

**Tentative Rulings for May 5, 2022**  
**Department 502**

---

**There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)**

---

**The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.**

---

**(Tentative Rulings begin at the next page)**

---

## **Tentative Rulings for Department 502**

Begin at the next page

(03)

**Tentative Ruling**

Re: **Kaye v. Fresno Surgery Center**  
Superior Court Case No. 17CECG04183

Hearing Date: May 5, 2022 (Dept. 502)

Motion: Plaintiff's Motion to Compel Further Responses to Requests for Production of Documents, Set Four

**Tentative Ruling:**

To deny plaintiff's motion to compel further responses to requests for production of documents, set four, numbers 39 to 41, as the requests seek documents that are privileged under Evidence Code section 1157. (Code Civ. Proc. § 2031.310.) The court intends to review the documents responsive to requests 42 to 44 and 46 to 48 in camera to determine whether they are covered by the medical peer review privilege under Evidence Code section 1157. The court will only compel production of non-privileged documents.

**Explanation:**

First, to the extent that defendants have requested that the court take judicial notice of other court actions involving plaintiff, the court intends to deny the request. While court records are generally subject to judicial notice (see Evidence Code section 452, subdivision (d)), here it does not appear that the other court cases are in any way relevant to the issues of this case. While defendants contend that the other cases show that plaintiff is a "litigious physician", many of the cases were not filed by plaintiff, and he was only a defendant in those actions. Others appear to be family law or personal injury cases that were not brought by plaintiff against other health care providers.

In any event, regardless of whether or not plaintiff is a "litigious physician", he still has a right to seek discovery of evidence related to the issues of the present case, as long as it is not privileged or otherwise protected from discovery. (Code Civ. Proc. § 2017.010.) Defendant has not shown that plaintiff has been declared a vexatious litigant. (Code Civ. Proc. § 391, *et seq.*) Therefore, the court will deny the request for judicial notice of the other cases involving plaintiff.

Next, with regard to the merits of the motion to compel, plaintiff seeks to compel defendant to produce documents in response to requests for production, set four, numbers 39 to 44 and 46 to 48. Requests 39 to 41 seek documents relating to Fresno Surgical Hospital's peer review criteria, dates of any updates to the peer review criteria, and the type of data collected for evaluation pursuant to the peer review criteria from 2015 to the present. Requests 42 to 44 and 46 to 48 seek documents related to communications to or from various witnesses or employees of FSH regarding plaintiff. Defendant objected to the requests based on Evidence Code section 1157, the right of privacy, and the attorney-client privilege or attorney work product doctrine. Defendant also served a privilege log with regard to the requests.

However, the privilege log that defendant served is vague with regard to which documents listed in the log correspond to which requests. The log lists several documents that have been withheld, but it is unclear to which requests those documents are responsive. (Exhibit 2 to Tran decl.) Thus, the privilege log is not particularly helpful in assessing the claimed privileges here. "If an objection is based on a claim of privilege or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log." (Code Civ. Proc., § 2031.240, subd. (c).) "The information in the privilege log must be sufficiently specific to allow a determination of whether each withheld document is or is not fact privileged." (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 130, internal citation omitted.)

Still, although the privilege log is somewhat vague, it appears that the documents responsive to requests 39-41 are listed in the privilege log as documents 1, 9, 11, 12, and 13, which are described as "Disruptive/Impaired Practitioner Policies". (Exhibit 2 to Tran decl.) The documents responsive to the other requests are apparently described in the log in items 2, 3, 4, and 10. However, defendant has not provided any evidence to support its assertion of the various privileges that it used to justify withholding the documents.

Defendant contends that the documents are privileged under Evidence Code section 1157, which provides that, "Neither the proceedings nor the records of organized committees of medical ... staffs in hospitals, ... or of a peer review body, as defined in Section 805 of the Business and Professions Code, having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, ... shall be subject to discovery." (Evid. Code, § 1157, subd. (a).)

"The obvious general purpose of section 1157 is to improve the quality of medical care in the hospitals by the use of peer review committees." (*West Covina Hospital v. Superior Court* (1986) 41 Cal.3d 846, 851.) "Section 1157 'gives a blanket exclusion from discovery to proceedings and records of committees of hospital medical staffs concerned with evaluation and improvement of the quality of care in the hospital.' By enacting this discovery exemption, '[t]he Legislature intended ... to encourage full and free discussions in the hospital committees in order to foster health care evaluation and improvement.' Section 1157 also removes a disincentive to voluntary physician participation in peer review by exempting participating physicians from the burdens of discovery and involuntary testimony. Section 1157's promotion of peer review candor has a cost: a plaintiff is denied access to potentially relevant evidence. Nevertheless, it is the judgment of the Legislature that societal interests are best served by exempting such information from discovery. It is not the judiciary's function to reorder competing societal interests which have already been ordered by the Legislature." (*University of Southern California v. Superior Court* (1996) 45 Cal.App.4th 1283, 1288-1289, internal citations omitted.)

