REQUEST FOR IMMEDIATE STAY — PRIVILEGED DOCUMENT ORDERED PRODUCED BY JANUARY 5, 2004

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

SUTTER DAVIS HOSPITAL, Petitioner, vs. SUPERIOR COURT FOR THE COUNTY OF YOLO, Respondent. ______________________ DONNA JOHNSON, as successor in interest to RICHARD JOHNSON, and DONNA JOHNSON, individually, Real Party in Interest. ______________________	)	3rd Civ. No. __________ Superior Court, Case No. PO-001810 (Honorable Thomas E. Warriner, Judge)

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; EXHIBITS [FILED UNDER SEPARATE COVER]
[Filed concurrently with Motion to File Confidential Exhibit Under Seal]

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INTRODUCTION

A. Why A Writ Is Necessary.

This writ petition presents the following issue:

> Does Evidence Code section 1157, which prohibits discovery of records of a medical peer review committee responsible for evaluating and improving a hospital's quality of care, apply to a record submitted to a member of that committee as part of a study undertaken on the committee's behalf to evaluate and improve the quality of care?

This is a medical negligence and elder abuse case brought by the wife and successor in interest of a patient who suffered a fall at a hospital. In a written order signed on December 29, 2003,[1] the trial court ruled that the peer review privilege does not apply and directed the defendant hospital to produce the document by January 5, 2004. The court concluded that the privilege should not apply where the peer review committee as a whole does not actually review the document. This requirement does not exist in the language of section 1157 or the cases interpreting it and should not exist in light of the beneficial public policies served by that statute. The court further concluded that the fact the hospital had difficulty locating the

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[1] Petitioner has been informed by respondent court's staff attorney that the court signed and dated the order on December 29, 2003, but due to the absence of court clerks over the holidays the order will not be issued until January 5, 2004.

document raised an inference that it was not intended for peer review. This too was contrary to the law.

Relief by way of an immediate stay and then issuance of a prerogative writ from this Court is the only practical remedy to protect the privilege at stake in this case. Once the privileged information is disclosed, the privilege will be destroyed and can never be redeemed. Moreover, a writ decision will provide an appropriate opportunity to clarify for all trial courts and litigants the true application and scope of the peer review privilege.

B. Summary Of Facts And Argument.

This is an action for damages brought by plaintiff and real party in interest Donna Johnson, the wife and successor in interest to the estate of Richard Johnson, who suffered a fall while he was a patient in the Intensive Care Unit at Sutter Davis Hospital (the "Hospital"). In discovery, plaintiff sought disclosure of a quality assurance report prepared by a nurse who was on duty at the time of the fall and submitted to the Hospital's Quality Management Director, a member of two of the Hospital's peer review committees. Because the Hospital initially was unable to locate the document, the Hospital objected to discovery on the grounds that the document did not exist, and that even if it did, it was privileged under Evidence Code section 1157.[2] When the document was later found, the Hospital moved for a protective order. Even though the evidence clearly showed that the document was prepared as part of the Hospital's peer

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[2] The complete text of section 1157 is set out in the appendix to this Petition.

review efforts to improve the quality of care and was submitted to a member of two Hospital peer review committees, the trial court denied a protective order and, in an order signed on December 29, 2003, directed the Hospital to produce the document by January 5, 2004. The court reasoned that (1) there was no evidence the peer review committees as a whole actually reviewed the document, and (2) the fact the Hospital had difficulty locating the misplaced document raised an inference that it was not prepared for peer review.

The court erred. Nothing in the language of section 1157 or the cases interpreting it requires that an entire peer review committee actually review the document. The document must simply be used or maintained by the committee. (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1225-1226, disapproved on other grounds in *Hassan v. Mercy River Memorial Hosp.* (2003) 31 Cal.4th 709, 724, fn. 4.) Moreover, the court's interpretation contravenes the Legislature's policy in enacting section 1157 of promoting candor and objectivity in medical peer review, thus improving the quality of health care and benefitting the public. The court's ruling strips the confidentiality of the Hospital's peer review process and effectively punishes the Hospital for taking proactive steps to improve its quality of care.

The court also was plainly wrong in ruling that the document's misplacement removed it from the protection of section 1157. The evidence clearly showed that the document was prepared for peer review purposes. The document was misplaced, not just anywhere, but in a filing cabinet in the office of the peer review committee member who reviewed the document and used it to prepare a report on quality of care issues for the committees. By ruling that this error negated the document's peer review

purpose, the trial court grossly abused its discretion and violated the Legislative purpose underlying section 1157.

An immediate stay and then a prerogative writ should issue from this Court to preserve the peer review privilege properly asserted by the Hospital in this case.

PETITION

By this verified petition, petitioner Sutter Davis Hospital alleges:

1. This case arises out of a fall suffered by Richard Johnson in the Intensive Care Unit at Sutter Davis Hospital (the "Hospital") on December 25, 1999. Plaintiff and real party in interest Donna Johnson, Mr. Johnson's wife and the successor in interest to his estate, sued defendant the Hospital on October 18, 2000 in the respondent Superior Court of the State of California for the County of Yolo. The action is entitled *Johnson v. Sutter Davis Hospital*, Yolo County Superior Court Case No. PO-00-1810. (Ex. 1.)[3] The case has been set for trial on March 2, 2004.

2. Plaintiff's original complaint alleged causes of action for medical negligence, abuse of an elderly person, and loss of consortium. (Ex. 1.) Plaintiff filed a Third Amended Complaint on December 21, 2001, reframing her causes of action as neglect and elder abuse, intentional and negligent infliction of emotional distress, and negligence per se. This is the operative complaint. (Ex. 7.)

