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NO. 856974

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

LEASA LOWY,

Respondent,

vs.

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

Petitioners,

SUPPLEMENTAL BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. SUPPLEMENTAL STATEMENT OF ISSUES ..... 2

III. SUPPLEMENTAL STATEMENT OF THE CASE ..... 3

IV. SUPPLEMENTAL ARGUMENT ..... 6

    1. RCW 70.41.200(3) Does Not Prohibit a Hospital’s Own  
    Internal Review of its QA Files in Order to Identify and  
    Produce in Discovery Relevant Information Which Is  
    Indisputably *Not* Part of the QA Files and *Not* Protected by  
    the QA Privilege. .... 6

        A. Limitations on Discovery in QA Statutes are in  
        Derogation of Common Law and Constitutional  
        Policies Favoring Discovery and should be Strictly  
        Construed. .... 7

        B. The Legislative Intent of RCW 70.41.200 is Limited  
        to Prohibiting Extrajudicial Review or Disclosure of  
        QA Documents and Information ..... 11

V. CONCLUSION ..... 20

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>Adcox v. Children's Orthopedic Hosp. and Medical Center,</i> 123 Wn.2d 15, 864 P.2d 921(1993) .....	6, 8-10
<i>Anderson v. Breda,</i> 103 Wn.2d 901, 700 P.2d 737 (1985) .....	8-10
<i>Christensen v. Ellsworth,</i> 162 Wn.2d 365, 173 P.3d 228 (2007) .....	12
<i>Coburn v. Seda,</i> 101 Wn.2d 270, 677 P.2d 173 (1984) .....	7-10, 12, 15
<i>Dailey v. N. Coast Life Ins. Co.,</i> 129 Wn.2d 488, 825 P.2d 300 (1992) .....	9
<i>In re Detention of Martin,</i> 163 Wn.2d 501, 182 P.3d 951 (2008) .....	12
<i>In re Schafer,</i> 149 Wn.2d 148, 66 P.3d 1036 (2003) .....	19
<i>John Doe v. Puget Sound Blood Ctr.,</i> 117 Wn.2d 772, 819 P.2d 370 (1991) .....	9
<i>Lowy v. PeaceHealth,</i> 159 Wn. App. 715, 247 P.3d 7 (2011) .....	2, 6, 12, 14
<i>Pedroza v. Bryant,</i> 101 Wn.2d 226, 677 P.2d 166 (1984) .....	3
<i>Putman v. Wenatchee Valley Medical Center,</i> 166 Wn.2d 974, 216 P.3d 374 (2009) .....	9

**OTHER CASES**

*Dayton Newspapers, Inc. v. Dept. of the Air Force*,  
107 F.Supp.2d 912 (S.D. Ohio 1990) ..... 19, 20

**STATUTES**

10 U.S.C. §1102(h) ..... 20  
RCW 4.24.250 ..... 2, 6-9  
RCW 4.24.250(1) ..... 7  
RCW 43.70.510 ..... 6, 7  
RCW 70.41.200 ..... 2, 6, 7, 9-13, 17  
RCW 70.41.200(3) ..... 6, 7, 11, 15, 19

**OTHER AUTHORITIES**

Laws 1993, ch. 492, §415 ..... 7  
Laws 1993, ch. 492, §417 ..... 6  
Laws of 2005, ch. 291 ..... 7, 11, 15, 17  
SB REP. on E.H.B. 2254, 59<sup>th</sup> Leg., Reg. Sess. (Wash. 2005) ..... 16  
WPI 105.02.02 ..... 3

## **I. INTRODUCTION**

This Court has long recognized that the Quality Assurance (QA) statutes for health care conflict with a plaintiff's right to discovery. Hospitals are entitled to protection under these statutes, but this Court strictly construes these statutes to the extent that they limit discovery.

The Court of Appeals in this case approved a limited and reasonable discovery order which protects Dr. Lowy's right to discover facts relevant to her claim, while preserving the protections of the QA statutes for the hospital. The opinion does *not* require the disclosure of *any* privileged or immune information or documents in the hospital's QA file or permit anyone outside the hospital to review the file. Rather, the Court of Appeals only required the hospital itself to examine its own QA file in order to identify and produce in discovery *non-privileged* materials in its possession, items which are indisputably relevant and discoverable. As the Court of Appeals stated:

The medical charts Lowy seeks were not created specifically for the quality assurance committee, are maintained external to committee files, and are indisputably relevant and discoverable. In disclosing them, the hospital will not be required to disclose who participated in the review process concerning IV injuries, which incidents the hospital found relevant or important, or how it sorted, grouped, or otherwise organized those incidents. The hospital will not disclose any analysis, discussions, or communications that occurred during the proceedings of the quality assurance committee. The response to the discovery request will reveal no more than if

the hospital had produced the medical records through a burdensome page-by page search.

*Lowy v. PeaceHealth*, 159 Wn. App. 715, 722, 247 P.3d 7 (2011).

The Court of Appeals correctly decided the question of statutory construction before it, that a 2005 amendment to the QA statutes does not prohibit the hospital from an internal review of its QA files in order to identify non-protected discoverable information for discovery in a civil action. In enacting the 2005 legislation, the legislature intended to prohibit extrajudicial access to QA materials by the public. Prior to that amendment, the statute did not prohibit extrajudicial access. The 2005 Act, supported by the Washington State Trial Lawyers, and the Washington State Hospital Association, passed without opposition in both the Senate and the House for the limited purpose of closing this loophole. The broad reading of the 2005 act by the hospital is not supported by this Court's prior decisions, the purposes of the QA statutes, the language of the statute itself, or the legislative history. The decision of the Court of Appeals should be affirmed.

## **II. SUPPLEMENTAL STATEMENT OF ISSUES**

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.<sup>1</sup>

### **III. SUPPLEMENTAL STATEMENT OF THE CASE**

On June 21, 2007, Dr. Leasa Lowy, a staff physician at St. Joseph Hospital in Bellingham, was admitted as a patient. While hospitalized, the staff improperly administered an IV to her left arm, seriously and permanently injuring it.

Dr. Lowy brought medical malpractice and corporate negligence claims against the hospital.<sup>2</sup> CP 5-8. After filing the lawsuit, Dr. Lowy learned that the hospital had a serious and systemic problem with IV infusion injuries. 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

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<sup>1</sup> In her supplemental brief, Dr. Lowy is addressing only the issue of statutory construction. However, she is not waiving the constitutional issues raised in her brief in the Court of Appeals. See Appellant's Brief at 23-29. The Court of Appeals did not reach the constitutional issues in its opinion, having decided the statutory issue in Dr. Lowy's favor.