"Section 1157 specifies that the records of a medical staff committee are immune from discovery when the committee has 'the responsibility of evaluation and improvement of the quality of care rendered in the hospital ....' In passing upon the claim of immunity, a court must have before it facts which allow it to match the staff

committee's mission and function against the specifications of the statute. ... The burden of establishing entitlement to nondisclosure rested with the party resisting discovery, not the party seeking it." (*Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 627, internal citation omitted.)

It is not enough for the party resisting the discovery to simply file an argumentative memorandum declaring that the documents are privileged under section 1157 without submitting any other facts to support the party's assertion of the privilege. (*Ibid.*) However, the reviewing court may also take judicial notice of nationwide, generally accepted standards describing the organization and functions of medical staffs and medical staff committees in accredited hospitals under Evidence Code section 452, subdivision (h). (*Ibid.*)

"The medical staff immunity described in section 1157 extends to, first, the proceedings, and second, the records of the described staff committees." (*Id.* at p. 628.) Also, "nothing in section 1157(a) limits the privilege to records that are *generated* by a medical staff committee, and nothing in the statute supports the suggestion that materials *submitted* to a committee for review are not protected 'records' of the committee." (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1225, italics in original, disapproved on other grounds in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709.) Moreover, section 1157 is not limited to the records or proceedings of physician peer reviews, and instead broadly applies to any records or proceeding related to the evaluation and improvement of the quality of care rendered in a hospital. (*Mt. Diablo Hospital v. Superior Court* (1986) 183 Cal.App.3d 33-34.)

"[T]he party claiming immunity from discovery carries the burden of showing that the evidence it seeks to suppress is within the terms of the statute it relies upon. Thus, a hospital cannot receive the benefit of section 1157 if it refuses to bear the associated burden of demonstrating why the information claimed to be immune should be deemed a record or proceeding of a medical staff committee." (*Santa Rosa Memorial Hospital v. Superior Court* (1985) 174 Cal.App.3d 711, 727, internal citations omitted.)

"Certain types of information are so clearly within the exclusive sphere of a protected medical staff committee - such as, for example, the infection control committee's self-generated analysis of the adequacy of work performed by hospital staff members engaged in infection control or of procedures utilized by them - that section 1157 can be found applicable without extensive judicial inquiry. On the other hand, when the information sought to be discovered relates to a matter that is not obviously within the sole purview of a protected committee - such as, for example, the nature of the infection control program administratively established in the hospital - the burden of showing that it is protected by section 1157 cannot be sustained except upon particularized judicial inquiry. The need for such inquiry is not eliminated by the fact that the person from whom discovery is sought is a member of a medical staff committee. ... Thus, when application of the statute to disputed discovery is not facially apparent, as will often be the case, the burden on the party resisting discovery ordinarily cannot be sustained except upon judicial inquiry into the pertinent facts at an *in camera* hearing. If it is revealed at such a hearing that only portions of a report or other document are derived from the work of a protected committee the court may order such portions

excised and compel disclosure of the remainder." (*Id.* at pp. 727–728, internal citations omitted.)

Here, defendant has not met its burden of showing that the documents sought in the requests for production are covered by section 1157's privilege. While defense counsel argues in the opposition brief that the documents are privileged peer review committee documents, she offers no evidence to support her argument other than a copy of a portion of the FSH bylaws and a copy of the defendant's privilege log. As discussed above, the privilege log is not very specific and does not even identify which withheld documents are responsive to which document requests. (Exhibit 2 to Tran decl.) In any event, the privilege log itself is not sworn under penalty of perjury and is not admissible evidence that the documents listed in the log are privileged. Thus, the privilege log does not satisfy defendant's burden of showing that the requested documents were properly withheld under section 1157.

The copy of an excerpt of FSH's bylaws is also insufficient to meet defendant's burden here, as the bylaws say nothing about what types of documents are relevant to the peer review committee, and indeed they do not discuss peer review committee procedures at all. (Exhibit 1 to Tran decl.) At most, the bylaws show that FSH medical staff has the authority to establish and maintain patient care standards, including developing a hospital-wide policy involving the oversight of care, treatment, and services provided by members and others in the hospital. (*Ibid.*) "The medical staff is also responsible for and involved with all aspects of delivery of health care within the hospital including, but not limited to, the treatment and services delivered by practitioners credentialed and privileged through the mechanisms described in these bylaws and the functions of credentialing and peer review." (*Ibid.*)

Presumably, this policy would include the establishment of a medical peer review committee. Indeed, the plaintiff has submitted a copy of another excerpt from the bylaws which discusses the peer evaluation process in some detail. (Exhibit J to Ryan decl., FSH Bylaws, p. 43.) Still, there is nothing in the partial copy of the bylaws submitted by the parties that would tend to show that the requested documents are covered by the privilege under section 1157. Therefore, the copy of the bylaws does not meet defendant's burden of showing that it properly withheld the documents under section 1157.

