of Dr. Stephanie Jackson, in which she gave further

details concerning the Hospital's regularly constituted quality improvement committees and the "Cubes" quality improvement database.

Specifically, she testified:

3. I am making this Declaration to provide greater specificity regarding the creation, use and type of information on the Cubes data base, and to emphasize it is information collected, maintained and used solely for Quality Improvement (QI) by PeaceHealth QI Committees.

4. The Cubes database is information and documents created specifically for, and collected and maintained solely by quality improvement committees. In the case of incidences of adverse drug reactions [such as possible IV infiltrations], those quality improvement committees are the Pharmacy and Therapeutic Committee and the Medication Safety Team. Both of these regularly constituted committees are established under RCW 70.41.200 and similar statutes, and the Cubes data, in spreadsheet format, are reports and written records of those two regularly constituted committees whose duty it is to review and evaluate the quality of patient care under RCW 4.24.250 and similar statutes.

* * *

6. Throughout the process of input and use of the information in the Cubes database by the QI committees are statements of its purpose and such statements include that the report is confidential and privileged under state law because it is a quality improvement report for quality improvement and peer review purposes. This confidentiality and privilege is maintained by passwords to preclude dissemination from the Cubes database to non-committee members.

7. I attach the Medical Staff Bylaws and Rules and Regulations of St. Joseph Hospital [Bylaws]. At page 4, section 3A of the Bylaws, the outline of the Medical Staff committees of the Hospital that carry our peer review and other performance improvement functions are delegated to

the Medical Staff by the Board. At page 9, section 3.K. the Pharmacy and Therapeutics Committee is established to “conduct ongoing reviews of adverse drug events reported through the Hospital Systems.” This review is the QI committee using the Cubes database.

8. The information about adverse drug events on the Cubes [database] is not patient medical records or excerpts of patient medical records; rather it is summary information reflecting the deliberative process and evaluation of the QI committee analyzing the occurrence in the performance of its QI mandate. Information such as severity, type of event, outcome and root cause is assessed. The committees evaluate improvement opportunities based on this information. However, the only information containing all the underlying facts and circumstances of any such events is the patient medical records. [CP 65-66.]

The trial court agreed with the Hospital’s analysis and granted the motion for reconsideration, CP 103-04, reversing its prior order denying the Hospital’s motion for a protective order, and holding that “the plain language of RCW 70.41.200(3) compels the conclusion that any kind of disclosure, whether of committee opinion or underlying factual complaints, shall not be disclosed.” CP 104 (emphasis in original).

D. Discretionary Review Proceedings.

Dr. Lowy moved for discretionary review of the order granting reconsideration. *See* CP 105-110. The Commissioner denied the motion for discretionary review, but this Court granted Dr. Lowy’s subsequent motion to modify the commissioner’s ruling.

IV. STANDARD OF REVIEW

Ordinarily, “the standard of review for the trial court’s grant of a protective order and for controlling discovery is abuse of discretion.” *Shields v. Morgan Financial, Inc.*, 130 Wn. App. 750, 759, 125 P.3d 164 (2005), *rev. denied*, 157 Wn.2d 1025 (2006). “A trial court abuses its discretion only if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons.” *King v. Olympic Pipe Line*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000), *rev. denied*, 143 Wn.2d 1012 (2001). To the extent that a question of statutory interpretation is involved, however, statutory interpretation is a question of law subject to *de novo* review under the error of law standard. *McGinnis v. State*, 152 Wn.2d 639, 642, 99 P.3d 1240 (2004).

V. ARGUMENT

- A. The Trial Court Properly Held, Consistent Not Only with RCW 70.41.200(3), But Also with RCW 4.24.250(1), that Information and Documents, Like the “Cubes” Database, Created Specifically for, and Collected and Maintained by, St. Joseph Hospital’s Quality Improvement Committees Are Not Subject to Review, Disclosure, or Discovery in this Action.

Dr. Lowy does not dispute that the “Cubes” database is a database created specifically for, and collected and maintained by, a St. Joseph Hospital quality improvement committee. Nevertheless, she seeks to have this Court hold that a CR 30(b)(6) witness for the Hospital may, and should be required to, review and mine the “Cubes” database, cull out

information that would not be privileged if obtained from another source, pretend that the witness obtained the information from another source, and investigate and disclose that information to Dr. Lowy in discovery in this litigation. The plain language of RCW 70.41.200(3),⁵ however, says that review, disclosure and discovery of information and documents, like the “Cubes” database, created specifically for, and collected and maintained by a hospital quality improvement committee, cannot be had.⁶

RCW 70.41.200(3) specifically provides:

Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted

⁵ The full text of all of RCW 70.41.200 is attached as Appendix A to this Brief.