3. Plaintiff alleges that Mr. Johnson was a patient at the Hospital and was recovering from surgery in its Intensive Care Unit on December 25, 1999. Due to inadequate monitoring by the Hospital staff, plaintiff alleges, Mr. Johnson fell and injured himself on December 25, 1999, when he apparently tried to get out of bed to use the toilet. (Ex. 9-10.) Plaintiff's

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[3] The exhibits to this Petition are filed under separate cover but are incorporated by reference in these verified allegations. The exhibits are paginated consecutively and are referred to here by page number; e.g., the Third Amended Complaint at p. 7 of the exhibits is referred to as "Ex. 7."

complaint seeks general and special damages, attorney's fees and costs. (Ex. 17.)

4. Cindy Goss, R.N. was on duty in the Intensive Care Unit on December 25, 1999, when Mr. Johnson fell. (Ex. 302.) In her deposition in this litigation, she testified that she filled out a record on the fall. (Ex. 23-25, 115.) Plaintiff then moved to compel discovery of the record. (Ex. 20, 31.)[4] The Hospital opposed. (Ex. 38.) Because the Hospital was unable to locate the record or even to determine from any source other than Nurse Goss whether it had even existed, the Hospital took the position that the record did not exist. The Hospital further asserted that even if the record did exist, it was subject to the provisions of Evidence Code section 1157. (Ex. 51-54, 57-59, 66-67, 78, 92, 95-96, 140-144.)

5. Plaintiff's motion was heard on October 8, 2002. At the hearing, the court specifically reserved determination of the applicability of section 1157 until the document was found. (Ex. 147.) The court then ordered that the Hospital "shall within 20 days serve upon the plaintiff either a true copy of the report or a statement under penalty of perjury describing the steps that have been taken to find it." (Ex. 303, 305.)

6. In compliance with the court's order, the Hospital provided a declaration by its then-current Quality Management Director outlining his efforts to locate the Quality Assurance record referred to by Nurse Goss at her deposition. (Ex. 156.) He stated that, among other places, he had personally searched the Quality Assurance and Risk Management records in

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[4] The motion papers filed in the respondent court were voluminous. To avoid burdening this Court with unnecessary pleadings, the Hospital has omitted exhibits and supporting documents that are not relevant to this writ petition. However, the Hospital has included all of the documents filed in support of and opposition to its motion for protective order, which is the subject of this writ petition.

the Hospital. (Ex. 157.) He also directed efforts by other Hospital personnel to search the documents in possession of the Intensive Care Unit, Medical Surgical floor, and Administrative Department. He spoke with his two predecessor Quality Management Directors, who reported that they also had searched all of the Hospital's Quality Assurance records. (Ex. 157-159.) Based on these and other efforts, the Hospital was unable to locate the record or to confirm whether anyone at the Hospital had ever possessed it. (Ex. 160; see also Ex. 215-219.)

7. Almost one year later, plaintiff filed a "Motion to Enforce Court Order Compelling Production of Nurse Cindy Goss's Incident Report," again seeking to compel production of the report. (Ex. 163.) The Hospital opposed. (Ex. 190.) The motion was heard on September 23, 2003. At the hearing, the court once again indicated that it had not yet determined the applicability of Evidence Code section 1157 and reserved that issue until the report was found. (Ex. 231-235.) The court then ordered the Hospital's counsel personally to conduct an additional search for the report and report back to the court. (Ex. 226-231, 246-248.) Specifically, the court ordered the Hospital's counsel to personally inspect, among other things, "[t]he Quality Assurance reports maintained in the filing cabinet or other storage facility, including closed storage containers whether on or offsite." (Ex. 307-308..)

8. In compliance with the court's order, the Hospital's counsel personally inspected the locations specified by the court, including the Quality Management Department filing cabinet where the Quality Assurance records were normally kept. Then, in an abundance of caution, the Hospital's counsel inspected the other drawers in the Quality Management Department and found the document, entitled a "Quality Assessment Record for Patient Falls," in the Quality Management

Director's office in a file cabinet drawer separate from the drawer where the Quality Assurance records were normally kept.[5]

9. At the next hearing on October 8, 2003, the Hospital advised the court where it had found the document.[6] The court then granted the Hospital two weeks to file a protective order. The court once again confirmed that it had not yet determined the applicability of Evidence Code section 1157.

10. On October 24, 2003, the Hospital moved for a protective order, seeking a ruling that the Quality Assessment Record for Patient Falls completed by Nurse Goss is protected from discovery under Evidence Code section 1157. The Hospital argued that the document is a record of an organized committee of the Hospital's staff having the responsibility of evaluation and improvement of the quality of care rendered in the Hospital and thus is absolutely privileged from discovery under Evidence Code section 1157. (Ex. 266-271.) In support of its motion, the Hospital presented declarations from the Medical Staff's Chief of Staff, the Quality Management Director, and Nurse Goss, and portions of the Medical Staff's

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[5] The Quality Assessment Record for Patient Falls that is the subject of this writ petition will be lodged in connection with the Hospital's Motion to File Confidential Exhibit Under Seal, filed concurrently with this writ petition.

[6] The Hospital ordered the reporter's transcript of the October 8, 2003 hearing at that hearing. Although the court reporter initially gave the Hospital's counsel an estimate of ten days to prepare the transcript, the Hospital has not yet received it. The Hospital expects to receive the transcript shortly and will file it with this Court as soon as it is received.