Likewise, defendant has not submitted any evidence to support its assertion of the attorney-client privilege, attorney work product doctrine, or the right to privacy. Again, defense counsel has only submitted a copy of the privilege log and an excerpt of the FSH bylaws without any other admissible evidence showing how the claimed privileges apply to the documents in question. Without some admissible evidence to show that a privilege applies, defendant has not met its burden of showing that it has properly withheld the documents under a claim of privilege.

On the other hand, it seems self-evident that at least some of the documents that plaintiff seeks are directly related to the hospital's peer review process, and thus they may be privileged. For example, requests 39 to 41 seek information about the criteria used by the hospital's peer review committee, when the peer review criteria were updated, and the type of data collected for evaluation pursuant to the criteria. Such

information is covered by the privilege under Evidence Code section 1157, and thus the documents sought by plaintiff's requests 39 to 41 are protected from discovery.

Plaintiff contends that he should be allowed to obtain the peer review criteria because the hospital's bylaws allow physician members to have access to the criteria used by the hospital's peer review committee. (Ryan decl., Exhibit J, p. 43, ¶ 6.1-1.) He claims that he is a member, and therefore he is entitled to access to the criteria. However, plaintiff has not presented any admissible evidence showing that he is still a member of the hospital, and it does not appear that he is because he admits that he no longer has privileges at the hospital. His attorney's statement that plaintiff is a "provisional staff member" of the hospital is not based on personal knowledge, and seems to be nothing more than an unsupported legal conclusion. (Ryan decl., p. 4, lines 11-13.) Therefore, plaintiff is not entitled to review the peer review criteria under section 6.1-1 of the bylaws. Because the peer review criteria fall under the section 1157 privilege, the court will not compel their production.

However, as discussed above, defendant has not provided any evidence to show that the other documents plaintiff seeks are privileged under section 1157, the attorney-client/work product privilege, or protected under the right of privacy. Requests 42 to 44 and 46 to 48 all seek documents related to communications by various witnesses who were apparently employees of FSH. Defense counsel claims in the opposition brief that these witnesses gave statements in relation to the peer review process, and thus the statements are privileged. Yet defendant has not offered any admissible evidence to support its contention that the witness statements were used by the peer review committee, or were in any way involved in the peer review process. Nor has defendant provided evidence stating that the witness statements were attorney-client communications or that they were generated by an attorney.

Still, it appears likely that most if not all of the statements were generated as part of the peer review process, or that they were created in anticipation of litigation. Even plaintiff's counsel seems to concede that many of the statements were provided as part of the peer review process, although he argues that they should be produced anyway because they contain discriminatory or defamatory statements. Plaintiff's contention here is unsupported by any authorities, and it is not consistent with the intent of section 1157, which broadly protects documents used in the peer review process.

Nevertheless, since defendant has not provided any evidence to support the application of the claimed privileges, the court will inspect the documents *in camera* to determine if they were generated as part of the peer review process. If they were documents provided to the peer review committee, or were part of the peer review proceedings in any way, then they are privileged under section 1157 and they may not be produced. On the other hand, if they were not provided to the peer review committee or considered by the committee, then the court will order defendant to produce them.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:** RTM **on** 5/3/22 .  
(Judge's initials) (Date)



(27)

**Tentative Ruling**

Re: **Wahlenmaier v. Baker**  
Superior Court Case No. 21CECG00834

Hearing Date: May 5, 2022 (Dept. 502)

Motion: By Plaintiff to Approve Sale

**Tentative Ruling:**

To grant the request to approve the sale, pending the scheduled hearing. (Code Civ. Proc., §§ 873.720; 873.730, subd. (a).)

**Explanation:**

The documents filed in support of this motion largely reflect the amounts, apportionments, and findings specified in previous court orders, and it appears that notice has been provided pursuant to Code of Civil Procedure section 873.720. Furthermore, the increase in the reimbursement amount to \$70,000 appears sufficiently addressed in the agreement attached to the declaration by Genifer Wahlenmaier.

Nevertheless, a hearing appears required. (See Code Civ. Proc., § 873.730, subd. (a) [*"At the hearing, the court shall examine the report and witnesses in relation to the report."* Emphasis added.].) Therefore, although the court's tentative ruling is to approve the sale, the hearing will go forward to comply with the applicable section.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

Issued By: RTM on 5/3/2022.  
(Judge's initials) (Date)