⁶ The same is true with respect to RCW 4.24.250(1), which Dr. Lowy concedes, *App. Br. at 12 n.4*, contains identical language to that of RCW 70.41.200(3) relevant to the issue in this case. RCW 4.24.250(1), provides in relevant part:

The proceedings, reports, and written records of such committees or boards [regularly constituted review committees or boards of professional societies or hospitals whose duty it is to evaluate the competency and qualifications of health care professionals or to evaluate the quality of care], or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider

Dr. Lowy does not dispute that the Cubes database is a written record of a regularly constituted review committee of St. Joseph Hospital whose duty it is to evaluate the quality of care. Nor does she claim that RCW 4.24.250(1) is ambiguous.

or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the department of health to be made regarding the care and treatment received.

Dr. Lowy does not claim that RCW 70.41.200(3) is ambiguous. Rather, she asks the Court to ignore the plain language of RCW 70.41.200(3) which, except in certain specified circumstances not applicable here, protects information and documents, including complaints and incident reports, from review, disclosure, discovery, and introduction into evidence, and to construe the statute to require the Hospital to have a CR 30(b)(6) representative review a database of information created specifically for a hospital quality improvement committee (a database that was derived from incident reports, CP 52 (§ 6), that are also protected

from discovery under RCW 70.41.200(3)), and to disclose whatever information that can be gleaned therefrom about other IV infusion incidents that she can try to use against St. Joseph Hospital in support of a corporate negligence claim. But, the judiciary does not have the power to rewrite an unambiguous statute even if it believes the legislature “intended something else but failed to express it adequately.” *In re Detention of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008), quoting *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978).

The court’s purpose in interpreting a statute is to discern and implement the intent of the legislature. *Columbia Physical Therapy, inc. v. Benton Franklin Orthopedic Assoc.*, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 964068, *3 (Mar. 18, 2010) (citing *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006)). The first inquiry is whether, looking to the entire statute in which the provision is found and to related statutes, the meaning of the provision in question is plain.⁷ *Id.* (citing *Cosmopolitan Eng’g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 298-99, 149 P.3d 666 (2006)). If so, the inquiry ends. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009). If, however, the statute is susceptible to more than one

⁷ Courts “must not add words where the legislature has chosen not to include them,” and must “construe statutes such that all of the language is given effect” *Restaurant Dev., Inc., v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

reasonable interpretation, it is ambiguous, and the court “may resort to statutory construction, legislative history, and relevant case law” *Id.* (quoting *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)). However, a statute “is not ambiguous merely because different interpretations are conceivable.” *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

Courts should not “second-guess the wisdom of the Legislature in making policy decisions unless those decisions violate constitutional principles,” nor should courts “amend statutes by judicial construction.” *In re Quackenbush*, 142 Wn.2d 928, 935, 16 P.3d 638 (2001), *see also*, *Schumacher v. Williams*, 107 Wn. App. 793, 805, 28 P.3d 792 (2001), *rev. denied*, 145 Wn.2d 1025 (2002) (Ellington, J., concurring) (courts must not “bend the rules of statutory construction to work an unstated change in the law”). And, statutes should not be construed so as to yield absurd or fundamentally unjust results. *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007).

The language of RCW 70.41.200(3) is plain and unequivocal. Subject to five exceptions not applicable here: “Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure . . . or discovery or introduction

into evidence in any civil action.” St. Joseph Hospital’s Cubes database is a compilation of information. The database and the information compiled therein was created specifically for, and was collected and maintained by, a St. Joseph Hospital quality improvement committee. Having met those statutory criteria, under RCW 70.41.200(3), the Cubes database cannot be reviewed, disclosed, discovered, or used in litigation. The trial court properly so concluded.

Although the statute lists five exceptions to the prohibition against review, disclosure, discovery, or introduction into evidence of quality improvement information and documents in civil actions, none of those exceptions applies in this case, nor does Dr. Lowy try to claim that any of them do. *See* CP 103. Rather, Dr. Lowy claims that she is only seeking documents and information about other IV transfusion incidents at the hospital that were “generated from sources outside the QA committee,” *App. Br. at 16*, or what the court in *Coburn v. Seda*, 101 Wn.2d 270, 277, 677 P.2d 173 (1984), in discussing RCW 4.24.250,⁸ which provides a privilege similar to RCW 70.41.200(3), *see footnote 5 supra*, referred to as information from “original sources” that is not “shielded merely by its introduction at a review committee meeting.” *See App. Br. at 14*. But the problem with Dr. Lowy’s claim is that Dr. Lowy does not dispute the

⁸ The full text of RCW 4.24.250 is attached as Appendix B to this brief.

