

63866-1

63866-1

NO. 63866-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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LEASA LOWY, Appellant

vs.

PEACEHEALTH, a Washington corporation; ST. JOSEPH HOSPITAL;  
Respondents

and

UNKNOWN JOHN DOES, Defendant.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT

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APPELLANT'S OPENING BRIEF

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## INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal addresses the question of how far the Quality Assurance (QA) statutes, RCW 70.41.200 and 4.24.250, can be used to limit a plaintiff's right to discover evidence which is highly relevant, in establishing a plaintiff's claim against a hospital for corporate negligence and medical malpractice. Washington courts have long recognized that the QA statutes conflict with a plaintiff's right to discovery, and for this reason, have determined that the QA statutes should be strictly construed. *Coburn v. Seda*, 101 Wn.2d 270, 276, 677 P.2d 173 (1984); *Anderson v. Breda*, 103 Wn.2d 901, 905, 700 P.2d 737 (1985). The importance of discovery in the Court's analysis has only been heightened since *Coburn* and *Anderson* by decisions recognizing that the right of discovery is part of the constitutional right of access to courts. See *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009); *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 819 P.2d 370 (1991).

In a decision which constitutes a major extension of the reach of the QA statutes, the trial court ruled that the QA statutes prohibit a hospital from reviewing its QA file in order to identify and produce documents and information that are indisputably **not privileged** under the QA statutes. This

order constitutes an unprecedented departure from the well-settled understanding of how the QA statutes operate.

Plaintiff in this case is not seeking discovery of confidential or candid discussions within the hospital's quality assurance. Plaintiff will not have access to "constructive criticism thought necessary to effective quality review." *Anderson*, 103 Wn.2d at 905. Plaintiff is not seeking statements or information created specifically for the purpose of assisting the hospital's QA committee in candidly assessing the health care the hospital is providing. The plaintiff is only asking that the hospital examine its QA file in order to identify and produce in discovery non-privileged materials, in the possession of the hospital, which are highly relevant and discoverable. Given the record-keeping practices of the hospital, this procedure is the only reasonable means available for identifying the discoverable material.

The order entered by the trial court is not compelled by the QA statutes. It does not reflect the strict construction of the QA statutes adopted and applied by Washington courts in the 25 years since the decisions in *Coburn* and *Anderson*. Moreover, as construed by the trial court, the order violates plaintiff's rights to discovery, as well as her constitutional right of access to courts and the constitutional separation of powers. This Court need

not reach the constitutional issues, however, as the QA statutes can be constitutionally construed so as to allow the discovery sought here.

### **ASSIGNMENTS OF ERROR**

1. The trial court erred in granting a protective order prohibiting discovery based upon a determination that RCW 70.41.200 and 4.24.250 barred the requested discovery.

2. The trial court's protective order prohibiting discovery based upon a determination that RCW 70.41.200 and 4.24.250 barred the requested discovery was error as a violation of the right of access to courts, Washington Constitution, Art. I, §10.

3. The trial court's protective order prohibiting discovery based upon a determination that RCW 70.41.200 and 4.24.250 barred the requested discovery was error as a violation of the doctrine of separation of powers, Washington Constitution, Art. IV, §1.

### **STATEMENT OF ISSUES**

The following issues pertain to the Assignments of Error:

1. Whether RCW 4.24.250 and 70.41.200 prohibit a defendant from reviewing its Quality Assurance (QA) files in order to identify and produce in discovery highly relevant documents and information which are

not immune from discovery under the QA statutes.

2. Whether RCW 4.24.250 and 70.41.200 as interpreted by the trial court and as applied to the facts of this case are unconstitutional as a violation of the right of access to courts under the Washington Constitution, Art. I, §10.

3. Whether RCW 4.24.250 and 70.41.200 as interpreted by the trial court and as applied to the facts of this case are unconstitutional as a violation of doctrine of separation of powers under the Washington Constitution, Art. IV, §1.

4. Whether review of the protective order is de novo when the order was based upon a question of law, the interpretation of RCW 4.24.250 and 70.41.200.

### **STATEMENT OF THE CASE**

#### **A. Background.**

On June 21, 2007, Dr. Leasa Lowy was admitted to St. Joseph Hospital in Bellingham as a patient. While hospitalized, the hospital staff improperly administered an IV to her left arm, causing serious and permanent injury to her arm. Dr. Lowy is a trained specialist in obstetrics and gynecology, with privileges at St. Joseph Hospital. As a result of the injuries

to her arm, she can no longer practice as an OB/GYN or surgeon. CP 39, 44.

Dr. Lowy filed this lawsuit against the defendants on October 31, 2008. The complaint included claims of medical malpractice under RCW 7.70.010 et seq., and claims for corporate negligence. CP 6-7 (Complaint ¶¶5.1 & 5.2).

**B. Motion for Protective Order.**

Early in discovery, Dr. Lowy noted the CR 30(b)(6) deposition of a witness to testify as a corporate representative regarding “Incidences of IV infusion complications and/or injuries at St. Joseph’s Hospital for the years 2000-2008.” CP 20-23. In response, the hospital moved for a protective order to prohibit questioning or production of information on this subject, supported by a one page declaration of Mary Whealdon, Risk Manager at St. Joseph’s Hospital. CP 16-19; 24-25.

The hospital’s motion did not contend that the requested information itself was irrelevant, or that it was in any way immune or privileged from discovery. The hospital instead contended that it had no lawful means of identifying responsive documents or information.

According to the hospital, it had two means of identifying the information: (1) review of 9 years of medical records of all St. Joseph

patients looking for references to IV infusion injuries or complications, (2) inspection of QA files documenting IV infusion injuries. CP 17.

As to the first means, the hospital contended that a search of medical records would be unduly burdensome under CR 26(b)(1)(C). The hospital submitted evidence that it did not have the search capability to retrieve the requested records. Accordingly, identification of responsive documents would require months to review records of every patient treated at St. Joseph Hospital within the requested time period for indications of IV injury. CP 25 (Whealdon Dec. ¶3). Plaintiff did not contest that the record by record search described by the hospital would be unduly burdensome.

As to the second means, the hospital conceded that review of the QA file was a “potential reasonable source” of identifying the requested information. CP 19. The hospital argued, however, that the QA statutes, RCW 4.24.250 and 70.41.200, precluded this use of the QA file.