Bylaws and Policy and Procedure Manual. (Ex. 280-302.) The evidence established the following facts:[7]

a. The Hospital has established three committees charged with the responsibility of evaluating and improving the quality of care rendered at the Hospital. The Medical Executive Committee is the organized committee expressly designated by the Medical Staff bylaws with that responsibility. In 1999 and 2000, it included the Chief of Staff, Vice Chief of Staff, Past Chief of Staff, physician representatives from Surgery, Internal Medicine, Family Practice, Anesthesiology, Emergency Medicine, Women's Health, and Pediatrics and two at-large physician members. In addition, the Administrator, the Assistant Administrator of Patient Care Services and the Quality Management Director were ex-officio members of the committee. The Committee is responsible for ensuring high quality of care and services to the patients, physicians, families, visitors and employees served by the Hospital. (Ex. 281.)

b. In fulfilling its duties, the Medical Executive Committee has delegated some of its peer review functions to two separate committees, both of which report directly to the Medical Executive Committee. Issues dealing with the quality of care rendered by physicians are delegated to the Physician Performance Improvement Monitoring Committee, which consists of the Vice Chief of Staff, representative physicians from the Hospital's medical departments, and, as ex-officio members, the Assistant Administrator for Patient Care Services and the Quality Management Director. (Ex. 281-282.) Issues involving interdisciplinary quality of care and performance improvement are delegated to the Quality Council. In 1999 and 2000, the Council consisted

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[7] The committees and procedures described here were in effect during the time period relevant to Mr. Johnson's fall.

of a chairperson from the Medical Staff, three additional members of the Medical Staff, the Administrator, the Assistant Administrator of Patient Care Services, the Controller, the Ancillary Services Director, the Human Resources Director, a representative from Communicare (Hospital-licensed clinics), a representative of the Hospital management staff as appointed by the Administrator, the Hospital's Lead Case Manager, and the Quality Management Director. The Quality Council's stated mission is to launch, coordinate and institutionalize multi-disciplinary quality improvement activities under the auspices of the Medical Executive Committee. (Ex. 282.) In carrying out this mission, the Quality Council holds regular meetings to review, evaluate and take necessary steps to improve the quality of care. Minutes are kept and forwarded to the Medical Executive Committee for review and approval. (Ex. 284.)

c. The Medical Executive Committee also has specifically delegated to the Hospital's Quality Management Director responsibility for gathering, evaluating and reporting information on quality of care and performance improvement issues for the Committee. (Ex. 282-283, 297.) The Committee has endorsed the Quality Management Director's use of a confidential communication document, entitled a Quality Assessment Record (or "QAR"), for these purposes. (Ex. 283, 297-298.) The QAR provides information to the Quality Management Director through a defined reporting process to help identify patterns, trends, incidents and issues affecting quality of care and to provide a focus for performance improvement activities. (Ex. 283, 297.)

d. The QAR is to be used by all members of the health care team and medical staff to report incidents involving patient care and Hospital safety. (Ex. 283, 297.) Any Hospital employee or medical staff member who is aware of an event that adversely impacts quality of care or

Hospital safety is expected to complete a QAR. (Ex. 283, 297-298.) Once completed, the QAR is forwarded to the manager of the affected department, who must then forward it to the Quality Management Department. (Ex. 283, 298.) As directed by the Medical Executive Committee, the Quality Management Director then reviews the QAR, performs appropriate follow-up, maintains all QARs in the Quality Management Department, and uses the information for monitoring and reporting patient care quality issues to the Medical Executive Committee, the Physician Performance Improvement Monitoring Committee, and the Quality Council. (Ex. 283, 298.)

e. The QARs are kept confidential. Specific access to individual QARs is granted only on a need-to-know basis as determined by the Quality Management Director and/or Chief of Staff. The documents are to be reviewed only by members of the Medical Executive Committee, Physician Performance Improvement Monitoring Committee, or Quality Council when appropriate. The Medical Executive Committee, in adopting the QAR's use, intended that it be subject to Evidence Code section 1157. (Ex. 284, 298-299.)

f. During her tenure as the Quality Management Director, Andrea Plon conducted a study to produce a Performance Improvement Report on patient falls at the Hospital for the Quality Council.[8] (Ex. 299.) The QAR in use at that time did not include prompts for information specific to patient falls sufficient to complete the study. (Ex. 299.) Ms. Plon therefore generated a Quality Assessment Record for Patient Falls (or "QAR for Patient Falls") to be used by Hospital staff when reporting patient falls to the Quality Management Department. (Ex. 299.) The Quality

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[8] Ms. Plon left her position as the Hospital's Quality Management Director in April 2001. (Ex. 296.)

Assessment Records for Patient Falls were subject to the same reporting process as the original QARs; the staff was instructed to follow the same process in completing the forms and forwarding them to the Quality Management Department. (Ex 299, 301.)[9] Ms. Plon used the Quality Assessment Records for Patient Falls as the basis of a Performance Improvement Report on patient falls between 1997 and 1999.

g. On December 25, 1999, Cindy Goss R.N. was working in the Intensive Care Unit at the Hospital. During her shift, Richard Johnson fell. (Ex. 302.) In response to that incident, before her shift ended Nurse Goss filled out a Quality Assessment Record for Patient Falls and gave it to her nursing supervisor with the understanding that it would be forwarded to the Quality Management Department as a part of the Hospital's quality assurance efforts. (Ex. 301-302.)

h. Ms. Plon, the Quality Management Director, included the information from Nurse Goss's Quality Assessment Record for Patient Falls in her Performance Improvement Report on patient falls from 1997 through 1999. (Ex. 299-300.) The minutes of the Quality Council's February 9, 2000 meeting show that the Quality Council reviewed and discussed that report. The Medical Executive Committee minutes from its February 23, 2000 meeting show that the Medical Executive Committee also reviewed the report. (Ex. 284.)

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[9] Due to a typographical error, the Quality Assessment Record for Patient Falls erroneously indicated that it was protected by the attorney-client privilege rather than Evidence Code section 1157. However, the Quality Management Director intended in generating the form that it be subject to the same reporting procedures and privileges as the QAR, including the privilege of Evidence Code section 1157. (Ex. 299.)