Hospital's showing that there is no information in the Cubes database that was created for a purpose other than quality improvement, and that there are no original source documents, such as patient medical records or excerpts of records concerning other IV infusion incidents, in the Cubes database. See CP 25 (¶ 4), 52 (¶¶ 6, 7), 65-66 (¶¶ 3, 4, 8). Thus, per RCW 70.41.200(3), any and all information from the Cubes database is statutorily protected from discovery, and the trial properly so held.

At least one court has specifically addressed the question and determined that requiring a search of a quality improvement database to obtain non-privileged information is prohibited. In *Dayton Newspapers, Inc. v. Dept. of the Air Force*, 107 F. Supp. 2d 912 (S.D. Ohio 1999), the plaintiff newspaper company brought a Freedom of Information Act action against the United States Air Force and the Army, seeking medical malpractice information contained in two databases that the government contended was "created by or for the Department of Defense ("DOD") as part of a medical quality assurance program." *Dayton Newspapers*, 107 F. Supp. 2d at 914. Defendants cited to 10 U.S.C. § 1102(a), as providing for confidentiality of medical quality assurance records:

- (a) Confidentiality of records. Medical quality assurance records created by or for the Department of Defense as part of a medical quality assurance program are confidential and privileged. Such records may not be disclosed to any

person or entity, except in [narrowly defined circumstances not applicable to the case]. [*Id.*]

Defendants contended that the entirety of each database qualified as medical quality assurance records. In affidavits to the court, defendants explained that each database

was created, and is maintained, in its entirety, within the DOD Quality Assurance Program. The ‘records’ within [each] database are compiled solely as a result of this quality assurance process, designed only to assess the quality of medical care within DOD. . . . [Each] database itself exists because of, and as part of, the DOD medical quality assurance program, and was specifically designed as a medical quality assurance record [*Dayton Newspapers*, 107 F. Supp. 2d at 915-16.]

Being so advised, the court determined that the databases themselves were “medical quality assurance records”, and held that “10 U.S.C. § 1102 protects the confidentiality of *all* medical quality assurance records, regardless of whether the contents of such records originated within or outside of a medical quality assurance program,” and that it followed that disclosure of a patient’s medical records from a medical quality assurance record was not authorized. *Dayton Newspapers*, 107 F. Supp. 2d at 917 (emphasis in original). The court noted that:

an individual is not precluded from obtaining those files *from an outside source* (i.e., a source other than the quality assurance program) simply because they may have been incorporated into a quality assurance record. . . . Consequently, if [the] databases contain information that also exists in a record created and maintained outside of the government’s medical quality assurance program, such

information remains subject to disclosure *by that outside source*. [*Dayton Newspapers, Inc.*, 107 F. Supp. 2d at 917-18 (emphasis in original).]

The reasoning of *Dayton Newspapers* is persuasive and should apply with equal force in applying RCW 70.41.200(3). Dr. Lowy is not precluded by virtue of RCW 70.41.200(3) from obtaining files from an outside source (*i.e.*, a source other than the Hospital's quality improvement database, or other quality improvement documents and information). What precludes her from obtaining the only available original source records, patient medical records from 2000-2008, is the fact that having someone retrieve thousands and thousands of patient records for the specified period to search for any evidence of IV infusion incidents is unduly burdensome. Nothing in RCW 70.41.200(3) admits of any exception to its prohibition against review, disclosure, discovery, or admissibility of quality improvement documents and information in any civil action, simply because discovery from other sources of information is unduly burdensome or otherwise unavailable.

B. The Legislature's Balancing of Competing Interests and Its Public Policy Decision to Prohibit Intrusion into Quality Improvement Documents in Discovery in Cases Like this One Must Be Respected.

In enacting RCW 70.41.200, the Washington State Legislature established a pervasive scheme to improve the quality of health care rendered at hospitals in the State of Washington, by requiring every

hospital to maintain a coordinated quality improvement program.⁹ These programs must include, among other things, the establishment of quality improvement committees “with the responsibility to review the services

⁹ RCW 70.41.200(1) provides:

(1) Every hospital shall maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The program shall include at least the following:

(a) The establishment of a quality improvement committee with the responsibility to review the services rendered in the hospital, both retrospectively and prospectively, in order to improve the quality of medical care of patients and to prevent medical malpractice. The committee shall oversee and coordinate the quality improvement and medical malpractice prevention program and shall ensure that information gathered pursuant to the program is used to review and to revise hospital policies and procedures;

(b) A medical staff privileges sanction procedure through which credentials, physical and mental capacity, and competence in delivering health care services are periodically reviewed as part of an evaluation of staff privileges;

(c) The periodic review of the credentials, physical and mental capacity, and competence in delivering health care services of all persons who are employed or associated with the hospital;