In her response to the motion, plaintiff made clear that she was not seeking discovery of QA privileged documents or information. CP 32.<sup>1</sup> Plaintiff argued, however, that the QA statutes did not preclude the hospital

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<sup>1</sup> Plaintiff also made clear that she did not intend to violate patient privacy rights, and that redaction of personal identifiers would be proper. CP 28. Defendants have never objected to the requested discovery in order to protect the privacy interests of third parties.

from examining its QA file in order to identify responsive documents and information which were not privileged and which could be produced.

Plaintiff argued:

Those [QA] statutes, which are strictly construed as in derogation of common law, do not immunize from discovery all documents submitted to a quality assurance or peer review committee. Rather, they immunize only documents “created specifically for” the committee. They do not immunize medical records or other materials or information from original sources. The statutes do not prohibit defendants from reviewing a QA file to determine which documents are actually privileged from discovery, and which may be produced.

CP 27-28.

In addition, Plaintiff submitted evidence that the hospital had a serious and systemic problem with IV infusion injuries. In her deposition testimony, Dr. Lowy described how she learned of the problem.

Stephanie Jackson, who works in the system office, came to me and asked me if I would go have a cup of coffee with her. And she brought her computer over. And we were not in a meeting. We were not doing anything. And she said, there is something I really want to show you. And I said, okay. And we were talking about her personal life, and her significant other, and their stuff in Eugene. And I thought maybe she was going to show me some pictures of her family. And she opened up a program called Pro Clarity or Clarity. And she showed me the screen. And the screen had what looked like a list. And she said, these are all the IV injuries that we’ve had. And I’ve been trying to get the PeaceHealth people to put an IV team in place. There is about 170 IV injuries. And

she said, I wanted to know how you're doing, because we're not—nothing is getting done about this. And she said I don't understand why nothing is getting done about it.

CP 29-30; 40-41.

The information which Dr. Lowy saw on the screen did not disclose patient names. It did disclose dates, what appeared to be an identification number for each incident, as well as some details of patient injury. Dr. Lowy saw the screen for about five minutes. She was not offered and does not have a printout of the information on the screen. CP 41.

Plaintiff therefore argued in its response, "St. Joseph is not required to undertake a page by page search of all its medical records in order to comply with the discovery request." CP 33. The hospital could identify the instances of IV injury by examining its file on the investigation. It could then produce non-privileged medical records and information regarding those injuries. *Id.*

In Reply, defendants acknowledged the existence of a database called Cube that contains QA protected material. Defendants explained that they had derived the information in the database from incident reports which were themselves also QA protected material. CP 50-52.

Defendants' Reply did not deny that they had in their possession the

underlying medical charts of the individuals reflected in the incident reports. Defendants did not deny that they could identify the underlying charts from the incident reports. Defendants did not argue that the task of identifying the underlying records from the incident reports would be unduly burdensome. Defendants did not contend that the underlying charts were protected under the QA privilege.

The trial court entered an order on April 30, 2009, which in its essentials tracked plaintiff's argument.<sup>2</sup> CP 53-54 (Appendix 4-5). The Order required the agent designated by the hospital to review its QA files, and to disclose the underlying facts and explanatory circumstances charted in hospital records related to IV injuries. The Order specifically precluded disclosure of related "peer review or quality assurance committee commentary, evaluations, opinions, discussion or conclusions" as well as any information and documentation "created specifically for, and collected and maintained by a quality improvement committee." CP 54 (Appendix 5).

**C. Motion to Reconsider.**

Defendants moved to reconsider and argued that the QA statutes

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<sup>2</sup> The Honorable Harry J. McCarthy was the trial judge who entered the April 30 order and the subsequent order on reconsideration from which this appeal is taken. The Honorable Theresa B. Doyle is now the trial judge in the case.

prohibited them from even reviewing the QA file in order to identify responsive documents which were not subject to the QA privilege. CP 55-82. Plaintiff responded that the QA statutes do not prohibit review by the defendant of a QA file, in order to identify, locate and produce, information and documents which are unquestionably not subject to the QA privilege. CP 84-95.

In an Order dated June 16, 2009, the trial court granted the Motion to Reconsider and entered the protective order originally requested by the hospital. CP 108-110 (Appendix 1-3). The trial court ruled the order was compelled as a matter of law by the statutory prohibition of RCW 70.41.200(3) on the discovery of QA material. The trial court stated:

It is unfortunate that a more practical solution allowing plaintiff relevant discovery is unavailable, but 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. Therefore, on further review and reconsideration, the court is persuaded that the Order of April 30, 2009 *must* be reversed.

CP 110 (Underlining in original; italics added) (Appendix 3).

Plaintiff moved for Discretionary Review of the Order on the Motion to Reconsider. The Commissioner denied the Motion for Discretionary Review on September 17, 2009. Plaintiff then filed a motion to modify, and

on December 18, 2009, this Court granted discretionary review.

## ARGUMENT

A. **The Trial Court Erred in Finding that RCW 70.41.200(3) Compelled the Protective Order Prohibiting Plaintiff's Requested Discovery.**

1. **Strict Construction of the QA Statutes.**

Washington has two Quality Assurance (QA) statutes, RCW 4.24.250, originally enacted in 1971, and RCW 70.41.200, originally enacted in 1986. RCW 4.24.250 applies to health care providers, including hospitals. *See Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 31, 864 P.2d 921(1993). RCW 70.41.200 applies only to hospitals.

The trial court's order from which this appeal is taken specifically relied upon RCW 70.41.200(3), which provides in relevant part:

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.

No published cases have interpreted RCW 70.41.200,<sup>3</sup> but the courts have provided an extensive legal framework for the interpretation of RCW 4.24.250.<sup>4</sup> The QA statutes are strictly construed because they are in derogation of common law and the general policy in favor of discovery. *Coburn v. Seda*, 101 Wn.2d 270, 276, 677 P.2d 173 (1984); *Anderson v. Breda*, 103 Wn.2d 901, 905, 700 P.2d 737 (1985). As the Court in *Coburn* observed:

What is the scope of the statute's grant of immunity from discovery? The protection afforded by the statute was nonexistent at common law. [citation omitted]. Further, the prohibition of discovery is in sharp contrast to the general policy favoring broad discovery. [citations omitted]. **As a statute in derogation of both the common law and the general policy favoring discovery, RCW 4.24.250 is to be strictly construed and limited to its purposes.**

*Coburn v. Seda*, 101 Wn.2d at 276 (emphasis added).