<sup>2</sup>See *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984) and WPI 105.02.02 on a hospital's liability under a theory of corporate negligence.

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 Dr. Lowy saw on the screen did not disclose patient names, but it contained dates, an identification number for each incident, and 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.

Dr. Lowy requested discovery of incidents of IV infusion complications and/or injuries at the hospital. CP 20-23. The hospital objected and filed a motion for a protective order. CP 16-25.

The hospital did not contest the relevancy of the requested discovery to Dr. Lowy's claims. It conceded that review of the QA file on the IV infusion injuries was a "potential reasonable source" of identifying the requested information, (CP 19), but it argued that the QA statutes precluded this particular use of the QA file. Further, it contended that the alternative method of identifying the records, a page by page review of every patient record at the hospital over a period of years in search of responsive incidents

was unduly burdensome. CP 25 (Whealdon Dec. ¶3).

Dr. Lowy did not contest the claim that the page by page search was unduly burdensome. She also made clear that she was not seeking discovery of QA privileged documents or information. CP 32.<sup>3</sup> Dr. Lowy argued, however, that responsive and discoverable information could be produced without violating the QA statutes by using the following procedure:

(1) Someone on behalf of the hospital will review the QA material.

(2) The hospital will use the information gathered in this process to identify non-privileged medical records and other documents. The hospital has never denied that non-privileged medical records and information could be identified from the QA material; nor has it contended that this procedure would be unduly burdensome.

(3) The hospital will disclose the non-privileged information it identifies, consisting of “underlying facts and explanatory circumstances charted in hospital records relating to alleged injuries, complications, malfunctions or adverse events associated with any IV infusions,” information not protected by the QA privilege. CP 54.

The trial court initially granted Dr. Lowy’s motion. CP 53-54. On the

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<sup>3</sup> Plaintiff also made clear personal identifiers in the records should be redacted in order to protect patient privacy rights. CP 28.

hospital's motion, however, the trial court reconsidered its ruling and denied the requested discovery, granting the hospital's motion for protective order. CP 102-04. Although describing Dr. Lowy's proposal as "reasonable" and "practical," the court ruled that RCW 70.41.200 compelled denial of the requested discovery. *Id.* The Court of Appeals granted discretionary review, and on January 31, 2011, issued its opinion reversing the trial court, and reinstating the original trial court order. *Lowy v. PeaceHealth*, 159 Wn. App. 715, 247 P.3d 7 (2011).

#### IV. SUPPLEMENTAL ARGUMENT

1. **RCW 70.41.200(3) Does Not Prohibit a Hospital's Own Internal Review of its QA Files in Order to Identify and Produce in Discovery Relevant Information Which Is Indisputably *Not* Part of the QA Files and *Not* Protected by the QA Privilege.**

Washington has two Quality Assurance (QA) statutes which apply to hospitals. RCW 4.24.250, enacted in 1971, applies to health care providers, including hospitals. RCW 70.41.200, enacted in 1986, applies only to hospitals. *See Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 29-30, 864 P.2d 921(1993).<sup>4</sup> The language relevant to the

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<sup>4</sup>The legislature enacted a third statute in 1993, now codified at RCW 43.70.510, for health care institutions and medical facilities other than hospitals. Laws 1993, ch. 492, §417. That statute has no direct application in the present case.

issues raised by this case is identical in both statutes.<sup>5</sup>

**A. Limitations on Discovery in QA Statutes are in Derogation of Common Law and Constitutional Policies Favoring Discovery and should be Strictly Construed.**

The QA statutes generally provide for the establishment of quality improvement committees to provide for the review of the quality of health care.<sup>6</sup> Documents and information specifically created for the QA committees and meeting other statutory criteria are entitled to special protection, including immunity from discovery in civil proceedings. In *Coburn v. Seda*, 101 Wn.2d 270, 677 P.2d 173 (1984), the Court first examined the QA statutes and described the purposes of the immunity from discovery which that case addressed as follows:

Confidentiality is essential to effective functioning of these

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<sup>5</sup> The hospital relied upon both RCW 4.24.250 and 70.41.200 in the courts below, without distinguishing between them. CP 17-19; Resp. Br., p. 12. The hospital observed that RCW 4.24.250(1) “contains identical language to that of RCW 70.41.200(3) relevant to the issue in this case.” Resp. Br., p. 13 n. 6. The legislature in 2005 added the relevant language to RCW 70.41.200, 4.24.250, and 43.70.510. See Appendix 9-15 for the text of Laws 2005, ch. 291. To the extent that the Hospital now argues that RCW 70.41.200 provides broader protection than RCW 4.24.250, see Petition for Review at 13-15, that argument is undercut by the presence of the identical relevant language in both statutes.

<sup>6</sup> The committees were originally called “quality assurance” committees, and this brief refers to them as QA committees, and the statutes as QA statutes. In 1993, the legislature substituted “quality improvement” for “quality assurance” in RCW 70.41.200. Laws 1993, ch. 492, §415. RCW 4.24.250 still refers to “quality assurance” committees.

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

101 Wn.2d at 276-77. In *Anderson v. Breda*, 103 Wn.2d 901, 905, 700 P.2d 737 (1985), the Court reiterated this purpose:

The Legislature recognized that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review. The immunity from discovery of committee review embraces this goal of medical staff candor in apprising their peers to improve the quality of in-hospital medical practice at the costs of impairing malpractice plaintiffs access to evidence revealing the competency of a hospital's staff.

At the same time, however, the Court limited the scope of the immunity because it conflicted with the general policy in favor of discovery and was in derogation of common law.

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*, 101 Wn.2d at 276 (emphasis added); accord *Anderson*, 103 Wn.2d at 905. In 1993, the Court reiterated this point in *Adcox*:

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); *Anderson v. Breda*, 103 Wn.2d at 905, 700 P.2d 737 (1985).