(d) A procedure for the prompt resolution of grievances by patients or their representatives related to accidents, injuries, treatment, and other events that may result in claims of medical malpractice;

(e) The maintenance and continuous collection of information concerning the hospital’s experience with negative health care outcomes and incidents injurious to patients including health care-associated infections as defined in RCW 43.70.056, patient grievances, professional liability premiums, settlements, awards, costs incurred by the hospital for patient injury prevention, and safety improvement activities;

(f) The maintenance of relevant and appropriate information gathered pursuant to (a) through (e) of this subsection concerning individual physicians within the physician’s personnel or credential file maintained by the hospital;

(g) Education programs dealing with quality improvement, patient safety, medication errors, injury prevention, infection control, staff responsibility to report professional misconduct, the legal aspects of patient care, improved communication with patients, and causes of malpractice claims for staff personnel engaged in patient care activities; and

(h) Policies to ensure compliance with the reporting requirements of this section.

rendered in the hospital, both retrospectively and prospectively, in order to improve the quality of medical care to patients and to prevent medical malpractice,” RCW 70.41.200(1)(a), as well as “[t]he maintenance and continuous collection of information concerning the hospital’s experience with negative health care outcomes and incidents injurious to patients . . .,” RCW 70.41.200(1)(e). In requiring hospitals to do these things, the Legislature enacted a companion privilege absolutely protecting hospitals from having the information and documents its quality improvement committees were mandated to collect, maintain, and evaluate from being subject to review, disclosure, discovery, and introduction into evidence in civil actions like this one. The goal was to encourage effective hospital quality improvement activities, and to achieve that goal, the Legislature determined that it should not allow hospitals’ mandated quality improvement activities to be used against them in lawsuits like this one.

In enacting RCW 70.41.200(3), the Legislature struck a balance among competing policy concerns in favor of immunizing quality improvement information and documents from discovery. As the court explained in *Anderson v. Breda*, 103 Wn.2d 901, 905, 700 P.2d 737 (1985), regarding RCW 4.24.250, the companion statute of RCW 70.41.200(3):

RCW 4.24.250, and similar statutes prohibiting discovery of hospital quality review committees, represent a legislative choice between competing public concerns. The Legislature recognized that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review.

And, as the court explained in *Coburn v. Seda*, 101 Wn.2d 270, 274-75, 677 P.2d 173 (1984) [footnotes omitted]:

The discovery protection granted hospital quality review committee records, like work product immunity, prevents the opposing party from taking advantage of a hospital's careful self-assessment. The opposing party must utilize his or her own experts to evaluate the facts underlying the incident which is the subject of suit and also use them to determine whether the hospital's care comported with proper quality standards.

The discovery prohibition, like an evidentiary privilege, also seeks to protect certain communications and encourage the quality review process. Statutes bearing similarities to RCW 4.24.250 prohibit discovery of records on the theory that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review. Courts determining that hospital quality review records should be subject to a common law privilege have advanced this same rationale. As the court stated in *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C.), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973):

Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. . . . Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denuncia-

tion of a colleague's conduct in a malpractice suit.

Information and documents generated by hospital quality improvement committees therefore "are entitled to special protection," *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 29, 864 P.2d 921 (1993), and, under RCW 4.24.250 and RCW 70.41.200(3), are immune from discovery. *See also, Ragland v. Lawless*, 61 Wn. App. 830, 838, 812 P.2d 872 (1991) (where, in applying RCW 4.24.250, the court held that "all civil actions *not* falling within the specific exception are subject to the statutory provision shielding certain information from discovery"); *Cruger v. Love*, 599 So.2d 111, 113-14 (Fla. 1992) (where the court, while recognizing that the discovery privilege limited "the rights of litigants to obtain information helpful or even essential to their cases," assumed that "the legislature balanced that against the benefits offered by effective self-policing by the medical community").

Almost every state has enacted a similar privilege statutes to protect the work of quality improvement committees. *See Carr v. Howard*, 689 N.E.2d 1304 (Mass. 1998); *Sanderson v. Bryan*, 522 A.2d 1138, 1140 n.3 (Pa. 1987) (enumerating 46 states' medical quality assurance statutes). The court in *Carr* recognized that "the peer review privilege imposes some hardship on litigants seeking to discover

information from hospital records, but the Legislature has clearly chosen to impose that burden on individual litigants in order to improve the medical peer review process[.]” *Carr*, 689 N.E.2d at 1315; *see also In re Investigation of Ruth Lieberman*, 646 N.W.2d 199, 201 (Mich. App. 2002) (quoting lower court’s observance that “health care quality assurance is uniquely important and uniquely fragile. The free and candid exchange of facts necessary to meaningful quality assurance or peer review cannot exist . . . without a guarantee of confidentiality.”).