11. In connection with its motion for a protective order, the Hospital lodged the QAR for Patient Falls completed by Nurse Goss under seal for in camera inspection. (Ex. 251-252.)

12. Plaintiff filed opposition. (Ex. 309.) Before the hearing on December 11, 2003, respondent court issued a tentative ruling denying the Hospital's motion for protective order, stating the following grounds:

> The [Hospital] has not shown that Nurse Goss' QAR is a 'record of an organized committee of medical staff in hospital or of a peer review body' within the meaning of Evidence Code section 1157. The evidence submitted does not suggest that either the Quality Council or the Medical Executive Committee ever reviewed this particular QAR. Moreover, the fact that the defendant was unable to locate the QAR until approximately a year after it was ordered produced suggests that the report was not part of the hospital's normal peer review process. If the report had been part of that process, the report would have been more easily located.

(Ex. 493.)

13. At the hearing, the court adopted the tentative ruling. (Ex. 514.) The court also expressed concern that the document had been found in a different drawer from the one where the QARs were usually kept. (Ex. 499, 503-505.) At the Hospital's request, the court ruled that the document would remain lodged under seal pending writ review of the court's ruling. (Ex. 515.) The court also stayed enforcement of the order until January 5, 2003, to allow the Hospital to seek writ review of its ruling. (Ex. 516-517.)

14. After the hearing, plaintiff submitted a proposed order to respondent court without first submitting it to the Hospital for approval as to form. (Ex. 520-523.) The Hospital filed objections to the order and submitted its own proposed order. (Ex. 523-530.)

15. On December 30, 2003, the Hospital's counsel, Jonathan A. Corr, spoke by telephone with Courtney McKeon, a staff attorney for respondent court. Ms. McKeon advised Mr. Corr that the court had signed and dated the Hospital's proposed order on the motion for protective order on December 29, 2003, but because the court clerks were absent that week, the order would not be filed until January 5, 2004.[10] The Hospital's proposed order, which tracked the tentative, stated:

> [T]he [Hospital] has not shown that nurse Goss' QAR is a "record of an organized committee of medical staff in a hospital or of a peer review body" within the meaning of Evidence Code Section 1157. The evidence submitted does not suggest that either the Quality Coun[cil] or the Medical Executive Committee ever reviewed this particular QAR. Moreover, the fact that the defendant was unable to locate the QAR until approximately a year after it was ordered produced suggests that the report was not part of the hospital's normal peer review process. If the report had been part of that process, the report would have been more easily located. . . .
>
> Enforcement of this order is stayed until January 5, 2003 [*sic*] absent a superceding order from the Appellate Court further staying enforcement of this order.

(Ex. 529-530.)

16. With regard to the order signed on December 29, 2003, respondent court grossly abused its discretion by denying the Hospital's motion for a protective order based on Evidence Code section 1157 and by compelling the Hospital to disclose documents privileged under that section. The reasons are:

a. The document plaintiff seeks to discover is clearly a record of an organized Hospital committee or peer review body having the

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[10] The Hospital intends to file the order with this Court as soon as it is received, on January 5, 2004 or as soon as possible thereafter.

responsibility of evaluation and improvement of the quality of care rendered in the Hospital and is therefore privileged from discovery under Evidence Code section 1157. The privilege does not depend on whether a document is generated by the peer review committee or body, but rather, as in this case, whether it was intended for use by the peer review committee.

b. Section 1157 does not require that a document actually be reviewed by the peer review committee or body as a whole to fall within its protection. Again, the privilege depends on whether the document was intended for use by the peer review committee. The trial court had no discretion to permit discovery of privileged matter on this basis.

c. The length of time it took to locate the document, and the fact that it was apparently misplaced, is immaterial. The document was found in the Quality Management Department, in the possession of the Quality Management Director, who was responsible for filing such documents, and was kept strictly confidential. The document's misplacement in no way contradicts that the document was intended for use by peer review committees. Again, the trial court had no discretion to permit discovery of privileged matter on this basis.

d. There is no way to redact the document to protect the integrity of the quality assurance process. Because the document deals specifically with Mr. Johnson's fall, an incident potentially implicating the quality of care at the Hospital, any information in the document is integrally linked with the quality assurance process and is privileged. Indeed, because the Quality Assurance Record for Patient Falls form itself was prepared under the direction of peer review committees as part of evaluating and improving quality of care, even the blank form with all information redacted would be privileged.

17. The Hospital has no plain, adequate and speedy remedy in the ordinary course of law. Respondent court's discovery order is not appealable. Appeal from the judgment which might eventually be entered in this case is not an adequate remedy. By the court's order, the Hospital is compelled to disclose privileged information now. Once that information is disclosed, it cannot be undisclosed. Unless this Court acts now to preserve the privilege, the privilege will be irretrievably lost.

18. Writ relief is necessary and appropriate in that this case presents, among other things, issues still of first impression in this State, as to whether a court has discretion to permit discovery of privileged records if they are not actually reviewed by a peer review committee as a whole or if they are misplaced.

19. An immediate stay is necessary and appropriate in that the court's order requires the Hospital to produce privileged documents by January 5, 2004. If the privileged information must be disclosed before this Court can rule on the merits of the petition, the privilege will have been lost.

