




Protecting Peer Review Privilege

Common Mistakes That Can Unintentionally Waive Confidentiality

WAMSS 47th Annual Education Conference : *Savoring Success: The Perfect Blend of Credentialing and Provider Enrollment*

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What We'll Cover Today

01 Peer Review Privilege What it is and why it matters	02 Legal Framework & Case Law Washington law overview (RCW 4.24.250)
03 Protected vs. Not Protected Clarity on what privilege covers	04 Common Mistakes Five ways organizations lose protection
05 High-Risk Scenarios Email, multi-entity systems, litigation	06 Best Practices Protecting confidentiality every day

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Why This Matters

- Candid Evaluation**
Enables honest assessment of physician performance
- Patient Safety**
Shields quality improvement efforts from outside interference
- Legal Shield**
Protects sensitive discussions from discovery & litigation
- ⚠️ Privilege Lost**
Internal discussions can become courtroom evidence
- Peer review privilege is powerful—but fragile.

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The Legal Framework (Washington)

Core Protection RCW 4.24.250
Protects peer review committee discussions, deliberations, and evaluations

"The proceedings, reports, and written records of [regularly constituted review committee or board of a professional society or hospital whose duty it is to evaluate the competency and qualifications of members of the profession], or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined in RCW 7.70.020 (1) and (2)."

Key Principle

Privilege is **statutory and conditional**

Not automatic. Not absolute.

What This Means

- Protection depends on how the process is structured
- Courts interpret privilege **narrowly**
- Small missteps can eliminate protection entirely

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What Is Protected — and What Is Not

✓ PROTECTED

Inside the Process

- Committee discussions & deliberations
- Opinions formed during review
- Documents *created specifically* for peer review

✗ NOT PROTECTED

Outside the Process

- Underlying factual patient records
- Documents created outside the process
- Information shared beyond the committee

☐ Privilege protects the process—not the underlying facts.

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How to Qualify for Peer Review Privilege



Proper Structure

Formally established committee with defined peer review purpose



Controlled Participation

Clearly defined membership limited to authorized participants only



Clear Function

Activities tied directly to quality improvement—not mixed with general business



Intentional Documentation


Records clearly created for peer review and marked confidential

☐ Privilege depends on structure and discipline.

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RCW 4.24.250 in the Courts

A case-by-case examination of how Washington's peer review privilege has been interpreted, tested, and refined — from foundational protection to the limits of digital data shielding.

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CASE 1: 1984

Coburn v. Seda — Establishing the Foundation of the Privilege

Fact Summary

During a medical malpractice lawsuit stemming from a fatal heart catheterization, the plaintiff sought access to records of a hospital committee that convened after the patient's death to review the incident. The central question: could those committee proceedings be compelled in discovery?

Key Findings — RCW 4.24.250


The Court confirmed that the "proceedings, reports, and written records" of a quality review committee are immune from discovery in civil actions. The legislative purpose is to encourage candid, self-critical evaluation within healthcare institutions.

Lessons Learned

- **The "Regularly Constituted" Requirement:** Privilege only attaches if the committee is a formally established body specifically tasked with evaluating patient care quality.
- **Remand for Determination:** When a committee's qualifying status is unclear, the trial court must hold an evidentiary hearing before ruling on privilege.

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CASE 2: 1985

Anderson v. Breda — Limits on Protecting Doctor Performance Facts

The Court drew a critical line between protecting committee deliberations and shielding the real-world outcomes of those deliberations — a distinction that practitioners must master.

Fact Summary

In a malpractice deposition, the plaintiff asked the defendant physician whether his hospital privileges had ever been revoked, suspended, or restricted. The doctor resisted on privilege grounds under RCW 4.24.250.

Key Finding

The Court held that the bare fact of a privilege restriction is not a "proceeding, report, or record" of a committee. The current status of a physician's staff privileges is therefore fully discoverable.

Privilege vs. Fact

The statute shields the committee's internal deliberations and reasoning — not the administrative result of a decision. Outcomes that flow into operational reality are not cloaked by privilege.