The Legislature had valid policy concerns that the risk of subsequent review, disclosure, discoverability, and utilization of quality improvement documents and information in litigation brought by a patient against the hospital would create a disincentive for hospitals to undertake effective quality improvement initiatives or to maintain, collect, and candidly evaluate information concerning the hospital’s experience with negative health care outcomes and injurious incidents. It was appropriate for the Legislature to make that policy choice. It is clear from the entirety of RCW 70.41.200(3), the case law interpreting its companion statute, as well as the legislative history that the Legislature meant to prohibit the review or disclosure of quality improvement documents and information unless there was a specific exception. As the Legislature, when amending RCW 70.41.300(3) in 2005, summarized in its Final Bill Report to EHB

2254 (July 24, 2005): “The review or disclosure of information and documents specifically created for, and collected and maintained by, quality improvement and peer review committees or boards is *prohibited* unless there is a specific exception.” [Emphasis added.]

The Legislature’s determination in that regard must be respected, even if it means that Dr. Lowy cannot access all the information she would like to access in discovery. As the court explained in *McGee v. Bruce Hospital System*, 439 S.E.2d 257, 259-60 (S.C. 1993):

The overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care. The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process.

* * *

We find that the public interest in candid professional peer review proceedings should prevail over the litigant’s need for information from the most convenience source. [Citations omitted.]

Here, St Joseph Hospital’s Cubes database was created under a legislative promise of privilege. The court should not impinge upon that promise.

C. Neither the Legislature's Enactment, Nor the Trial Court's Application, of RCW 70.41.200(3) Violates Dr. Lowy's Right of Access to the Courts.

Dr. Lowy, citing *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009), argues, *App. Br. at 23-24*, that RCW 70.41.200(3) as applied violates her right of access to courts. But, Dr. Lowy cites no authority whatsoever suggesting that there is a constitutional right to discovery of privileged information. The *Putman* court did not so hold. Rather the *Putman* court stated that “[the] right of access to courts includes the right of discovery **authorized by the civil rules.**” *Putman*, 166 Wn.2d at 979 (emphasis added). The civil rules make clear that there is no right to discovery of privileged information, when they provide that: “Parties may obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter involved in the pending action” CR 26(b)(1) (emphasis added).

Dr. Lowy argues, *App. Brief at 25*, that St. Joseph Hospital has “utilized the QA statute to bar plaintiff from obtaining discovery of a category of evidence highly relevant to her claim that her injuries were caused by the corporate negligence of defendants.” That is not true. As explained in the declarations of Mary Whealdon and Dr. Stephanie Jackson, the only non-privileged source of information about potential IV infusion incidents would be from patient medical records, CP 25, 52, but

because the Hospital's electronic medical record system does not have a search field capability to query and retrieve such information from patient medical records, the nine years' worth of information sought by Dr. Lowy would require a months-long, page-by-page search of the medical records, CP 25, which even Dr. Lowy does not dispute would be unduly burdensome, *see App. Br. at 6*. Dr. Lowy did not dispute this testimony or narrow her request for a shorter time period. Rather, she has insisted upon trying to require a St. Joseph Hospital corporate representative to access, review, and cull privileged information from a protected database to respond to the discovery she requests.

Other courts have addressed the question of whether statutes barring discovery of health care quality improvement and peer review information unconstitutionally impinge upon a plaintiff's right to pursue a corporate negligence claim against a hospital, and have concluded that they do not. For example, in *Humana Hosp. Desert Valley v. Superior Court*, 742 P.2d 1382 (Ariz. 1987), the plaintiff argued that preventing discovery of a hospital's peer review documents effectively abrogated her negligent supervision claim against the hospital, and violated her rights under the Arizona Constitution. The court found that despite the statute prohibiting discovery of peer review documents, the plaintiff:

is left with ample alternatives to prove her negligent supervision theory against [the Hospital] without obtaining access to privileged information. . . . Such original sources include court records about previous malpractice claims and administrative records or testimony about a physician's education and training.

A plaintiff can also discover a hospital's general credentialing or review procedure policies. . . . A plaintiff also has access to medical records available pursuant to a patient's consent. Finally, a plaintiff can retain experts to give opinions regarding all of the above matters. [*Humana Hosp.*, 782 P.2d at 1386.]

Weighing those considerations against the policy in favor of protecting what the court considered "an important state interest" of effective peer review, the court held that "the peer review act merely regulates a plaintiff's claim against a hospital for negligent supervision, and does not violate [the Arizona Constitution]." *Id.*; *see also, Ex parte Qureshi v. Vaughan Reg'l Med. Ctr.*, 768 So.2d 374, 380 (Ala. 2000) (same).