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<sup>3</sup> *Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 864 P.2d 921(1993), is the only published case citing RCW 70.41.200. *Adcox* held that RCW 70.41.200 was not retroactive, and did not apply in the case before it since the facts predated the statute's 1986 enactment.

<sup>4</sup> The statutes are identical in terms of the language relevant to the issue in this case. Compare the language of RCW 70.41.200(3) quoted in text above to RCW 4.24.250(1), which provides in relevant part:

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 . . .* (Emphasis added).

Defendants moved for a protective order under both statutes, but the trial court's order mentioned only RCW 70.41.200, the statute specifically directed to hospitals.

In 1993, the Supreme Court reaffirmed its holding that the QA statutes were to be strictly construed, with the burden of proof on the party asserting the QA privilege.

We have already recognized that this statute, being contrary to the general policy favoring discovery, is to be strictly construed and limited to its purposes. *Coburn v. Seda*, 101 Wn.2d 270, 276, 677 P.2d 173 (1984). Moreover, the burden of proving the statute's applicability rests with the party seeking its application. *Anderson*, 103 Wn.2d at 905, 700 P.2d 737.

*Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 31, 864 P.2d 921(1993).<sup>5</sup>

The strict construction of the QA statutes is in accord with the law governing privileges. "Privileges are narrowly construed to serve their purposes so as to exclude the least amount of relevant evidence." *State v. Burden*, 120 Wn.2d 371, 376, 841 P.2d 758 (1992). "Statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth." *Versuslaw Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 332, 111 P.3d 866 (2005), *rev. den.*, 156 Wn.2d 1008 (2006), citing *Baldrige v. Shapiro*, 455 U.S. 345, 360, 102 S.Ct. 1103, 71 L.Ed.2d 199

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<sup>5</sup> *Adcox* rejected the hospital's contention that an "informal investigation" was entitled to the QA privilege. The hospital failed to show that the review was conducted by a "regularly constituted review committee." Having failed to meet the requirements of the statute construed strictly, the hospital was not entitled to assert the QA privilege. 123 Wn.2d at 31.

(1982).<sup>6</sup>

By its express terms, RCW 70.41.200 applies only to documents and information “created specifically for” the QA Committee. The statute may not be used to shield documents and information generated from a source independent of the QA committee, even if those documents or information were collected and maintained by a QA Committee and placed in the QA file.

The statute may not be used as a shield to obstruct proper discovery of information generated outside review committee meetings. The statute does not grant an immunity to information otherwise available from original sources. For example, any information from original sources would not be shielded merely by its introduction at a review committee meeting.

*Coburn*, 101 Wn.2d at 277.

Indeed, it is not unusual for QA files to contain both privileged documents “created specifically for” a QA committee and underlying non-privileged medical reports, such as patient charts, operative reports, or whatever ordinary medical record is relevant to the particular problem under review. When discovery is requested, the defendant has a duty to conduct a

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<sup>6</sup> The attorney-client privilege should in fact be given a broader construction than the QA privilege because the former is not in derogation of common law. See e.g., *In re Schafer*, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003) (The attorney client privilege is the oldest of the common law privileges). The QA privilege is given a narrow construction, because it derogates from the common law, and the general policy in favor of discovery. *Coburn v. Seda*, 101 Wn.2d at 276; *Anderson v. Breda*, 103 Wn.2d at 905.

reasonable inquiry for responsive documents that include an internal review of its own QA files. It may ultimately be the case that some or all of the documents and information in a QA file are privileged and not subject to disclosure, but the defendant must “review” the file for discovery purposes in order to make that determination. To hold otherwise would allow a hospital to immunize ordinary records simply by placing them in the QA file, in contradiction of the express “created specifically for” language of the statute and the clear teaching of *Coburn*.

The attorney-client privilege offers a helpful analogy. Communications between an attorney and client are privileged, and the client may not be required to answer questions about a privileged attorney-client communication. But under the attorney-client privilege, there is no question that an attorney is required to review privileged communications if necessary in order to identify and disclose nonprivileged information and/or documents responsive to discovery. Indeed, when an attorney prepares ordinary discovery responses, the attorney typically engages in privileged communications with the client in order to determine what response should be made, and what information needs to be disclosed.

As another example, if the client responds to a question in a

deposition or at trial with an answer that differs from that given in a previous privileged communication, the attorney may review the privileged communication with the client for the purpose of making sure the record or evidence or discovery response is truthful and fully responsive to the request. The existence of the privilege does not relieve the attorney of the duty to review information gained in a privileged communication to make sure that discovery responses are full, accurate and truthful. And the attorney may do so without waiving the privilege that attaches to the communication, or disclosing any information about the privileged communication itself.

**2. Plaintiffs' Proposed Discovery Does Not Violate RCW 70.41.200.**

In the present case, plaintiff is seeking documents and information regarding the IV transfusion problem at the hospital that were generated from sources outside the QA committee. These discoverable documents and information could be produced without violating the QA statutes by using the following procedure, proposed by plaintiff below and initially adopted in the trial court's order of April 30, 2009:

(1) A person or persons on behalf of the hospital will review the QA material. The hospital is free to determine which person or persons will undertake this task. The hospital has never suggested that this task would be

unnecessarily burdensome, or that it could not carry out this task.

(2) The hospital will use the information gathered in this process to identify non-privileged medical records and other documents. In the several declarations submitted by defendants, defendants never denied that non-privileged medical records and information could be identified from the QA material. Nor did the defendants deny that this procedure would make short work of the laborious page by page search of all hospital records described as the only other way of uncovering the discoverable material.

(3) The hospital will disclose this non-privileged information it identifies, consisting of, in the words of the April 30, 2009 court order, “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 (Appendix 5).

Under RCW 70.41.200(3), QA documents are “*not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action.*” The four discrete instances in which the statute applies are to be strictly construed. Plaintiff addresses each of the prohibitions in turn in light of the discovery that plaintiff requested and the trial court denied:

Does the discovery requested allow the *disclosure* of any quality assurance document or information to plaintiff or her counsel? It does not.

Does the discovery requested allow the production in *discovery* of any quality assurance document or information? It does not.

Does the discovery requested allow the *introduction into evidence* of any quality assurance document or information? It does not.