PRAYER

WHEREFORE, defendant and petitioner Sutter Davis Hospital prays that:

1. This Court issue an immediate stay of respondent court's order signed on December 29, 2003 pending final determination of this writ proceeding;

2. Issue a peremptory writ of mandate or other appropriate relief compelling respondent court to set aside its discovery order signed on December 29, 2003, insofar as the order compels disclosure of information and documents protected by the privilege under Evidence Code section 1157, and to enter a new and different order granting the Hospital's motion for a protective order in this regard;

3. In the alternative, to issue an alternative writ of mandate or other appropriate relief requiring respondent court to show cause before this Court why it should not set aside its order signed on December 29, 2003, and to enter a new and different order granting the Hospital's motion for a protective order;

4. Award the Hospital its costs herein; and

5. Grant such other and further relief as may be just and proper.

Dated: February 28, 2007

Respectfully submitted,

PORTER, SCOTT, WEIBERG & DELEHANT
Norman V. Prior
Jonathan A. Corr

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By ______________________________
Lillie Hsu

Attorneys for Petitioner Sutter Davis Hospital

VERIFICATION

State of California)
) SS
County of Sacramento)

I, Jonathan A. Corr, am an attorney at law duly licensed to practice before all courts of the State of California, and am an associate with the law firm of Porter, Scott, Weiberg & Delehant, who, together with Greines, Martin, Stein & Richland LLP, represents petitioner Sutter Davis Hospital in the instant writ proceedings. I have personally reviewed and am familiar with the records, files and proceedings described in, and which are, the subject of this petition, and know the facts set forth in the petition to be true and correct.

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

Executed on December ___, 2003, at Sacramento, California.

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Jonathan A. Corr

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND REQUEST FOR STAY

I. RESPONDENT COURT'S DISCOVERY ORDER IMPROPERLY REQUIRES DISCLOSURE OF MEDICAL PEER REVIEW COMMITTEE RECORDS THAT ARE ABSOLUTELY PRIVILEGED FROM DISCOVERY UNDER EVIDENCE CODE SECTION 1157.

A. Evidence Code Section 1157 Represents A Legislative Determination That The Public Policy In Favor Of Confidentiality Of The Peer Review Process Outweighs The Public Policy In Favor Of Disclosure Of Potentially Relevant Evidence.

"Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." (*U.S. v. Nixon* (1974) 418 U.S. 683, 705 [94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039].) To prevent this chilling effect on the peer review activities of health care providers, the Legislature enacted Evidence Code section 1157, subdivision (a), which provides:

> Neither the proceedings nor the records of organized committees of medical . . . staffs in hospitals, or of a peer review body . . . having the responsibility of evaluation and improvement of the quality of care rendered in the hospital . . . shall be subject to discovery.

By adopting this discovery privilege, the Legislature intended "to encourage candor between the staff of professional health care institutions in order to allow the efficient and effective monitoring of patient care at these institutions." (*People v. Superior Court (Memorial Medical Center)* (1991) 234 Cal.App.3d 363, 385.) Section 1157 "evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality," thus benefitting the public as a whole. (*County of Los Angeles v. Superior Court (Martinez)* (1990) 224 Cal.App.3d 1446, 1452; *Memorial Medical Center*, *supra*, 234 Cal.App.3d at p. 385.)

It is, of course, true that the statute embraces the goal of peer review candor at the cost of occasionally impairing plaintiffs' access to potentially relevant evidence. (*Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 629.) But "the Legislature has made the judgment call that an even more important societal interest is served by declaring such evidence 'off limits.'" (*West Covina Hospital v. Superior Court* (1984) 153 Cal.App.3d 134, 138.) As one appellate court has explained, "[i]t is not our function as a judicial body to reweigh the competing interests considered by the Legislature based on our perception of which consideration may or may not be more important." (*California Eye Institute v. Superior Court* (1989) 215 Cal.App.3d 1477, 1486.) Thus, section 1157 provides "complete protection" against discovery, regardless of a plaintiff's need for the evidence. (*Scripps Memorial Hospital v. Superior Court* (1995) 37 Cal.App.4th 1720, 1724; *Snell v. Superior Court* (1984) 158 Cal.App.3d 44, 49.) It applies, not only to medical malpractice actions, but to any civil action not specifically exempted by section 1157. (See *Willits v. Superior Court* (1993) 20 Cal.App.4th 90, 101-102; *California Eye Institute, supra*, 215 Cal.App.3d at p. 1485.)

B. The Court's Order Requires Disclosure Of Privileged Documents.

The statutory privilege is given a broad reading to ensure that its purposes are served. (*Alexander v. Superior Court, supra*, 5 Cal.4th at p. 1225, fn. 6; *Scripps Memorial Hospital, supra*, 37 Cal.App.4th at p. 1724.) Our Supreme Court has held that the privilege for "proceedings and records" should be read broadly to include information used or maintained by a medical staff committee or peer review body, including information submitted to it from an outside source. (*Alexander, supra*, 5 Cal.4th at pp. 1225-1226.)

It is well established that a "medical staff committee" or "peer review body" includes not only committees composed solely of physicians, but also multidisciplinary committees in which the majority of members are nurses and administrators. (*Santa Rosa Memorial Hospital v. Superior Court* (1985) 174 Cal.App.3d 711, 718-719, 720; *County of Los Angeles v. Superior Court (Martinez), supra*, 224 Cal.App.3d at p. 1453.) The privilege also extends to committees that review not only physicians but any other aspect of hospital activities that relates to "evaluation and improvement of the quality of care rendered in the hospital." (*Mt. Diablo Hospital Dist. v. Superior Court* (1986) 183 Cal.App.3d 30, 34, citing *Santa Rosa Memorial Hospital, supra*, 174 Cal.App.3d at pp. 719-721.) For example, it extends to investigation of risks or harm to patients, as well as

hospital staff and visitors.[11] (*Willits v. Superior Court, supra*, 20 Cal.App.4th at pp. 102-103.)