*Adcox*, 123 Wn.2d at 31.<sup>7</sup> Subsequent cases affirming the right of discovery as part of the constitutional right of access to courts only underscore the reasoning of these earlier QA cases. See *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009); *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

Thus, for instance, the immunity from discovery does not extend to every document or piece of information contained in a QA file. An ordinary hospital record or chart is not immunized from discovery, simply because it is placed into a 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

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<sup>7</sup> *Coburn* and *Anderson* addressed RCW 4.24.250 in 1984 and 1985, respectively, before the 1986 enactment of RCW 70.41.200. In enacting and amending RCW 70.41.200, the legislature is presumed to know these decisions strictly construing QA statutes insofar as they conflict with discovery. See *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 488, 496, 825 P.2d 300 (1992) (“the Legislature is presumed to know existing case law in areas in which it is legislating.”)

meeting.

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

Notwithstanding the Court's holding, the hospital argues that strict construction does not apply to the language in RCW 70.41.200 prohibiting "review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action." The hospital contends that strict construction applies only to the statutory language protecting information which is "created specifically for, and collected and maintained by a quality improvement committee." *See* Petition for Review p. 10, n. 4.

The hospital cites no authority for this distinction. This Court applied strict construction insofar as the QA statute limits the right of discovery in derogation of common law and public policy. *Coburn*, 101 Wn.2d at 276; *Anderson*, 101 Wn.2d at 905. In *Adcox*, the Court applied strict construction to allow discovery of investigative documents generated by an informal review committee, because the hospital had not established "a regularly constituted review committee" as required by the QA statute in order to obtain immunity from discovery. *Adcox*, 123 Wn.2d at 31.

The hospital is now using the statutory language to limit Dr. Lowy's right to discovery. Under this Court's case law, that language is to be construed strictly.

**B. The Legislative Intent of RCW 70.41.200 is Limited to Prohibiting Extrajudicial Review or Disclosure of QA Documents and Information.**

RCW 70.41.200(3) 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 . . .

The legislature added the highlighted language in 2005 to RCW 70.41.200, which will be discussed below. Laws of 2005, ch. 291.

The Court of Appeals' opinion does not permit discovery or introduction into evidence of QA material in any civil action. Nor does the opinion allow the disclosure of any QA document or information to the Plaintiff or review by the Plaintiff of QA information.

The hospital argues, however, that the "review" language added by the 2005 amendment not only bars review of the QA information by Plaintiff, but that it bars internal review by the hospital itself. The hospital appears to argue that the "plain meaning" of the word "review" evidences a legislative

intent to prohibit review per se, whether external or internal, of a QA file.

“The Court’s objective in construing a statute is to determine the legislature’s intent.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007). The 2005 amendment to RCW 70.41.200 does not expressly define “review” or describe the parameters of what the legislature intended by “review.” The Court of Appeals after examining the language of the amendment, the structure and purposes of the QA statutes, prior case law on the QA statutes, and legislative history properly held that the legislature intended to bar only “extrajudicial” or “external” review of QA protected documents and information. It did not intend to limit a hospital’s own internal review of QA materials. *Lowy*, 159 Wn. App. at 720.

This interpretation of the statute is consistent with this Court’s holding that to the extent that the QA statute is used to limit discovery, it is “to be strictly construed *and limited to its purposes.*” *Coburn*, 101 Wn.2d at 276 (emphasis added). “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).<sup>8</sup>

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<sup>8</sup>To be clear, this Court should adopt the interpretation proposed by Dr. Lowy even without regard to the canon on strict construction because that

The argument that “review” bars the hospital from both internal and external review of its own documents fundamentally changes and indeed thwarts the intended operation and structure of the QA statutes. As discussed above, mere placement of a document in a QA file does not immunize it from discovery. By its express terms, RCW 70.41.200 protects only information and documents “created specifically for, and collected and maintained by, a quality improvement committee.” (Emphasis added). The legislature in 2005 did not amend the statutory definition of protected material. Information and documents, such as ordinary charts and medical records, are still not QA material even if they are placed in the QA file.<sup>9</sup> Since a QA file may contain information and documents not immune from discovery, it is proper, and indeed, it may be necessary, for a hospital to internally review the file in response to a discovery request.

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interpretation is the most reasonable interpretation of the statute and the intent of the 2005 amendment. However, where strict construction applies, as it does here, the Court should adopt the narrow restrictive construction, even if it were to find the hospital’s interpretation more reasonable.

<sup>9</sup>As Lisa Thatcher, representing the Washington State Hospital Association, stated to the Senate Committee on Health and Long-Term Care considering the 2005 bill, EHB 2254: “Information coming into peer review and quality improvement committees are not protected unless it’s a document specifically created for that purpose . . .” Appendix 23. Ms. Thatcher rightly recognized that ordinary patient records and charts can and often do “come into” a QA file, and that they are not thereby immunized from discovery. The Court permitted WSHA to file an amicus brief in this case to present its views.

The hospital in this case did internally “review” its QA database in response to Dr. Lowy’s discovery request. *Lowy*, 159 Wn. App. at 720; CP 24-25. If the statutory prohibition on review extends to a hospital’s review of its own QA file, then the hospital violated the statute in this case. The hospital, however, did not violate the statute, but instead properly responded to the discovery request by internally reviewing its QA file.

Further, internal review is essential to the purposes of the QA statutes. As the Court of Appeals pointed out, ‘preventing all hospital personnel from reviewing the contents of the database would frustrate the very purpose for which the quality assurance committee gathered the records in the first place.’ *Lowy*, 159 Wn. App. at 720. The court rightly concluded that “it is not reasonable to interpret the statute as containing an outright prohibition on internal review.” *Id.*

The Court of Appeals’ interpretation of “review” is consistent with the purpose of the statute, to protect a hospital’s self-assessment, while at the same time, allowing a 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*, 101 Wn.2d at 274. The Court of Appeals' opinion does not allow Dr. Lowy to access the hospital's self-assessment of its IV problem. It does not give her access to incident reports, or statements or testimony specifically created for the committee. But she is entitled to have access to relevant non-privileged facts so that her experts can make their own assessment of these facts.

The legislative history of the 2005 act overwhelmingly supports this interpretation.<sup>10</sup> Before the 2005 act, RCW 70.41.200(3) applied solely in the judicial setting, prohibiting only the "discovery or introduction into evidence in any civil action" of QA protected materials. It did not prohibit dissemination of QA protected material extrajudicially to the public.<sup>11</sup>

The legislature intended Chapter 291 to fill this gap by prohibiting extrajudicial access of the public to QA materials. According to a bill report:

It adds protection for quality improvement and peer review committees that do not exist statutorily. This allows open

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<sup>10</sup>This Court relied upon legislative history when it initially interpreted the QA statute in *Coburn*. *Coburn*, 101 Wn.2d at 277 n. 3.