Does the discovery requested allow plaintiff or her counselor anyone outside the hospital's QA process to *review* any quality assurance document or information? It does not.

**3. Plaintiff's Proposed Discovery does not Violate the "Review" Provisions of RCW 70.41.200.**

Defendants have argued that the requested discovery violates the "review" language of the statute. According to defendants' contention in this Court, "requiring the Hospital to have someone access its quality improvement database for discovery purposes would run contrary to the statutory privilege to the statutory privilege extended to such information and documents." Response to Motion for Discretionary Review at 10. The defendants' interpretation of the statute is problematic.

This interpretation of the QA statutes dispenses with the requirement under Coburn, that the defendant examine its QA files in order to identify

non-privileged material which may be produced in discovery. If defendants' test is now the law, then once a hospital places a document or information within its QA file, regardless of its source of origin, the file may not be reviewed or accessed for discovery purposes. The QA file becomes "hermetically sealed" for discovery purposes.

Defendants themselves have violated their own proposed test in the case, because they have "accessed" and "reviewed" the QA file for discovery purposes. Defendants examined the QA file and determined that it contained no responsive non-privileged documents. CP 24-25.

Defendants have proposed an interpretation that liberally, indeed generously, expands the reach of the QA statute at the expense of the right to discovery. It is an interpretation which for the first time authorizes a court to prohibit the discovery of documents and information that is not privileged under the QA statute.

Contrary to this interpretation, the Washington Supreme Court has made clear that the statute is to be narrowly and strictly construed and limited to its purposes. *Coburn*, 101 Wn.2d at 276.<sup>7</sup> *Coburn* describes the limited

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<sup>7</sup> "To strictly construe a statute simply means that given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option." *In re Detention of Martin*, 163 Wn.2d 501, 510, 182 P.3d 951 (2008), quoting *Pacific Northwest Annual Conference of United Methodist Church v. Walla Walla County*, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973).

purpose of the statute in protecting a hospital's self-assessment, while at the same time, allowing plaintiff to obtain relevant non-privileged evidence:

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.

*Coburn v. Seda*, 101 Wn.2d 270, 274, 677 P.2d 173 (1984) (emphasis added).

Dr. Lowy is not seeking access to the hospital's own self-assessment of its IV problem. She is not seeking access to incident reports created for the QA committee, or statements or testimony specifically created for the committee. But she is entitled to have access to the facts that will enable her experts to carry out their own assessment as those facts are relevant to the issues in the civil action. The requested discovery provides her with access to those facts, without requiring the hospital to disclose privileged information or allowing plaintiff to review that information.

4. **The "Review or Disclosure" Provision of RCW 70.41.200 is Intended to Provide Extrajudicial Protection to the QA Process.**

Plaintiff's interpretation of RCW 70.41.200 is in accord with the

legislative history of the “review” language on which defendants rely. That language was added by chapter 291 of the Laws of 2005, as follows:<sup>8</sup>

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 . . . .<sup>9</sup> (Emphasized language added by Laws of 2005, ch. 291).

Prior to the addition of the “review or disclosure” language, RCW 70.41.200 only prohibited the discovery and the introduction into evidence of QA protected materials. That is, the prohibitions were limited to the judicial setting. The statute did not prohibit dissemination of QA protected material extrajudicially, i.e., to the public.

Chapter 291 was intended to fill this gap by prohibiting access of the public through extrajudicial means to QA materials. According to the testimony in favor of the bill (House Bill No. 2254):

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<sup>8</sup> Appendix A9-A15 contains ch. 291 in its entirety. The addition of the “review or disclosure” language to RCW 70.41.200, RCW 4.24.250 and RCW 43.70.510 are the only changes made by this chapter. Plaintiff has never relied upon the “except” clause of RCW 70.41.200.

<sup>9</sup> Prior to the passage of Laws of 2005, ch. 291, the relevant portion of 70.41.200(3) stated: “Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to discovery or introduction into evidence in any civil action . . . .”

It adds protection for quality improvement and peer review committees that do not exist statutorily. This allows open discussion without the fear of the information being released to the **public**, and provides the opportunity to candidly discuss bad outcomes and near misses. The **public** still retains access to the information that goes into the committee and that comes out of the committee, but does not have access to the inner workings of the committee. (Emphasis added).

Appendix 17 (Senate Bill Report EHB 2254).

The 2005 amendment did not change the law governing the treatment of QA material in the discovery or trial of a lawsuit. It did not change or extend the definition of what materials should be treated as confidential. It simply extended the scope of the confidential treatment to extrajudicial review and disclosure of materials. The bill enjoyed bipartisan support for this limited purpose. Both the Washington State Trial Lawyers Association and the Washington State Hospitals Association agreed to the bill. Appendix 17. It passed unanimously in both chambers of the legislature. Appendix 17, 20. Nothing in the legislative history of this uncontroversial bill indicates that the legislature intended the unprecedented expansion of the scope of the QA statutes described by defendants.

The defendants' theory of the statute constitutes a dramatic and unprecedented expansion of the law of privilege. It is a theory that can be justified, if at all, only by a strong presumption in favor of non-disclosure,

and only if the statute is liberally, indeed generously, construed with all issues resolved in favor of non-disclosure and confidentiality. But Washington courts do not read the statute in this fashion. Defendants can make their argument, only by ignoring the rules of construction and decisions described above, and the policies supporting those rules and decisions.

The Court's decisions since *Coburn* and *Anderson* have only underscored the necessity and importance of discovery in our system of civil justice. As discussed below, the right of discovery is constitutionally founded. *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009). Discovery is not simply a "mere value" to be discarded whenever lawyers are able to conjure an ingenuous interpretation of a statute which allows them to avoid the obligations of discovery. That value has an importance which undergirds the task of the Courts in narrowly construing the QA statute.

**B. RCW 70.41.200(3) as Applied in the Protective Order Violates the Right of Access to Courts, Wash. Const. Art. I, §10.**

In *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009), the Supreme Court held that the certificate of merit requirement for medical malpractice plaintiffs, RCW 7.70.150, violated the

constitutional right to the access to courts.<sup>10</sup> The statute required a medical malpractice plaintiff to file with the complaint and before any discovery, a certificate signed by an expert stating that the evidence in the case established a probability of medical malpractice.