The same conclusion should obtain here. Indeed, Dr. Lowy is left with ample ways to try to prove her corporate negligence claim against the hospital without forcing review and disclosure of privileged information. She can certainly obtain discovery concerning the hospital's IV infusion policies in effect at the time of her injury. She can present expert testimony as to whether such policies comply or fail to comply with the applicable standard of care. She herself has offered such testimony, as she has already testified in deposition to her opinions as to how the Hospital's

policies were deficient. CP 39 (pp. 12-13). The existence and application of RCW 70.41.200(3) does not deprive Dr. Lowy of the ability to bring her corporate negligence action and does not violate her right of access to the courts, any more than the existence or application of any other privilege limiting the review, disclosure, discoverability or admissibility of other potentially otherwise relevant information does. Taken to its logical conclusion, Dr. Lowy's constitutional right of access to courts argument would preclude the assertion of any privilege that might deprive a plaintiff of otherwise potentially relevant evidence.

D. Neither the Legislature's Enactment, Nor the Trial Court's Application, of RCW 70.41.200(3) Violates Separation of Powers.

Dr. Lowy argues, *App. Br. at 26-29*, that RCW 70.41.200(3) as applied in this case violates separation of powers. She claims, *App. Br. at 27*, that RCW 70.41.200(3), as applied, "violates CR 26(b)(1), which allows 'discovery regarding any matter not privileged, which is relevant to the subject matter of the pending action.'" She states that "[i]t is for the courts to determine the nature and extent of the privilege under CR 26(b)(1)", *App. Br. at 27*, and posits that "the legislature could destroy the judicial power to define what may be discovered simply by reclassifying any evidence it wished to exclude from discovery as 'privilege.'" *Id. at 28*.

Dr. Lowy's separation of powers argument is without merit. Under Washington "separation of powers" analysis, when a court rule and a procedural statute seem inconsistent, the court "makes every effort to harmonize such apparent conflicts" and only if it cannot do so does the court rule oust the statute. *State v. Blilie*, 132 Wn.2d 484, 491, 939 P.2d 691 (1997); *Washington State Bar Ass'n v. State*, 125 Wn.2d 901, 909, 890 P.2d 1047 (1995); *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984). Here, contrary to Dr. Lowy's assertions, RCW 70.41.200(3) neither "violates" nor conflicts with CR 26(b)(1). CR 26(b)(1) merely defines what parties may discover in litigation as "any matter, *not privileged*, that is relevant to the subject matter of the pending litigation." RCW 70.41.200(3) defines what is privileged from discovery in the context of hospital quality improvement activities. Dr. Lowy cites no authority suggesting that the Legislature is powerless, under separation of powers analysis, to enact any privilege from discovery.

Indeed, the Legislature has a long history of promulgating statutory privileges that have been embraced and enforced by the courts, and that have never been held to conflict with the separation of powers doctrine for purposes of discovery or admissibility. In fact, ER 501, sets forth a non-exclusive list of numerous such privileges enacted by the Legislature, including RCW 5.60.060(1) (spousal privilege); RCW 5.60.060(2)

(attorney-client privilege); RCW 5.60.060(3) (clergy privilege); RCW 5.60.060(4) (physician-patient privilege); RCW 5.60.060(5) (public officer privilege); RCW 7.75.050 (dispute resolution center privilege); RCW 18.53.200 (optometrist-patient privilege); RCW 5.62.010-.030 (registered nurse-patient privilege); and RCW 74.04.060 (public assistance recipient privilege).

In enacting RCW 70.41.200(3), the Legislature imposed on hospitals certain requirements for gathering and evaluating information for quality improvement purposes and provided hospitals with a companion privilege protecting such information from being reviewed, disclosed, discovered, or used against it in cases like this one. In so doing, the Legislature balanced the need for hospitals to gather and evaluate potentially damaging information to assure effective health care quality improvement against the risks of unbridled discoverability of such information, and determined that the information should be privileged from discovery. The Legislature is not powerless, under separation of powers analysis, to do that kind of balancing or set that kind of policy; that kind of balancing and policy-making is exactly what the Legislature is expected to do. If anything, it would violate separation of powers principles for the courts to do what Dr. Lowy is asking – to de-couple the Legislature’s mandate in RCW 70.41.200(1) for hospitals to gather

quality-improvement information from the Legislature's companion promise to hospitals in RCW 70.41.200(3) that the quality-improvement information hospitals must gather under RCW 70.41.200(1) will be treated as privileged and will not be subject to review or disclosure, or discovery or introduction into evidence, for the benefit of persons suing hospitals in civil actions like this one.