<sup>11</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 . . ."

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).

SB REP. on E.H.B. 2254, 59<sup>th</sup> Leg., Reg. Sess. (Wash. 2005) (App. A-17).

Lisa Thatcher, representing the Washington State Hospital Association, explained the reasons for the bill to the Senate committee considering it as follows:

“there is an agreement that this is an important piece of legislation that needs to happen, because **it adds some protection for peer review and quality improvement committees that did not exist statutorily, and that’s from review and disclosure *outside of litigation purposes.*”<sup>12</sup>**

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, and the bill passed unanimously. Appendix at 17, 20, 22. Nothing in the history of this uncontroversial bill indicates that the legislature intended the unprecedented expansion of the scope of the QA statutes described by the hospital.

Finally, the statutory language itself grammatically distinguishes

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<sup>12</sup>See Appendix 21-24 for a complete transcript of the March 30, 2005, Senate Health and Long Term Care Committee on EHB 2254, from which Ms. Thatcher’s remarks are taken. The audio of the hearing, from which the transcript was made, can be found on the TVW.org website. See Appendix 21 for the address.

extrajudicial from judicial prohibitions in RCW 70.41.200. The statute states in pertinent part that QA documents and information

are not subject to **review or disclosure, except as provided in this section**, or discovery or introduction into evidence in any civil action . . . . (Emphasized language added by Laws of 2005, ch. 291).

The phrase “in any civil action” is an express judicial category, which modifies only the immediately preceding antecedent phrase, “discovery or introduction into evidence.” The entire phrase is inherently judicial in its references to discovery, evidence and civil actions. No commas separate “discovery or introduction into evidence” nor is this phrase separated by a comma from “in any civil action.”

The words “review” and “disclosure” are also not separated from each other by commas, and constitute a single phrase. The phrase “review or disclosure” is separated by two commas from the judicial category of “discovery or introduction into evidence in any civil action,” and is thus grammatically distinguished from the judicial category.

The statute does not say “review, disclosure, discovery, or introduction into evidence in any civil action,” that is, it does not have four individual words belonging to a single word group modified by “in any civil action.” Rather, it sets out two distinct word groups each consisting of two

paired terms, with one of those word groups – “discovery or introduction into evidence” – expressly modified by the phrase “in any civil action.” Grammatically, the most natural reading of the language supports the extrajudicial/judicial distinction recognized by the Court of Appeals and the legislative history.

On the other hand, if “in any civil action” is construed to modify “review or disclosure,” then the legislative intention to prohibit extrajudicial review and disclosure would be completely thwarted. The “review or disclosure” language would only apply “in any civil action” but the language would not bar “review or disclosure” outside the litigation context, a result no one intended.

This interpretation of the language is in accord with the law governing other privileges. For instance, an attorney or client may not be required to answer questions about a privileged attorney-client communication. But an attorney unquestionably may review privileged communications if necessary in order to identify and disclose non-privileged 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. The privileged

communications themselves are not disclosed, but they are reviewed in order to make non-privileged disclosures.<sup>13</sup>

The hospital relies upon cases from South Carolina, Michigan, Massachusetts, and the federal courts, to support its interpretation. Pet. at 13-20. None of the statutes in these cases contain the “review” language found in Washington’s QA statute. None has Washington’s unique legislative history. Further, in each case cited by the hospital, a party was attempting to obtain the protected material itself. Dr. Lowy is not. Finally, no case applied strict construction, the fundamental canon for interpreting QA statutes impinging on discovery in Washington.

*Dayton Newspapers, Inc. v. Dept. of the Air Force*, 107 F.Supp.2d 912 (S.D. Ohio 1990) is readily distinguishable. The federal QA statute is broader than RCW 70.41.200(3), protecting QA records from disclosure “regardless of whether the contents of such records originated within or outside of a medical quality assurance program.” 107 F.Supp.2d at 917. Thus, unlike Washington law, an ordinary patient record placed in the federal

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<sup>13</sup>One of the reasons QA privilege is given a narrow construction is because it derogates from the common law. The attorney-client privilege should be given a broader construction than the QA privilege because it is not in derogation of common law, but is instead the oldest of the common law privileges. *See e.g., In re Schafer*, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003).

QA file is immune from disclosure.<sup>14</sup> Further, *Dayton Newspapers* is an FOIA case that did not involve civil discovery. The court did not consider the implications of the decision on the right to obtain discovery. Finally, Plaintiffs in *Dayton Newspapers* did not ask the Defense Department to review its database in order to identify materials outside the database. The newspapers sought production of the database itself. Dr. Lowy is not asking for production of the database here.

#### V. CONCLUSION

The trial court erred in granting the protective order. The Court of Appeals should be affirmed.

Dated this 11<sup>th</sup> day of August, 2011.

LUVERA, BARNETT, BRINDLEY,  
BENINGER & CUNNINGHAM



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<sup>14</sup>The federal statute, 10 U.S.C. §1102(h), does not authorize “disclosure of a patient’s medical files from a medical quality assurance record.” 107 F.Supp.2d at 917. Such disclosure can only be made from an outside source. *Id.*

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STATE OF WASHINGTON  
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NO. 856974

SUPREME COURT OF THE STATE OF WASHINGTON  
[Court of Appeals Division I No. 63866-1-I]

---

LEASA LOWY, Petitioner

vs.

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

and

UNKNOWN JOHN DOES, Defendant.

---

CERTIFICATE OF SERVICE

---

LUVERA, BARNETT, BRINDLEY,  
BENINGER & CUNNINGHAM  
Joel D. Cunningham, WSBA #5586  
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Attorneys for Petitioner

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ORIGINAL

THE UNDERSIGNED hereby certifies that he caused delivery of Supplemental Brief of Respondent and Appendix to be served on August 11, 2011, on the below counsel of record in the following manner:

Mr. John C. Graffe, Esq. *Via Legal Messenger*  
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Seattle, WA 98104

Ms. Mary H. Spillane *Via Legal Messenger*  
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Seattle, WA 98111-3926

Mr. Stephen C. Yost, Esq. *Via Email*  
Campbell Yost Clare & Norell  
101 N. First Avenue, Suite 2500  
Phoenix, AZ 85003

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11<sup>th</sup> day of August, 2011, at Seattle, Washington.