In holding the statute unconstitutional as a violation of the right of access to courts, the Supreme Court focused specifically on the constitutionally based right to discovery under court rules, a right which the legislature is prohibited from unduly burdening. The Court stated:

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch), 137, 163, 2 L.Ed. 60 (1803). The people have a right of access to courts; indeed, it is “the bedrock foundation upon which rests all the people’s rights and obligations.” *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991). *This right of access to courts “includes the right of discovery authorized by the civil rules.” Id., As we have said before, “[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff’s claim or a defendant’s defense.” Id., at 782, 819 P.2d 370.*

Requiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their right of access to courts. Through the discovery process, plaintiffs uncover the evidence necessary to pursue their claims. *Id.* Obtaining the

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<sup>10</sup> The right of access to courts is predicated upon Art. I, §10 as well as other provisions of the Washington Constitution. See *John Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 780-83, 819 P.2d 370 (1991).

evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when health care workers can be interviewed and procedural manuals reviewed. Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts.

*Putman*, 166 Wn.2d at 979 (emphasis added).

In the present case, Dr. Lowy contends that the hospital is vicariously liable for the medical malpractice of its employees in negligently administering, monitoring and overseeing Dr. Lowy, the IV patient. But Dr. Lowy also contends that the hospital is directly liable for its own negligence under the doctrine of corporate negligence. The corporate negligence of a health care institution and the medical negligence of individual health care providers are two different types of claims, requiring different kinds of proof. *See generally, Douglas v Freeman*, 117 Wn.2d 242, 814 P.2d 1160 (1991); *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984); *Ripley v. Lanzer*, 152 Wn.App. 296, 215 P.3d 1020 (2009); WPI 105.02.02 (Hospital Responsibility—Corporate Negligence) and comments thereto.

The defendants have 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. The discovery requested is not privileged, and indisputably exists in defendants'

files. Nevertheless, the defendants assert that the QA statute bars them from utilizing their QA files to identify non-privileged and discoverable evidence.

The interpretation of the QA statutes in the protective order, as applied to the facts in the present case, violates Dr. Lowy's right of access to courts by depriving her of this information in discovery.<sup>11</sup> However, the Court need not reach this constitutional issue. If a statute is reasonably capable of a constitutional construction, it should be given that construction rather than an alternative construction which would render it unconstitutional. *High Tide Seafoods v. State*, 106 Wn.2d 695, 698, 725 P.2d 411 (1986); *State v. Owen*, 78 Wn.2d 717, 719, 600 P.2d 1268 (1979). The statute can and should be given the interpretation plaintiff has proposed above, an interpretation that is consistent with constitutional requirements.

C. **RCW 70.41.200(3) as Applied in the Protective Order is a Violation of Separation of Powers, Wash. Const. Art. IV, §1.**

Washington does not have a formal separation of powers clause, but the doctrine of separation of powers has long been recognized as fundamental to our constitutional structure. See *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 980-81. Under this doctrine, the judicial branch has

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<sup>11</sup> An "as applied" challenge to the constitutionality of a statute seeks invalidation of the statute on the facts before the Court and in similar contexts in the future. It does not seek total invalidation of the statute. See *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004).

certain inherent powers, including the power to promulgate rules for its practice. If a legislative rule appears to conflict with a court rule, the courts will first attempt to harmonize the two. If they cannot be harmonized, the court rule prevails on procedural matters. *Id.* at 980.

RCW 70.41.200 as applied by the trial court in the present case violates CR 26(b)(1), which allows “discovery regarding any matter not privileged, which is relevant to the subject matter of the pending action.” This rule of discovery is procedural. A statute that conflicts with a court rule is unconstitutional and may not be enforced.

Defendants contend that CR 26(b)(1) is not violated because the QA privilege as they assert is recognized under the QA statutes constitutes a privilege under CR 26(b)(1). It is for the courts to determine the nature and extent of the privilege under CR 26(b)(1). If the legislature can determine by statute the meaning of language in rules promulgated by the judiciary, then the separation of powers principle so powerfully expounded in *Putman* is a nullity.

In *Putman*, the certificate of merit requirement violated separation of powers because it conflicted with the requirements of CR 8 and 11 on the filing of civil actions. The hospital in *Putman* argued that no conflict existed

because medical malpractice proceedings are “special proceedings” under CR 81. CR 81 exempts special proceedings from the requirements of CR 8 and 11. The Supreme Court rejected this argument as a backdoor attempt to nullify the judicial power to determine procedural rules.

This argument is unsustainable because it places no limits on the ability of the legislature to determine procedural rules. Under this standard, the legislature could reclassify any common law action as a special proceeding by passing statutes regulating its procedures, thereby eroding this court's power to determine its own court rules.

*Putman*, 166 Wn.2d at 812.

Similarly, 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.” *Putman* stands solidly in opposition to any such attempt.

The QA “privilege” at issue in this case is sui generis. It was not a privilege recognized at common law, another reason why *Coburn* construed it strictly. 101 Wn.2d at 276. Nor does not it flow from or elaborate on any privilege recognized at common law.

Plaintiff recognizes, of course, that the Court in *Coburn* recognized the QA privilege. But it recognized only a narrowly construed QA privilege under CR 26, based upon the statute, consistent with the countervailing value

of discovery. The Court did not relinquish the judicial responsibility of interpreting the extent of the privilege for purpose of court rules.

The QA privilege asserted by defendants sweeps more broadly than any other privilege recognized by the courts. Even if the legislature intended such a result—and as argued above, it did not—the courts are not constrained to accept such a legislative abrogation of judicial power. The courts have not extended the QA privilege to bar a person or entity holding a privilege from examining privileged material in order to identify and produce non-privileged material.

Plaintiff has proposed a construction that is reasonable, and consistent with both the strict construction required for this statute, and the right to discovery as set out in court rules. The interpretation offered by Defendants and adopted by the trial court in its June 16, 2009, goes beyond the “privilege” permitted by CR 26(b)(1) and violates the doctrine of separation of powers.

**D. The Standard of Review for Interpreting RCW 70.41.200(3) is De Novo.**

When a ruling is predicated on a question of law, including question of statutory interpretation, the issue is reviewable de novo as a matter of law, and not under an abuse of discretion standard. *Mayer v. Sto-Industries Inc.*,

156 Wn.2d 677, 684, 132 P.3d 115 (2006); *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 136, 750 P.2d 1257 (1988); *In re LaChapelle*, 152 Wn.2d 1, 5, 100 P.3d 805 (2004).