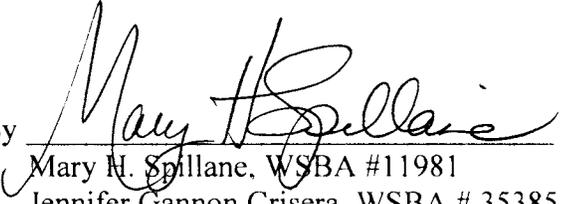
VI. CONCLUSION

The Legislature has mandated in RCW 70.41.200(3) that "information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure . . . in any civil action." This Court must assume that it meant what it said. The Cubes database, and the incident reports from which it was derived, are just such type of information and are not subject to review or disclosure by a St. Joseph Hospital CR 30(b)(6) witness, or anyone else, for purposes of Dr. Lowy's lawsuit.

This Court should affirm the trial court's June 16, 2009 order on reconsideration, prohibiting Dr. Lowy from requiring a St. Joseph Hospital CR 30(b)(6) deponent to review, search, or disclose any information in the Cubes database, which was created specifically for, and collected and maintained by, St. Joseph Hospital's quality improvement committee.

RESPECTFULLY SUBMITTED this 5th day of May, 2010.

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APPENDIX A

C

West's Revised Code of Washington Annotated Currentness

Title 70. Public Health and Safety (Refs & Annos)

↖ Chapter 70.41. Hospital Licensing and Regulation (Refs & Annos)

→ **70.41.200. Quality improvement and medical malpractice prevention program Quality improvement committee Sanction and grievance procedures Information collection, reporting, and sharing**

(1) Every hospital shall maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The program shall include at least the following:

(a) The establishment of a quality improvement committee with the responsibility to review the services rendered in the hospital, both retrospectively and prospectively, in order to improve the quality of medical care of patients and to prevent medical malpractice. The committee shall oversee and coordinate the quality improvement and medical malpractice prevention program and shall ensure that information gathered pursuant to the program is used to review and to revise hospital policies and procedures;

(b) A medical staff privileges sanction procedure through which credentials, physical and mental capacity, and competence in delivering health care services are periodically reviewed as part of an evaluation of staff privileges;

(c) The periodic review of the credentials, physical and mental capacity, and competence in delivering health care services of all persons who are employed or associated with the hospital;

(d) A procedure for the prompt resolution of grievances by patients or their representatives related to accidents, injuries, treatment, and other events that may result in claims of medical malpractice;

(e) The maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients including health care-associated infections as defined in RCW 43.70.056, patient grievances, professional liability premiums, settlements, awards, costs incurred by the hospital for patient injury prevention, and safety improvement activities;

(f) The maintenance of relevant and appropriate information gathered pursuant to (a) through (e) of this subsection concerning individual physicians within the physician's personnel or credential file maintained by the hospital;

(g) Education programs dealing with quality improvement, patient safety, medication errors, injury prevention,

infection control, staff responsibility to report professional misconduct, the legal aspects of patient care, improved communication with patients, and causes of malpractice claims for staff personnel engaged in patient care activities; and

(h) Policies to ensure compliance with the reporting requirements of this section.

(2) Any person who, in substantial good faith, provides information to further the purposes of the quality improvement and medical malpractice prevention program or who, in substantial good faith, participates on the quality improvement committee shall not be subject to an action for civil damages or other relief as a result of such activity. Any person or entity participating in a coordinated quality improvement program that, in substantial good faith, shares information or documents with one or more other programs, committees, or boards under subsection (8) of this section is not subject to an action for civil damages or other relief as a result of the activity. For the purposes of this section, sharing information is presumed to be in substantial good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading.

(3) Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the department of health to be made regarding the care and treatment received.

(4) Each quality improvement committee shall, on at least a semiannual basis, report to the governing board of the hospital in which the committee is located. The report shall review the quality improvement activities conducted by the committee, and any actions taken as a result of those activities.

(5) The department of health shall adopt such rules as are deemed appropriate to effectuate the purposes of this section.

(6) The medical quality assurance commission or the board of osteopathic medicine and surgery, as appropriate, may review and audit the records of committee decisions in which a physician's privileges are terminated or re-

stricted. Each hospital shall produce and make accessible to the commission or board the appropriate records and otherwise facilitate the review and audit. Information so gained shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section. Failure of a hospital to comply with this subsection is punishable by a civil penalty not to exceed two hundred fifty dollars.

(7) The department, the joint commission on accreditation of health care organizations, and any other accrediting organization may review and audit the records of a quality improvement committee or peer review committee in connection with their inspection and review of hospitals. Information so obtained shall not be subject to the discovery process, and confidentiality shall be respected as required by subsection (3) of this section. Each hospital shall produce and make accessible to the department the appropriate records and otherwise facilitate the review and audit.