Respondent court's order in this case improperly requires disclosure of just such privileged information. The Hospital's Medical Executive Committee, and the Quality Council to which it delegated peer review functions, clearly are medical staff or peer review committees having the responsibility of evaluation and improvement of the quality of care rendered in the Hospital.[12] The Quality Management Director, Andrea Plon, was a member of both committees and was herself charged by the Medical Executive Committee with peer review functions involving the quality of care. She developed the Quality Assurance Record for Patient Falls as part of her committee duties, to study patient falls at the Hospital and report her findings to the Medical Executive Committee and Quality Council—in other words, to evaluate and improve the quality of care. The QAR for Patient Falls was subject to a defined reporting process to ensure its confidentiality and its return to the Quality Management Director. The Quality Management Director received and maintained the QARs for patient falls in her capacity as a peer review committee member. By

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[11] Because "the risk of injuries to health care workers threatens the entire health care system" and "some hazards endanger workers, patients and visitors alike," injuries to physicians, hospital employees and visitors are included in "the quality of care rendered in the hospital." (*Willits*, *supra*, 20 Cal.App.4th at pp.102-103). Thus, contrary to plaintiff's suggestion, the fact that hospital employees might fill out a Quality Assurance Record to report incidents involving harm to persons other than patients does not remove it from protection under section 1157.

[12] The committees at issue here qualify for protection under Evidence Code section 1157 both as an "organized committee" of the Hospital's "medical staff" and as a "peer review body." However, the classification makes no difference; the protection is the same. (*People v. Superior Court (Memorial Medical Center), supra*, 234 Cal.App.3d at pp. 379-381.)

submitting the QARs for Patient Falls to her, the Hospital staff submitted them to the Medical Executive Committee and the Quality Council.

Moreover, the QAR for Patient Falls completed by Nurse Goss was submitted to the committees via the Quality Management Director. After filling out the record, Nurse Goss gave it to her nursing supervisor with the understanding that it would be forwarded to the Quality Management Department. That is exactly where it went; it was found there in this litigation. The Quality Management Director used it to prepare the performance improvement report on patient falls, which was reviewed by both the Quality Council and the Medical Executive Committee.

In short, the evidence submitted by the Hospital showed that the QAR for Patient Falls completed by Nurse Goss was part of an investigation by an organized hospital committee or peer review body conducted for the express purpose of evaluating and improving the quality of care at the Hospital. Nothing in plaintiff's evidence showed the contrary. Thus, the QAR for Patient Falls is subject to the privilege of Evidence Code section 1157.[13]

The fact that the QAR for Patient Falls was filled out by Nurse Goss rather than by a peer review committee is irrelevant. The privilege applies just as much for documents prepared for a peer review committee as part of the peer review process as it does to documents prepared by the committee

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[13] Cf. *County of Los Angeles v. Superior Court (Martinez), supra*, 224 Cal.App.3d at p. 1453 (confidential records of committee whose purpose was "to reduce morbidity and mortality—i.e., to improve patient care" were privileged under section 1157); *Snell v. Superior Court, supra*, 158 Cal.App.3d at p. 49 (files were privileged under section 1157 where hospital's declaration stated that files were those of quality assurance committee).

itself. As the Supreme Court stated in *Alexander v. Superior Court*, *supra*, 5 Cal.4th 1218:

> [A] court has no authority to qualify the statutory protection by limiting it to materials that are "generated by" a committee: "we reject the interpretation . . . that . . . documents, information, or records in the possession of the committee are not protected if they originated from sources outside the board or committee proceedings. If the Legislature intended the privilege to extend only to documents created by the Board or committee, then surely that is what it would have said."

(*Id.* at pp.1225-1226.)

C. Respondent Court's Reasons For Denying A Protective Order Have No Basis In The Law.

In its order denying the Hospital's motion for a protective order, respondent court reasoned that (1) the evidence did not suggest that the Quality Council or the Medical Executive Committee reviewed the QAR for Patient Falls completed by Nurse Goss, and (2) the fact that the Hospital was unable to locate the QAR for Patient Falls until approximately a year after it was ordered produced suggested that it was not part of the Hospital's normal peer review process. (Ex. 529; see also Ex. 493 [tentative ruling].)

As we discuss next, each of the court's stated reasons was a blatant misapplication of the law.

1. Respondent court's requirement that the peer review committee as a whole actually review the record is unwarranted and contrary to the public policy supporting Evidence Code section 1157.

In respondent court's order, the court reasoned that "the [Hospital] has not shown that nurse Goss's QAR [for Patient Falls] is a 'record of an organized committee of medical staff in a hospital or other peer review body' within the meaning of Evidence Code section 1157. The evidence submitted does not suggest that either the Quality Coun[cil] or the Medical Executive Committee ever reviewed this particular QAR." (Ex. 529; see also Ex. 493 [tentative ruling].)

Respondent court's reasoning is contrary to the law and the facts. The Quality Management Director, Andrea Plon, was herself a member of the Quality Council and the Medical Executive Committee and, in that capacity, she did review the QAR for Patient Falls submitted by Nurse Goss. Nothing in Evidence Code section 1157 or the cases interpreting it requires that the *entire* medical staff committee or peer review body—or, for that matter, even *one* member of the committee—actually review the document. The law requires only that the information be submitted to the committee and that the committee have the responsibility of improving or evaluating the Hospital's quality of care. (*Alexander*, *supra*, 5 Cal.4th at pp. 1225-1226.)

Respondent court's order directly contradicts our Supreme Court's reasoning in *Alexander*. There, the Court held that physicians' applications for staff privileges at a hospital were "records" of a hospital's medical staff committee under section 1157. The Court reasoned that such applications

"are the province of the hospital's medical staff committee" (*id.* at p. 1224), and "'pertain to the committee's investigative and evaluative functions'" because they contain crucial information relating to the quality of care at the hospital (*id.* at p. 1226 & fn. 8). The Court noted that staff applications are developed by a medical staff committee, are returned to the medical staff after applicants complete them, and are maintained by the medical staff committee in its files. (*Id.* at p. 1221, fn. 2.)