The trial court below initially allowed discovery. It then granted the protective order and denied discovery because it believed it was compelled as a matter of law to do so by the statutory prohibition of RCW 70.41.200(3) on the discovery of QA material. The trial court did not make a discretionary ruling, and review should be de novo. CP 108-110 (Appendix 1-3)

Even if the ruling is considered discretionary, an abuse of discretion is shown if the exercise of discretion is based upon untenable grounds. *John Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 778, 819 P.2d 370 (1991). A decision “is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). A trial court necessarily abuses its discretion when a ruling is based upon an erroneous view of the law. *Mayer v. Sto-Industries Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

### CONCLUSION

Dr. Lowy respectfully asks this Court to vacate the Order of the Trial

Court entered June 16, 2009, and to reinstate the order originally entered on  
April 30, 2009.

Dated this 5<sup>th</sup> day of March, 2010.

LUVERA, BARNETT, BRINDLEY,  
BENINGER & CUNNINGHAM



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Attorneys for Appellants

## APPENDIX

- |    |  |           |
|----|--|-----------|
| 1. | Order granting reconsideration         | A1- A3    |
| 2. | Initial order denying protective order | A4 - A5   |
| 3. | RCW 70.41.200                          | A6 – A8   |
| 4. | Laws of 2005, Chapter 291              | A9 – A15  |
| 5. | Senate Bill Report EHB 2254            | A16 - A17 |
| 6. | House Bill Report EHB 2254             | A18 – A19 |
| 7. | Final Bill Report EHB 2254             | A20       |

**CERTIFICATE OF SERVICE**

THE UNDERSIGNED hereby certifies that she caused delivery of a copy of the foregoing Appellant's Brief in the manner set forth below:

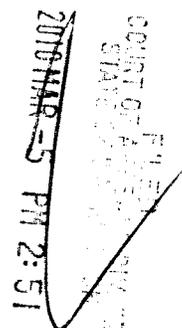
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Dated this 5<sup>th</sup> day of March, 2010.

  
Catherine Galfano



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Office of Luvera Barnett Brindley  
Beninger & Cunningham

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

LEASA LOWY,	)	
	)	No. 08-2-37646-0 SEA
PLAINTIFF,	)	ORDER
v.	)	
PEACEHEALTH, a Washington corporation;	)	
ST. JOSEPH HOSPITAL; and UNKNOWN	)	
JOHN DOES,	)	
DEFENDANTS.	)	

Defendants have moved the Court to reconsider its order of April 30, 2009 requiring the disclosure of the underlying factual basis contained in hospital records relating to any injuries, complications, malfunctions or adverse events associated with any IV infusions during the period January 1, 2003 through March 31, 2009. The Court has considered Defendant's Motion for Reconsideration, Plaintiff's Response in Opposition and Defendant's Reply, as well as the previous submissions of the parties.

The Court's order of April 30, 2009 was an effort to balance plaintiff's broad discovery rights under CR26 with the statutory mandate of R.C.W. 70.41.200 (3), specifically prohibiting the disclosure of "[i]nformation and documents, including complaints and incident reports created specifically for, and corrected and maintained by a quality improvement committee" Id. The statutory language chosen by the legislature had made clear its intent to bar disclosure while

ORDER

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

1 simultaneously created a privilege for all information collected by the hospital committee. The  
2 question again presented to the Court is whether or not the liberal discovery rules of CR26  
3 trump the prohibitions set forth at R.C.W. 70.42.200 (3).  
4

5 As a general matter, Washington's liberal discovery rules would ordinarily prevail over a  
6 statute in derogation of common law, such as R.C.W. 70.41.200. Helpful case authority on this  
7 issue is scarce. In its analysis of a similar statute, R.C.W. 4.24.250, Division Three of the Court  
8 of Appeals in Ragland v. Lawless, 61 Wn. App 830, 838-39 812 P.2d 872 (1991), held that "all  
9 civil actions not falling within the specific exemption are subject to the statutory provision  
10 shielding certain information from discovery." Id at 838. The Court's analysis in Ragland is  
11 instructive as applied to the circumstances of this case.  
12

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14 The statutory scheme examined in Ragland precluding discovery except in certain  
15 specific instances, is very similar to R.C.W. 70.41.210 (3). Both statutes reflect a legislative  
16 decision to bar discovery of any hospital peer evaluation committee records unless a particular  
17 exemption can be shown. Here, as in Ragland, plaintiff does not claim that any of the  
18 exceptions apply but instead argues that a practical accommodation should be reached so that  
19 plaintiff's right to discovery of important, relevant underlying factual information present in the  
20 hospital records can be achieved.  
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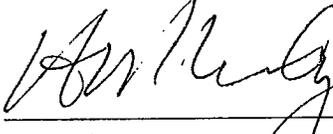
22  
23 The court's order of April 30, 2009 authorized access to the relevant, factual complaints  
24 and related information in order to balance the competing interests at stake. However  
25 reasonable or practical such an accommodation may be, it appears to be contrary to the language  
26 of R.C.W. 70.41.210 (3).  
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ORDER

1 It is unfortunate that a more practical solution allowing plaintiff relevant discovery is  
2 unavailable, but the plain language of R.C.W. 70.41.200 (3) compels the conclusion that any  
3 kind of disclosure, whether of committee opinion or underlying factual complaints, shall not be  
4 disclosed. Therefore, on further review and reconsideration, the court is persuaded that the  
5 Order of April 30, 2009 must be reversed.  
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7 Defendants' Motion for Reconsideration is GRANTED.  
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10 DATED this 15 day of June, 2009

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14 Harry J. McCarthy, Judge

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Office of Luvera Barnett Brindley  
Beninger & Cunningham

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

LEASA LOWY,

PLAINTIFF,

v.

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

No. 08-2-37646-0 SEA

ORDER

THIS MATTER came before the Court upon Defendant's Motion for Protective Order.

In reviewing the motion, the Court has considered:

1. Defendant's Motion for Protective Order;
2. Declaration of Mary Whealdon;
3. Plaintiff's Response in Opposition to Defendant's Motion for Protective Order;
4. Declaration of Andrew Hoyal;
5. Defendant's Reply.