  
Dee Dee White

## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
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**Subject:** RE: Lowy v. PeaceHealth/Supreme Court No. 85697-4

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**Subject:** Lowy v. PeaceHealth/Supreme Court No. 85697-4

Re: *Lowy v. PeaceHealth*  
Supreme Court No. 85697-4

Attached please find the Supplemental Brief of Respondent and Certificate of Service for filing in the above-referenced matter.

Attorneys filing:

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NO. 856974

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

LEASA LOWY,

Respondent,

vs.

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

Petitioners,

---

APPENDIX

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STATE OF WASHINGTON  
SUPERIOR COURT  
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INDEX TO 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
8.	Transcription of Hearing before Senate Health & Long-Term Care Committee, March 30, 2005, on EHB 2254.	A21-A23
9.	Court of Appeals Opinion	A24-29

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

LEASA LOWY,	)	
PLAINTIFF,	)	No. 08-2-37646-0 SEA
v.	)	ORDER
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

1.

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9206

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

13  
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.  
21

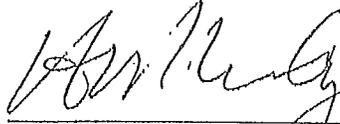
22  
23 The court's order of April 30, 2009 authorized access to the relevant, factual complaints  
24 and related information in order to balance the competing interests at stake. However  
25 reasonable or practical such an accommodation may be, it appears to be contrary to the language  
26 of R.C.W. 70.41.210 (3).  
27  
28  
29

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.  
6

7 Defendants' Motion for Reconsideration is GRANTED.  
8

9  
10 DATED this 15 day of June, 2009

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14 Harry J. McCarthy, Judge  
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ORDER

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Beninger & Cunningham

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

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

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

Judge Harry J. McCarthy  
King County Superior Court  
516 3rd Avenue  
Seattle, WA 98104

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.  
18  
19

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21  
22 DATED this 30 day of April, 2009.

23  
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25 

26 Harry J. McCarthy, Judge

27  
28  
29 ORDER

Westlaw.

West's RCWA 70.41.200

Page 1

West's Revised Code of Washington Annotated Currentness

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

Chapter 70.41. Hospital Licensing and Regulation (Refs &amp; 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)

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

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

Page 1

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

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 >>

WA LEGIS 291 (2005)  
2005 Wash. Legis. Serv. Ch. 291 (H.B. 2254) (WEST)  
(Publication page references are not available for this document.)

Page 5

(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-

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

WA LEGIS 291 (2005)  
2005 Wash. Legis. Serv. Ch. 291 (H.B. 2254) (WEST)  
(Publication page references are not available for this document.)

Page 7

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.

WA LEGIS 291 (2005)

END OF DOCUMENT

# 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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C 291 L 05

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

**Transcription of Hearing before Senate Health & Long-Term Care Committee,  
March 30, 2005, on EHB 2254.**

**Stephanie Yurcusin [staff]:** Madame Chair, members of the committee, Engrossed House Bill 2254 is behind tab 13, it is clarifying protections provided to quality improvement activities. Hospitals are required to maintain a quality improvement committees and provider groups and medical facilities other than hospitals are generally encouraged to maintain such QI and peer review committees. With some limited exceptions, information and documents that are created for or that are collected and maintained by a quality improvement committee are not subject to discovery and are not admissible in evidence in a civil action. Under this bill, the review or the disclosure of such information and documents that were specifically created for and collected and maintained by QI and/or peer review committees, would be prohibited unless there is specific exemption.

**Chair:** Is there a senate bill that we had on this?

**Yurcusin:** No, I don't think so.

**Chair:** We did not. Ok. Alright, Representative Cody, it's good to see you again.

**Rep. Cody:** Always a pleasure, I don't know about the 8 a.m. hearing, but...

**Chair:** I know.

**Rep. Cody:** Thank you Senator, Madam Chair and the Healthcare Committee, I am Eileen Cody from the 34<sup>th</sup> district. I don't think there was a Senate companion on this, because they came to us late, right before cut-off and we dropped a title only, actually, is how this started out. The—and I—actually Lisa Thatcher from the Hospital Association can explain the bill much better than I, but there was concern raised over the filing of initiative 336, I had to remember which one it was, that there was, if there was passage of that initiative that it would actually cause some problems, it was unintended problems, that would actually hurt the peer review policies, and so the trial lawyers and the hospital association worked together on this and got to the compromise language which actually gives the hospitals more protection for peer review and if there was passage of that initiative it will not cause a problem there.

**Chair:** Did this provision get put into 'plan b'?

**Rep Cody:** No, it's not in any of the plans.

**Chair:** Ok. Alright.

**Rep. Cody:** It's not in anything...

**Chair:** It's out there,

**Rep. Cody:** It's out there, around, to make sure nobody gets hurt.

**Chair:** Ok. Any questions?

**Rep Cody:** It's a stand alone piece.

**Senator Parlette:** This is just something, just a suggestion or request for some sort of a side-by-side of all the state law that talks about, you know, some of these issues, I can't keep track of all this, in the interim maybe.

**Chair:** That's right. We have had them for nursing homes, we've had them... and I've appreciate that confusion, that's why I am expressing the concern here, too. Because we have had so many different quality improvement exemptions, so that would be helpful for all of us. Thank you. Lisa Thatcher with the Hospital Association, would like to speak to the bill.

**Ms. Thatcher:** Good morning Madam Chair, members of the committee, for the record, I'm Lisa Thatcher, representing the Washington State Hospital Association. As Representative Cody explained to the committee, the reason the bill came to the legislature and it came in kind of a late fashion, was that through discussions with the Washington State Trial Lawyers Association about concerns about initiative 336, parties at the hospital association and the trial lawyers, recognize that peer review, if that initiative were to pass, would be pierced. It wasn't their intent, and so we were able to work out language to protect peer review if that was to occur. Although, I'd like to say that regardless of whether 336 were to pass or not, there is an agreement that this is an important piece of legislation that needs to happen, because it adds some protection for peer review and quality improvement committees that did not exist statutorily, and that's from review and disclosure outside of litigation purposes. This particular committee has recognized, I think historically, the importance of peer review and quality improvement committees. That it is those open discussions without fear of having that be released to the public, that has really enabled physicians and other providers in the hospital systems, to figure out what went wrong, or more importantly, and I think that this is where they really do their important work, is looking at near misses to ensure that it doesn't happen again and that patients are protected in hospital and other settings that have quality improvement committees. So again, this is an agreed to bill, between the Washington State Trial Lawyers Association and the Washington State Hospital Association and I would urge your support. In terms of whether it fits in or what not with plan b before we had this bill which passed unanimously out of the House of Representatives, all the attorneys on the respective sides looked at it and determined that it was not an alternative to 336, and that it could pass as an independent bill.