The Court further noted that nothing in section 1157 limits the privilege to records that are generated by a medical staff committee or suggests that materials submitted to a committee for review are not protected "records" of the committee. (*Id.* at p. 1226.) Finally, the Court reasoned that denying the privilege would contravene section 1157's Legislative policy of promoting candor and objectivity in medical peer review. That policy:

> applies equally to [documents] submitted to a hospital's medical committee: Committee members and those providing information to the committee must be able to operate without fear of reprisal. Similarly, it is essential that doctors seeking hospital privileges disclose all pertinent information to the committee. Physicians who fear that information provided in an application might someday be used against them by third party will be reluctant to fully detail matters the committee should consider.

(*Id.* at p. 1227, internal quotation marks omitted.) The Court further stated that denying protection to documents submitted to the committee from an outside source, including documents such as letters of reference which might contain crucial adverse information regarding physician competence, would lead to "absurd and unintended results":

> The immediately predictable result will be that physicians . . . will cease providing . . . negative information or constructive criticism . . . . Without this frank exchange of information,

> medical staffs will have no legal grounds upon which to initiate corrective action . . . that could be critical to the protection of patients. Clearly such a result would be contrary to the Legislature's intent in enacting section 1157.

(*Id.* at pp.1227-1228, internal quotation marks omitted.)

As discussed in detail above (see section I.B., *supra*), ensuring quality of care was the province of the Medical Executive Committee and the Quality Council, which had delegated authority to Quality Management Director, a member of both committees, to perform some of its quality of care functions. The QAR for Patient Falls was developed by the Quality Management Director and, after Nurse Goss completed it, was submitted to, used and kept by the Quality Management Director—on behalf of the Medical Executive Committee and the Quality Council—for precisely that purpose. In fact, the Quality Management Director presented a report to the committees based on the document. Section 1157 requires no more.

Nothing in section 1157, *Alexander*, or any other case requires that a document prepared for and submitted to a medical peer review committee actually be reviewed by the entire committee to warrant protection. The Supreme Court's holding in *Alexander* was not based on the fact that any particular staff application, or even staff applications in general, were reviewed by the entire committee rather than a single member. In fact, it is reasonable to assume that a medical staff committee might delegate responsibility for reviewing particular documents to a subcommittee or to individual committee members, who would report to the committee at large and even eliminate certain documents from further consideration by the committee. Or, the committee might delegate responsibility to certain members to read portions of a document, such as a QAR for Patient Falls, and compile the information into larger reports to the entire committee. The

fact that a particular document may have been reviewed by one committee member who then reported to the committee as a whole would not remove that document from the privilege of section 1157. Indeed, one could imagine a situation where, at the time of discovery, certain documents submitted to the committee might not yet have been reviewed by anyone. The fact that a particular document might have been sitting on someone's desk waiting to be reviewed by the committee also cannot destroy the privilege of section 1157. Why? Because those documents were intended for and in fact *submitted to* the committee, even if the entire committee did not review them.

Even more important, protecting the QAR for Patient Falls submitted by Nurse Goss is completely consistent with the Legislative policy underlying section 1157—protecting candor and objectivity of medical peer review and thus improving the quality of health care for the general public. In determining the scope of section 1157, courts have consistently examined "whether [that] legislative intent . . . would be furthered by allowing or disallowing discovery." (*Willits v. Superior Court, supra,* 20 Cal.App.4th at p. 96.) The QAR for Patient Falls was created and used as part of the Hospital's medical peer review committees' efforts to evaluate and improve the Hospital's quality of care. If such documents are not protected, hospital staff might be reluctant to fully document patient falls or other incidents affecting the quality of care at the hospital for fear of reprisal in later litigation. In fact, the policy objective that caused the Legislature to enact section 1157 is even more relevant here than in the garden-variety case of protecting staff applications as in *Alexander*. Here the Quality Management Director specifically undertook a study of patient falls on behalf of the Hospital's peer review committees—a proactive effort to improve the quality of care at the Hospital. The committees likely would have been less

willing to undertake such a study if the records produced as part of it could be discoverable.

Finally, this policy concern is no less important if one committee member reviews a document on behalf of the committee and then reports to it. Indeed, requiring an entire peer review committee to review every single document produced as part of a study to improve quality of care would be extremely time-consuming. It is unlikely that any hospital would be willing to undertake such a study given the time commitment it would require—for no purpose other than protecting the document from discovery under section 1157.

In short, by denying a protective order on this basis, respondent court has stripped the confidentiality of the Hospital's peer review records and created a disincentive to undertake efforts to evaluate and improve its quality of care. This absurd result was not compelled by the facts presented in respondent court and should not be condoned by this Court.

2. Contrary to respondent court's reasoning, the Hospital's difficulty in locating the misplaced QAR does not remove it from protection under section 1157.

In its order, respondent court reasoned that "the fact that the [Hospital] was unable to locate the QAR [for Patient Falls] until approximately a year after it was ordered produced suggests that the report was not part of the hospital's normal peer review process. If the report had been part of that process, the report would have been more easily located." (Ex. 529; see also Ex. 493 [tentative ruling].) At the hearing, the court also seemed troubled that the document was found in a drawer separate from the

one where the QARs were normally kept. (Ex. 499, 503-505.) Again, respondent court's reasoning was unsupported by the law or the facts.