In an effort to balance plaintiff's discovery rights to obtain relevant information with the hospital's right to protect privileged information submitted to and maintained by a peer review

ORDER

1 and quality assurance committee at St. Joseph's Hospital pursuant to R.C.W. 4.24.250 and  
2 70.41.200,

3  
4 It is ORDERED as follows:

5 The designated agent of St. Joseph's Hospital shall review all relevant records of the  
6 quality assurance and peer review committee for the period January 1, 2003 through March 31,  
7 2009 and disclose the following information:

8  
9 The underlying facts and explanatory circumstances charted in hospital records relating  
10 to alleged injuries, complications, malfunctions or adverse events associated with any IV  
11 infusions.

12 Any peer review or quality assurance committee commentary, evaluations, opinions,  
13 discussion or conclusions related to alleged IV injuries, complications, malfunctions or adverse  
14 events associated with IV administrations, shall not be disclosed. Any information and  
15 documentation, other than records of the underlying facts and explanatory circumstances,  
16 "created specifically for, and collected and maintained by a quality improvement committee,"  
17 R.C.W. 70.41.200 (3), shall not be disclosed.  
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22 DATED this 30 day of April, 2009.

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26 Harry J. McCarthy, Judge

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29 ORDER

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, im-

proved 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 restricted. 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 February 15, 2010

Westlaw

WA LEGIS 291 (2005)

Page 1

2005 Wash. Legis. Serv. Ch. 291 (H.B. 2254) (WEST)

(Publication page references are not available for this document.)

WASHINGTON 2005 LEGISLATIVE SERVICE  
59th Legislature, 2005 Regular Session

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Additions are indicated by **Text**; deletions by  
~~Text~~. Changes in tables are made but not highlighted.  
Vetoed provisions within tabular material are not displayed.

CHAPTER 291

H.B. No. 2254

EXECUTIVE DEPARTMENT--COMMITTEES--COORDINATED QUALITY IMPROVEMENT PROGRAMS  
AN ACT Relating to peer review committees and coordinated quality improvement  
programs; and amending RCW 4.24.250, 43.70.510, and 70.41.200.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

**Sec. 1.** RCW 4.24.250 and 2004 c 145 s 1 are each amended to read as follows:

<< WA ST 4.24.250 >>

(1) Any health care provider as defined in RCW 7.70.020 (1) and (2) ~~as now exist-~~  
~~ing or hereafter amended~~ 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 com-  
petency 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 re-  
view 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 pre-  
sumption 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,  
~~shall not be~~ **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 clin-  
ical or staff privileges of a health care provider as defined ~~above~~ in RCW

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7.70.020 (1) and (2).

(2) A coordinated quality improvement program maintained in accordance with RCW 43.70.510 or 70.41.200 and any committees or boards 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) and 70.41.200(3).

**Sec. 2.** RCW 43.70.510 and 2004 c 145 s 2 are each amended to read as follows:

<< WA ST 43.70.510 >>

(1)(a) Health care institutions and medical facilities, other than hospitals, that are licensed by the department, professional societies or organizations, health care service contractors, health maintenance organizations, health carriers approved pursuant to chapter 48.43 RCW, and any other person or entity providing health care coverage under chapter 48.42 RCW that is subject to the jurisdiction and regulation of any state agency or any subdivision thereof may 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 as set forth in RCW 70.41.200.

(b) All such programs shall comply with the requirements of RCW 70.41.200(1) (a), (c), (d), (e), (f), (g), and (h) as modified to reflect the structural organization of the institution, facility, professional societies or organizations, health care service contractors, health maintenance organizations, health carriers, or any other person or entity providing health care coverage under chapter 48.42 RCW that is subject to the jurisdiction and regulation of any state agency or any subdivision thereof, unless an alternative quality improvement program substantially equivalent to RCW 70.41.200(1)(a) is developed. All such programs, whether com-

plying with the requirement set forth in RCW 70.41.200(1)(a) or in the form of an alternative program, must be approved by the department before the discovery limitations provided in subsections (3) and (4) of this section and the exemption under RCW 42.17.310(1)(hh) and subsection (5) of this section shall apply. In reviewing plans submitted by licensed entities that are associated with physicians' offices, the department shall ensure that the exemption under RCW 42.17.310(1)(hh) and the discovery limitations of this section are applied only to information and documents related specifically to quality improvement activities undertaken by the licensed entity.

(2) Health care provider groups of five or more providers may 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 as set forth in RCW 70.41.200. All such programs shall comply with the requirements of RCW 70.41.200(1) (a), (c), (d), (e), (f), (g), and (h) as modified to reflect the structural organization of the health care provider group. All such programs must be approved by the department before the discovery limitations provided in subsections (3) and (4) of this section and the exemption under RCW 42.17.310(1)(hh) and subsection (5) of this section shall apply.

(3) 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 (6) of this section is not subject to an action for civil damages or other relief as a result of the activity or its consequences. 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.

(4) 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 that form the basis for the institution of such proceedings of which

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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 challenging the termination of a contract by a state agency with any entity maintaining a coordinated quality improvement program under this section if the termination was on the basis of quality of care concerns, introduction into evidence of information created, collected, or maintained by the quality improvement committees of the subject entity, which may be under terms of a protective order as specified by the court; (e) 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 (f) in any civil action, discovery and introduction into evidence of the patient's medical records required by rule of the department of health to be made regarding the care and treatment received.

(5) Information and documents created specifically for, and collected and maintained by a quality improvement committee are exempt from disclosure under chapter 42.17 RCW.

(6) 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 with RCW 70.41.200 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 (4) of this section and RCW 4.24.250.

(7) The department of health shall adopt rules as are necessary to implement this section.

**Sec. 3.** RCW 70.41.200 and 2004 c 145 s 3 are each amended to read as follows:

<< WA ST 70.41.200 >>

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(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, 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, 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 commit-

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tee 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 restricted. Each hospital shall produce and make accessible to the commission or board the appropriate

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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 with RCW 43.70.510 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 and RCW 4.24.250.

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

Approved May 4, 2005.

Effective July 24, 2005.