**Senator Thibaudeau:** Since I didn't hear the first of this I am going to ask you something anyways, so bear with me. How does this impact the patient bill of rights?

**Ms. Thatcher:** Senator Thibaudeau, the patient bill of rights, I think that it goes into the insurance code and what access they have in recourse that way, so I don't know in terms of this is just the peer review, the sections that are modified in this bill are the peer review provisions. The quality improvement committees in hospitals and also quality improvement committees that are

authorized by the Department of Health in any other health care setting, that wants to do so that's not a hospital.

**Senator Thibaudeau:** I appreciate the need for open communication. I also appreciate the fact that newspapers sometimes blow out of proportion certain things and Roland will have to forgive me for that, but I think it's true. But I do get worried from time to time, when we place all of these confidential provisions, I get worried that things are falling between the cracks that people aren't, that errors aren't being opened to public view. Patients aren't getting full communications from their providers, whether it's a hospital.

**Ms. Thatcher:** Well, if I may, I can answer that in two ways. The institute of medicine, which is most often cited in the legislature around errors and deaths, and things that happen in hospitals, the thing they fundamentally encourage though, are peer review and quality improvement committee discussions and recognizing that changing the culture away from blame to that of open dialogue to discover what happened and how to make improvements, is where they think you're actually going to go to reduce those medical errors. So, the institute of medicine really brought that to the public's attention, but what they said is you need to encourage peer and quality improvement committees. The other thing to remember is, I think of it as a black box, Senator Thibaudeau, information coming into peer review and quality improvement committees are not protected, unless it's a document specifically created for that purpose. And then, what comes out of those discussions are not protected, it's just what happens within there so the public has access to what comes in, the public has knowledge of what comes out, but they don't have access to those open discussions to try to figure out, " Yes. I left that sponge in there and I don't know why we didn't do a count." It's that kind of discussions.

**Committee member:** One more quick question. I understand that a number of hospitals are hiring hospitalists, medical doctors on staff who can have the authority to treat patients. What's your experience with that? What's the association's experience with that?

**Ms. Thatcher:** I think that's a recommendation from Leap Frog, to have those types of physicians of staff. I can speak to the association that says we just hired a new staff person just to deal with patient safety issues and I think that there is a growing focus, at least on the part of the association and I know, going outward to our members to really begin to make patient safety the lead focus in the hospitals. Many of them are implementing different quality improvement programs and looking at ways to take what people have learned in the manufacturing sector around continuous quality improvement and start to apply that to the hospital settings. So there's a lot of really good creative ideas going on right now to look at how you improve systems and better deliver healthcare in hospital settings.

*Transcribed from TVW.org audio of hearing found at  
<http://www.tvw.org/media/mediaplayer.cfm?evid=2005030225&TYPE=A&CFID=1092869&CFTOKEN=52456575&bhcp=1> between 38:12 and 47:29*



247 P.3d 7  
 159 Wash.App. 715, 247 P.3d 7  
 (Cite as: 159 Wash.App. 715, 247 P.3d 7)

Page 1

Court of Appeals of Washington,  
 Division 1.  
 Leasa LOWY, Appellant,  
 v.  
 PEACEHEALTH, a Washington corporation; St.  
 Joseph Hospital, Respondents,  
 and  
 Unknown John Does, Defendants.

No. 63866-1-I.  
 Jan. 31, 2011.

**Background:** Patient brought corporate negligence suit against hospital in connection with neurologic injury she sustained to her arm after an intravenous infusion in the hospital. Hospital moved for protective order to prohibit disclosure of medical charts arising from use of its quality assurance database. The Superior Court, King County, Harry J. McCarthy, J., granted motion. Patient appealed.

**Holding:** The Court of Appeals, Becker, J., held that statute prohibiting "review or disclosure" of information created for and maintained by a hospital's quality improvement committee did not prohibit its internal review of its computerized information database to respond to patient's limited discovery requests.

Reversed.

West Headnotes

[1] Health 198H 656

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures

198Hk655 Hospitals in General

198Hk656 k. In general. Most Cited

Cases

Doctrine of corporate negligence is applicable to hospitals in Washington.

[2] Statutes 361 181(1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(1) k. In general. Most

Cited Cases

A court's purpose in interpreting a statute is to discern and implement the intent of the legislature.

[3] Statutes 361 190

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of ambiguity.

Most Cited Cases

Statutes 361 223.2(.5)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to

Other Statutes

361k223.2 Statutes Relating to the

Same Subject Matter in General

361k223.2(.5) k. In general. Most

Cited Cases

When interpreting a statute, a court's 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; if so, the court's inquiry is at an end.

[4] Statutes 361 190

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of ambiguity.

247 P.3d 7  
 159 Wash.App. 715, 247 P.3d 7  
 (Cite as: 159 Wash.App. 715, 247 P.3d 7)

Page 2

## Most Cited Cases

**Statutes 361**  **217.4**

## 361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k217.4 k. Legislative history in  
 general. Most Cited Cases

**Statutes 361**  **218**

## 361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k218 k. Contemporaneous con-  
 struction in general. Most Cited Cases

If a statute is susceptible to more than one rea-  
 sonable interpretation, it is ambiguous, and courts  
 may resort to statutory construction, legislative his-  
 tory, and relevant case law.

**[5] Health 198H**  **270**

## 198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk268 Staff Privileges and Peer Re-  
 view

198Hk270 k. Peer review in general.  
 Most Cited Cases

**Privileged Communications and Confidentiality 311H**  **422(1)**

311H Privileged Communications and Confidentiality

311HVII Other Privileges

311Hk419 Peer Review Privilege

311Hk422 Medical or Health Care Peer  
 Review

311Hk422(1) k. In general. Most Cited  
 Cases

Quality improvement statute is most reasonably  
 interpreted simply as prohibiting review of commit-

tee records by persons outside the hospital and may  
 not be used as a shield to obstruct proper discovery  
 of information generated outside review committee  
 meetings. West's RCWA 70.41.200(3).