In response to plaintiff's original discovery request, the Hospital made a diligent search for the QAR for Patient Falls prepared by Nurse Goss but was unable to find it. When the court ordered the Hospital and then counsel to search specific locations, they complied. The Hospital's counsel finally found the document in the Quality Management Department in a drawer separate from the one where the QARs were normally kept. It obviously had been misplaced and overlooked by the Hospital in its earlier search. While arguably this shows less-than-perfect organization by the Hospital, it is perhaps understandable given that the Quality Management Director who originally received the document, Andrea Plon, had left her position at the Hospital over a year before plaintiff's initial motion to compel and three different people had occupied that position by the time the Hospital's counsel found the document. (Ex. 156-158, 296.) More important, the Hospital's difficulty in locating the document is no basis for destroying the privilege under section 1157.

As detailed above (see section I.B., *supra*.), the Hospital's evidence clearly established that the document was prepared as part of a study of patient falls undertaken on behalf of the Hospital's peer review committees by the Quality Management Director, a committee member, to evaluate and improve the quality of care at the Hospital. Once completed by Nurse Goss, the document was forwarded to the Quality Management Director, Ms. Plon, through the defined reporting process, kept confidential, and used by her to prepare a performance improvement report to the committees. In short, the document was submitted, through Ms. Plon, to the committees as part of their peer review efforts to improve the quality of care. Nothing in plaintiff's opposition papers contradicts this— nor does the fact that the

document was misplaced and took some time to find. The document was misplaced, not just anywhere, but in the Quality Management Director's office. Thus, it was always in possession of the Quality Management Director; its confidentiality was never violated and it was never used for any purpose other than quality-of-care peer review. There is absolutely no basis for respondent court's suggestion that because the document was misplaced, it was not undertaken for peer review.

In short, what matters under section 1157, and what the Hospital's evidence established here, is that the document was clearly intended for peer review. There is no basis for any inference to the contrary.

D. A Protective Order Is Necessary Because The Document Cannot Be Redacted.

Finally, as a practical matter, there is no way to redact the document to protect the integrity of the peer review process. Because the document deals specifically with Richard Johnson's fall, an incident potentially implicating the quality of care at the Hospital, any information in the document is inextricably linked with the peer review process and is thus privileged. Indeed, because the QAR for Patient Falls form itself was prepared under the direction of peer review committees as part of the evaluation and improvement of the quality of care, even the blank form with all information redacted would be privileged. (Cf. *Cedars-Sinai Medical Center v. Superior Court* (1993) 12 Cal.App.4th 579, 588 [identities of medical staff review committee members who evaluated defendant physicians' obstetrical privileges was so intimately related to the evaluation itself as to fall within the privilege of section 1157].)

II. DEFENDANT HAS NO PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW: IF THE ORDER FOR DISCLOSURE OF THE PRIVILEGED DOCUMENTS IS ENFORCED, THE PRIVILEGE WILL BE IRRETRIEVABLY DESTROYED.

A writ is necessary and appropriate in this case because the Hospital has no plain, speedy and adequate remedy at law. No direct appeal lies from respondent court's orders for disclosure of privileged matters. (*Rumac, Inc. v. Bottomley* (1983) 143 Cal.App.3d 810, 812, fn. 1; *Poe v. Diamond* (1987) 191 Cal.App.3d 1394, 1397-1398; *Slemaker v. Woolley* (1989) 207 Cal.App.3d 1377, 1382.) The Hospital would have no effective remedy by way of appeal from any final judgment, because by that time, of course, the privilege the Hospital seeks to protect would have been irreparably violated by enforcement of the trial court's orders.

As our Supreme Court has stated in *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 336:

> The need for the availability of the prerogative writs in discovery cases where an order of the trial court granting discovery allegedly violates a privilege of the party against whom discovery is granted, is obvious. The person seeking to exercise the privilege must either succumb to the court's order and disclose the privileged information, or subject himself to a charge of contempt for his refusal to obey the court's order pending appeal. The first of these alternatives is hardly an adequate remedy and could lead to disruption of a confidential relationship. The second is clearly inadequate as it would involve the possibility of a jail sentence and additional delay in the principal litigation during review of the contempt order. Thus, the use of the prerogative writ in a case such as this is proper.

(Accord, *County of Los Angeles v. Superior Court (Martinez), supra*, 224 Cal.App.3d at p. 1451, fn. 3 ["discovery orders requiring the revelation of

allegedly privileged information may be a proper subject of review by prerogative writ"]; *Britt v. Superior Court* (1978) 20 Cal.3d 844, 851-852.)

In addition, writ relief is particularly appropriate in a case such as this, which presents an important issue of first impression and of general interest. (*Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185-186, fn. 4.)

III. A TEMPORARY STAY ORDER SHOULD ISSUE TO PREVENT DISCLOSURE OF THE PRIVILEGED MATTERS PENDING DETERMINATION OF THE ISSUES RAISED BY THIS PETITION.

This Court has inherent power to stay lower court orders in furtherance of its jurisdiction. (*People ex rel. S.F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 536-539.)

For the same reasons that extraordinary relief is required, a temporary stay of respondent court's orders is also required pending determination by this Court of the issues raised by this petition. If a stay does not issue by January 5, 2004, privileged matters will have to be disclosed and the Hospital will suffer irreparable harm. Once these matters are disclosed, the legal issues will be rendered essentially academic. The only other alternative is for the Hospital to disobey the court's order and face contempt citations. This is equally unacceptable for all concerned.

CONCLUSION

For all the reasons stated herein, defendant Sutter Davis Hospital respectfully requests that this Court issue an immediate stay of respondent court's order signed on December 29, 2003, and thereafter issue a peremptory writ of mandate or other appropriate relief directing respondent court to set aside its order denying a protective order and compelling disclosure of privileged matters and to issue a new order protecting those privileged matters.

Dated: February 28, 2007

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

Pursuant to California Rules of Court, rule 14(c)(1), I certify that this writ petition contains 8,683 words, not including the tables of contents and authorities.

Dated: February 28, 2007

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Lillie Hsu