(8) A coordinated quality improvement program may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee or a peer review committee under RCW 4.24.250 with one or more other coordinated quality improvement programs maintained in accordance with this section or RCW 43.70.510, a coordinated quality improvement committee maintained by an ambulatory surgical facility under RCW 70.230.070, a quality assurance committee maintained in accordance with RCW 18.20.390 or 74.42.640, or a peer review committee under RCW 4.24.250, for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The privacy protections of chapter 70.02 RCW and the federal health insurance portability and accountability act of 1996 and its implementing regulations apply to the sharing of individually identifiable patient information held by a coordinated quality improvement program. Any rules necessary to implement this section shall meet the requirements of applicable federal and state privacy laws. Information and documents disclosed by one coordinated quality improvement program to another coordinated quality improvement program or a peer review committee under RCW 4.24.250 and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section, RCW 18.20.390 (6) and (8), 74.42.640 (7) and (9), and 4.24.250.

(9) A hospital that operates a nursing home as defined in RCW 18.51.010 may conduct quality improvement activities for both the hospital and the nursing home through a quality improvement committee under this section, and such activities shall be subject to the provisions of subsections (2) through (8) of this section.

(10) Violation of this section shall not be considered negligence per se.

CREDIT(S)

[2007 c 273 § 22, eff. July 1, 2009; 2007 c 261 § 3, eff. July 22, 2007; 2005 c 291 § 3, eff. July 24, 2005; 2005 c 33 § 7, eff. July 24, 2005; 2004 c 145 § 3, eff. June 10, 2004; 2000 c 6 § 3; 1994 sp.s. c 9 § 742; 1993 c 492 § 415; 1991 c 3 § 336; 1987 c 269 § 5; 1986 c 300 § 4.]

Current with 2010 Legislation effective through April 22, 2010

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APPENDIX B

C

West's Revised Code of Washington Annotated Currentness

Title 4. Civil Procedure (Refs & Annos)

▣ Chapter 4.24. Special Rights of Action and Special Immunities (Refs & Annos)

→ **4.24.250. Health care provider filing charges or presenting evidence--Immunity--Information sharing**

(1) Any health care provider as defined in RCW 7.70.020(1) and (2) who, in good faith, files charges or presents evidence against another member of their profession based on the claimed incompetency or gross misconduct of such person before a regularly constituted review committee or board of a professional society or hospital whose duty it is to evaluate the competency and qualifications of members of the profession, including limiting the extent of practice of such person in a hospital or similar institution, or before a regularly constituted committee or board of a hospital whose duty it is to review and evaluate the quality of patient care and any person or entity who, in good faith, shares any information or documents with one or more other committees, boards, or programs under subsection (2) of this section, shall be immune from civil action for damages arising out of such activities. For the purposes of this section, sharing information is presumed to be in good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading. The proceedings, reports, and written records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined in RCW 7.70.020(1) and (2).

(2) A coordinated quality improvement program maintained in accordance with RCW 43.70.510 or 70.41.200, a quality assurance committee maintained in accordance with RCW 18.20.390 or 74.42.640, or any committee or board under subsection (1) of this section may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a coordinated quality improvement committee or committees or boards under subsection (1) of this section, with one or more other coordinated quality improvement programs or committees or boards under subsection (1) of this section for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The privacy protections of chapter 70.02 RCW and the federal health insurance portability and accountability act of 1996 and its implementing regulations apply to the sharing of individually identifiable patient information held by a coordinated quality improvement program. Any rules necessary to implement this section shall meet the requirements of applicable federal and state privacy laws. Information and documents disclosed by one coordinated quality improvement program or committee or board under subsection (1) of this section to another coordinated quality improvement program or committee or board under subsection (1) of this section and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (1) of this section and by RCW 43.70.510(4), 70.41.200(3), 18.20.390(6) and (8), and 74.42.640(7) and (9).

CREDIT(S)

[2005 c 291 § 1, eff. July 24, 2005; 2005 c 33 § 5, eff. July 24, 2005; 2004 c 145 § 1, eff. June 10, 2004; 1981 c 181 § 1; 1979 c 17 § 1; 1977 c 68 § 1; 1975 1st ex.s. c 114 § 2; 1971 ex.s. c 144 § 1.]

Current with 2010 Legislation effective through April 22, 2010

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 5th day of May, 2010, caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered by U.S. Mail, postage prepaid to the following counsel of record:

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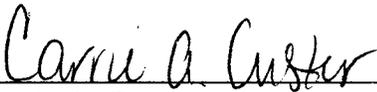
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