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# SENATE BILL REPORT

## EHB 2254

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As Reported By Senate Committee On:  
Health & Long-Term Care, March 31, 2005

**Title:** An act relating to peer review committees and coordinated quality improvement programs.

**Brief Description:** Clarifying protections provided to quality improvement activities.

**Sponsors:** Representative Cody.

**Brief History:** Passed House: 3/15/05, 96-0.

**Committee Activity:** Health & Long-Term Care: 3/30/05, 3/31/05 [DP].

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### SENATE COMMITTEE ON HEALTH & LONG-TERM CARE

**Majority Report:** Do pass.

Signed by Senators Keiser, Chair; Deccio, Ranking Minority Member; Benson, Brandland, Franklin, Johnson, Kastama, Kline, Parlette and Poulsen.

**Staff:** Stephanie Yurcisin (786-7438)

**Background:** Hospitals must maintain quality improvement committees to improve the quality of health care services and prevent medical malpractice. Quality improvement proceedings review medical staff privileges and employee competency, collect information relating to negative health care outcomes, and conduct safety improvement activities. Provider groups and medical facilities other than hospitals are encouraged to conduct similar activities.

With some limited exceptions, information and documents created for or collected and maintained by a quality improvement committee are not subject to discovery, not admissible into evidence in any civil action, and are confidential and not subject to public disclosure. A person participating in a meeting of the committee or in the creation or collection of information for the committee may not testify in any civil action regarding the content of the committee proceedings or information created or collected by the committee.

A provision of law immunizes a health care provider who, in good faith, files charges or presents evidence against another provider before a regularly constituted review committee or board of a professional society or hospital on grounds of incompetency or misconduct. The proceedings and records of a review committee or board are not discoverable except in actions relating to the recommendation of the review committee or board involving restriction or revocation of the provider's privilege.

**Summary of Bill:** The review or disclosure of information and documents specifically created for, and collected and maintained by, quality improvement and peer review committees is prohibited unless there is a specific exception.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** This bill is an effort to ensure that quality improvement committee protections are still in place even with the potential passage of an initiative that will be on the ballot this fall. It adds protection for quality improvement and peer review committees that do not exist statutorily. This allows open discussion without the fear of the information being released to the public, and provides the opportunity to candidly discuss bad outcomes and near misses. The public still retains access to the information that goes into the committee and that comes out of the committee, but does not have access to the inner workings of the committee. This bill is agreed to by the Washington State Hospitals Association and the Washington State Trial Lawyers.

**Testimony Against:** None.

**Who Testified:** PRO: Representative Cody, prime sponsor; Lisa Thatcher, Washington State Hospitals Association.

# HOUSE BILL REPORT

## EHB 2254

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### As Passed Legislature

**Title:** An act relating to peer review committees and coordinated quality improvement programs.

**Brief Description:** Clarifying protections provided to quality improvement activities.

**Sponsors:** By Representative Cody.

### Brief History:

#### Committee Activity:

Health Care: 2/28/05, 3/1/05 [DP].

#### Floor Activity:

Passed House: 3/15/05, 96-0.

Passed Senate: 4/12/05, 44-0.

Passed Legislature.

### Brief Summary of Engrossed Bill

- Prohibits the review or disclosure of information and documents created for quality improvement and peer review committees.

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### HOUSE COMMITTEE ON HEALTH CARE

**Majority Report:** Do pass. Signed by 9 members: Representatives Cody, Chair; Campbell, Vice Chair; Morrell, Vice Chair; Appleton, Clibborn, Green, Lantz, Moeller and Schual-Berke.

**Minority Report:** Do not pass. Signed by 6 members: Representatives Bailey, Ranking Minority Member; Curtis, Assistant Ranking Minority Member; Alexander, Condotta, Hinkle and Skinner.

**Staff:** Chris Blake (786-7392).

### Background:

Hospitals must maintain quality improvement committees to improve the quality of health care services and prevent medical malpractice. Quality improvement proceedings review medical staff privileges and employee competency, collect information related to negative health care outcomes, and conduct safety improvement activities. Provider groups and medical facilities other than hospitals are encouraged to conduct similar activities.

With some limited exceptions, information and documents created for or collected and maintained by a quality improvement committee are not subject to discovery, not admissible into evidence in any civil action, and are confidential and not subject to public disclosure. A person participating in a meeting of the committee or in the creation or collection of information for the committee may not testify in any civil action regarding the content of the committee proceedings or information created or collected by the committee.

A provision of law immunizes a health care provider who, in good faith, files charges or presents evidence against another provider before a regularly constituted review committee or board of a professional society or hospital on grounds of incompetency or misconduct. The proceedings and records of a review committee or board are not discoverable except in actions relating to the recommendation of the review committee or board involving restriction or revocation of the provider's privileges.

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**Summary of Engrossed Bill:**

The review or disclosure of information and documents specifically created for, and collected and maintained by, quality improvement and peer review committees is prohibited unless there is a specific exception.

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**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Testimony For:** This is a placeholder for discussions related to the application of protections for quality improvement and peer review programs.

**Testimony Against:** None.

**Persons Testifying:** Larry Shannon, Washington State Trial Lawyers Association; and Lisa Thatcher, Washington State Hospital Association.

**Persons Signed In To Testify But Not Testifying:** None.

# FINAL BILL REPORT

## EHB 2254

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Synopsis as Enacted

**Brief Description:** Clarifying protections provided to quality improvement activities.

**Sponsors:** By Representative Cody.

**House Committee on Health Care**  
**Senate Committee on Health & Long-Term Care**

**Background:**

Hospitals must maintain quality improvement committees to improve the quality of health care services and prevent medical malpractice. Quality improvement proceedings review medical staff privileges and employee competency, collect information related to negative health care outcomes, and conduct safety improvement activities. Provider groups and medical facilities other than hospitals are encouraged to conduct similar activities.

With some limited exceptions, information and documents created for or collected and maintained by a quality improvement committee are not subject to discovery, are not admissible into evidence in any civil action, and are confidential and not subject to public disclosure. A person participating in a meeting of the committee or in the creation or collection of information for the committee may not testify in any civil action regarding the content of the committee proceedings or information created or collected by the committee.

A health care provider who, in good faith, files charges or presents evidence against another provider before a regularly constituted peer review committee or board of a professional society or hospital on grounds of incompetency or misconduct is immune from liability for these activities. The proceedings and records of a review committee or board are not discoverable except in actions relating to the recommendation of the review committee or board involving restriction or revocation of the provider's privileges.

**Summary:**

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.

**Votes on Final Passage:**

House	96	0
Senate	44	0

**Effective:** July 24, 2005