**[6] Privileged Communications and Confidentiality 311H**  **422(1)**

311H Privileged Communications and Confidentiality

311HVII Other Privileges

311Hk419 Peer Review Privilege

311Hk422 Medical or Health Care Peer  
 Review

311Hk422(1) k. In general. Most Cited  
 Cases

Statute prohibiting "review or disclosure" of  
 information created for and maintained by a hospi-  
 tal's quality improvement committee did not prohibit  
 its internal review of its computerized information  
 database for limited purpose of responding to  
 former patient's discovery request that hospital  
 identify and disclose medical charts of patients who  
 had experienced complications or injuries similar to  
 the patient's alleged injury at hospital, for purposes  
 of her corporate negligence suit; charts sought were  
 not created specifically for committee, were main-  
 tained external to committee files, and were relev-  
 ant and discoverable, and committee's discovery re-  
 sponse would reveal no more than if hospital had  
 produced the records through burdensome page-  
 by-page search. West's RCWA 70.41.200(3).

**\*\*8** Joel Dean Cunningham, J. Andrew Hoyal II,  
 Luvera Law Firm, Seattle, WA, Michael Jon Myers,  
 Michael J. Myers PLLC, Spokane, WA, for Appel-  
 lant.

Mary H. Spillane, Daniel W. Ferm, Williams Kast-  
 ner & Gibbs, John Coleman Graffe, Jr., Johnson  
 Graffe Keay Moniz, Jennifer M. Gannon Crisera,  
 Bennett Bigelow & Leedom P.S., Seattle, WA, for  
 Respondents.

BECKER, J.

247 P.3d 7  
 159 Wash.App. 715, 247 P.3d 7  
 (Cite as: 159 Wash.App. 715, 247 P.3d 7)

Page 3

\*716 ¶ 1 An issue concerning discovery of patient records comes to us on discretionary review. The plaintiff sustained a neurological injury to her left arm after an intravenous infusion in the hospital. As relevant to her cause of action against the hospital for corporate negligence,\*717 she requests production of medical charts of other patients who have experienced complications or injuries at the hospital in connection with intravenous infusions. To meet this request would be unduly burdensome unless the hospital is permitted to use its quality improvement database to identify the relevant records. The hospital contends the use of the database to identify relevant patient records is prohibited by RCW 70.41.200(3), a statute designed to protect the confidentiality of information created for and maintained by a quality improvement committee. We disagree and hold the hospital may internally review the database for this purpose. The order denying discovery is reversed.

¶ 2 Appellant Leasa Lowy, formerly a staff physician at St. Joseph's Hospital in Bellingham, stayed at the hospital as a patient for six days in January 2007. Lowy alleges that during her stay, she sustained permanent neurological injury to her left arm as a result of negligence when she had an intravenous, or IV, infusion. According to her physician, Lowy will no longer be able to practice her specialties of obstetrics and gynecology due to the injury.

[1] ¶ 3 The hospital is owned and operated by PeaceHealth. Lowy commenced this action against PeaceHealth and certain hospital employees. One of her theories against PeaceHealth is that the hospital is liable for corporate negligence. The doctrine of corporate negligence applies to hospitals in Washington. *Pedroza v. Bryant*, 101 Wash.2d 226, 229–33, 677 P.2d 166 (1984).

¶ 4 In connection with her theory of corporate negligence, Lowy sought to obtain, through a deposition under CR 30(b)(6), information relating to instances of “ IV infusion complications and/or injuries at St. Joseph's Hospital for the years

2000–2008.” It is undisputed that the requested information is relevant.

¶ 5 One way for the hospital to gather the requested information would be to go through its entire database of patient records. But the hospital lacks the capability of conducting such a search electronically. The parties agree \*718 that requiring the hospital to conduct the search manually, page-by-page, would be unduly burdensome.

¶ 6 Another way for the hospital to obtain the requested information would be to consult a computerized database maintained by the hospital quality assurance committee. As a member of a quality and safety leadership\*\*9 team at the hospital, Lowy knew the database was capable of producing a list of patient IV injuries indexed by date and identification number. It is undisputed that the hospital, through use of such a list, could readily identify the records of patients who experienced complications with IV infusions. After redactions to protect patient confidentiality, those records could then be produced to Lowy.

¶ 7 PeaceHealth believes the use of the quality assurance database to identify the records sought by Lowy is prohibited by RCW 70.41.200(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.

RCW 70.41.200(3). PeaceHealth moved for a protective order based on the statute, contending that the information in the database is protected because it is “derived from incident reports, which are themselves quality assurance and peer review documents.”

¶ 8 The trial court at first denied the motion. On April 30, 2009, the court ordered the hospital to

247 P.3d 7  
 159 Wash.App. 715, 247 P.3d 7  
 (Cite as: 159 Wash.App. 715, 247 P.3d 7)

Page 4

designate an agent to review the quality assurance records and then to disclose “underlying facts and explanatory circumstances charted in hospital records relating to alleged injuries, complications, malfunctions or adverse events associated with any IV infusions.” The only condition was that no records be disclosed that were “created specifically for, and collected and maintained by a quality improvement committee.” After considering Peace-Health’s motion for reconsideration, however, the trial court reversed itself and concluded that \*719 the statute prohibits any disclosure arising from the use of the quality assurance database:

The court’s order of April 30, 2009 authorized access to the relevant, factual complaints and related information in order to balance the competing interests at stake. However reasonable or practical such an accommodation may be, it appears to be contrary to the language of RCW 70.41.200(3).

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.

¶ 9 Lowy asks this court to vacate the order granting reconsideration and to reinstate the order of April 30, 2009. Because a question of statutory interpretation is involved, our review is de novo. *Cedell v. Farmers Ins. Co. of Wash.*, 157 Wash.App. 267, 272, 237 P.3d 309 (2010).

[2][3][4] ¶ 10 The court’s purpose in interpreting a statute is to discern and implement the intent of the legislature. 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. If so, the court’s inquiry ends. But if the statute is susceptible to more

than one reasonable interpretation, it is ambiguous. In that case, the court may resort to statutory construction, legislative history, and relevant case law. *Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs.*, 168 Wash.2d 421, 432–33, 228 P.3d 1260 (2010).

¶ 11 Title 70 RCW concerns public health and safety. Chapter 70.41 RCW addresses hospital licensing and regulation. The primary purpose of the chapter is to “promote safe and adequate care of individuals in hospitals through the development, establishment and enforcement of minimum hospital standards for maintenance and operation.” RCW 70.41.010. The quality improvement statute, RCW 70.41.200, requires every hospital to “maintain a coordinated\*720 quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice.” RCW 70.41.200(1). The statute requires hospitals to create quality improvement committees to monitor and review the performance of their \*\*10 staff, including the “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). According to the provision under review, such records “are not subject to review or disclosure.” RCW 70.41.200(3).

¶ 12 Plainly, the statute prevents the hospital from disclosing the quality assurance records themselves or allowing persons outside the hospital to review them. The question, however, is whether the statute likewise prevents the hospital itself from conducting an internal review to facilitate the location of hospital records that were not created specifically for the quality improvement committee and that are maintained elsewhere in the hospital. The statute does not expressly draw a distinction between internal and external review. But to interpret it as preventing all hospital personnel from reviewing the contents of the database would frustrate the very purpose for which the quality assurance

247 P.3d 7  
 159 Wash.App. 715, 247 P.3d 7  
 (Cite as: 159 Wash.App. 715, 247 P.3d 7)

Page 5

committee gathered the records in the first place. Indeed, the hospital has already conducted an internal review of the database, as shown by a declaration stating that hospital personnel examined it and determined that it contained no responsive, nonprivileged documents.

[5] ¶ 13 Because it is not reasonable to interpret the statute as containing an outright prohibition on internal review, we conclude the statute is most reasonably interpreted simply as prohibiting review of committee records by persons outside the hospital. This interpretation is supported by the Supreme Court's opinion interpreting a similar statute in *Coburn v. Seda*, 101 Wash.2d 270, 276, 677 P.2d 173 (1984), and it is also supported by the legislative history of RCW 70.41.200.

\*721 ¶ 14 The statute addressed in *Coburn* was RCW 4.24.250, which protects records created by regularly constituted committees that evaluate the quality of patient care in hospitals or similar institutions. Because it is 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*, 101 Wash.2d at 276, 677 P.2d 173. The court explained that the purpose of the protection from discovery afforded by RCW 4.24.250 is to encourage the quality review process, based on the theory that external access to the committee's work stifles the candor that is necessary to engage in constructive criticism:

Policies favoring both discovery immunities and evidentiary privileges underlie RCW 4.24.250. 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.

*Coburn*, 101 Wash.2d at 274-75, 677 P.2d 173; see also *Anderson v. Breda*, 103 Wash.2d 901, 905, 700 P.2d 737 (1985) ("The Legislature recognized that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review.").

¶ 15 At the same time, the statute "may not be used as a shield to obstruct proper discovery of information generated outside review committee meetings." *Coburn*, 101 Wash.2d at 277, 677 P.2d 173. To illustrate the point, the court commented that information from original sources "would not be shielded \*722 merely by its introduction at a review committee meeting." *Coburn*, 101 Wash.2d at 277, 677 P.2d 173. The statute was meant to protect "substantive information about specific cases and individuals generated in the course of committee meetings." *Coburn*, 101 Wash.2d at 278, 677 P.2d 173.

\*\*11 [6] ¶ 16 PeaceHealth has not demonstrated that the legislative purpose of encouraging internal candor, open discussion, and constructive criticism will be served by an interpretation of the statute as banning internal review of the database to identify the records Lowy requests. The medical charts Lowy seeks were not created specifically for the quality assurance committee, are maintained external to committee files, and are undisputedly relevant and discoverable. In disclosing them, the hospital will not be required to disclose who participated in the review process concerning IV injuries, which incidents the hospital found relevant or important, or how it sorted, grouped, or otherwise organized those incidents. The hospital will not disclose any analysis, discussions, or communications

247 P.3d 7  
 159 Wash.App. 715, 247 P.3d 7  
 (Cite as: 159 Wash.App. 715, 247 P.3d 7)

Page 6

that occurred during the proceedings of the quality assurance committee. The response to the discovery request will reveal no more than if the hospital had produced the medical records through a burdensome page-by-page search.

¶ 17 Legislative history also weighs in favor of a narrow interpretation of what is meant by the prohibition on “review or disclosure.” The version of RCW 4.24.250 addressed in *Coburn* provided that the records of quality assurance committees “shall not be subject to subpoena or discovery proceedings in any civil action,” with certain exceptions not relevant here. Former RCW 4.24.250(1)(2) (2004). In 2005, the legislature enacted an amending statute adding the prohibition on “review or disclosure” to RCW 4.24.250 (health care providers) and RCW 43.70.510 (health care institutions and medical facilities other than hospitals), as well as to the statute at issue in the present case, RCW 70.41.200 (hospitals). Laws of 2005, ch. 291, §§ 1–3. The vote was unanimous. SENATE JOURNAL, 59th Leg., Reg. Sess., at 1089 (Wash. 2005); HOUSE JOURNAL, 59th \*723 Leg., Reg. Sess., at 566 (Wash. 2005). According to a bill report, the 2005 amendment was supported by representatives of trial lawyers and hospitals. S.B. REP. on E.H.B. 2254, 59th Leg., Reg. Sess. (Wash. 2005). It is unlikely that the bill would have enjoyed such broad support if it had been intended to prohibit internal review as well as external review of quality assurance records. According to the summary of testimony in the bill report, the bill was designed to fill a gap in the earlier versions of these statutes. Before the 2005 amendment, the statute provided that quality assurance records were not subject to discovery or introduction into evidence “in any civil action.” The purpose of the 2005 amendment was simply to ensure that the records could not be released to the public in some extrajudicial context, that is, outside of a civil action. S.B. REP. on E.H.B. 2254 (Wash. 2005).

¶ 18 In summary, the first order entered by the trial court satisfied *Coburn's* mandate that the stat-

ute be strictly construed and limited to its purposes, and it reflects an interpretation that is supported by legislative history. The hospital must deny review of its quality assurance records by outside persons, thereby preserving confidentiality of those records. But the statute may not serve as an artificial shield for information contained in ordinary medical records. We conclude that the hospital may review its quality assurance records for the limited purpose of identifying and producing these medical charts.

¶ 19 The order granting reconsideration is reversed. The original order is to be reinstated.

WE CONCUR: SPEARMAN and APPELWICK, JJ.

Wash.App. Div. 1, 2011.  
 Lowy v. PeaceHealth  
 159 Wash.App. 715, 247 P.3d 7

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