Source Matters

If a credentialing decision is executed by an administrator — rather than generated by a formal committee — the associated records are administrative, not privileged, and subject to discovery.

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CASE 6 - 2012

Lowy v. PeaceHealth — Databases and the "Cubes" Controversy

Fact Summary

A plaintiff seeking evidence of prior infusion complications requested relevant patient data. The hospital responded that the only means of retrieving this information was through its "Cubes" database — a proprietary system maintained exclusively by its quality improvement committee — and thus claimed wholesale protection under RCW 70.41.200, quality improvement privilege.

Key Finding — The Supreme Court's Answer


Relying on prior cases analyzing RCW 4.24.250, the Washington Supreme Court drew a sharp distinction: while the **database itself** may qualify as a privileged committee record, a hospital cannot use a privileged system as a vault to **hide otherwise discoverable underlying facts** — such as patient names, incident dates, or complication frequencies.

Lessons Learned

- **Anti-Tunneling Rule:** Hospitals may not deliberately store discoverable facts inside privileged quality databases to render them unreachable by plaintiffs.
- **The Hardship Factor:** If no alternative source exists, courts may compel production of the raw underlying facts — while still protecting the committee's deliberative process and internal analysis.

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CASE 6 - 2012

Fellows v. Moynihan (2012): A Landmark Case

This pivotal case clarified the boundaries of peer review privilege in Washington State, stemming from a serious birth injury.

Case Summary


- **Incident & Injury:** A child sustained severe injuries during vacuum-assisted delivery, leading to permanent liver and renal failure.
- **Corrective Action:** Following the incident and a similar prior case, the hospital's executive committee took corrective action, resulting in a physician surrendering privileges.
- **Discovery Dispute:** Plaintiffs sought the hospital's credentialing, privileging, and personnel records for the involved physicians.
- **Hospital Resistance:** The hospital refused, citing statutory peer review and quality improvement privileges.
- **Trial Court Error:** The initial court accepted the hospital attorney's certification without an independent review, failing to verify the privilege claims.

Key Lessons from the Ruling

<p>Strict Construction Privilege is strictly construed; limited only to its intended purposes.</p> <p>Discovery Shield Limit Privilege doesn't cover information existing outside committee meetings (e.g., original medical records).</p> <p>Outcomes Are Not Protected While deliberations are confidential, the fact of privilege restriction/revocation is discoverable.</p>	<p>Two-Prong Test Records must be generated by a regularly constituted committee AND be its actual proceedings/records.</p> <p>No Initial Credentialing Protection Initial credentialing records are discoverable; quality of care review hasn't occurred yet.</p> <p>Judicial Oversight Courts must conduct in camera reviews; attorney certifications are insufficient to prove privilege.</p>
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CASE 7 - 2013

Cornu-Labat v. Hosp. Dist. No. 2 of Grant County

This case highlighted the tension between peer review privilege and public transparency, particularly for public hospitals.

Case Facts

- Physician terminated after refusing psychological evaluation post-investigations.
- Requested investigative records under the Public Records Act.
- Hospital cited peer review (RCW 4.24.250) and quality improvement (RCW 70.41.200) privileges.

Key Ruling

- The WA Supreme Court found the hospital failed to prove its "privileged" records were from a "regularly constituted" committee.
- Remanded to determine if the investigating group met the narrow definition of a peer review committee.

Lessons Learned: Proving Peer Review Privilege

- Formal Committee Status**
Must prove records from a "regularly constituted committee"; ad hoc groups may not qualify.
- Narrow Construction**
In public settings, privilege is weighed against PRA transparency; ambiguity favors disclosure.
- The "Agents" Extension**
Only applies if agents act specifically for a properly established peer review body.
- In Camera Review**
Courts must privately review withheld records to confirm privilege claims.
- Burden of Proof**
The hospital bears the entire burden to document and prove statutory compliance.
- Potential for Sanctions**
Improper withholding can lead to attorney fees, costs, and daily penalties.

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CASE 8 - 2020

Seattle Children's Hospital v. King County (2020)

In 2020, public agencies were asked to disclose records under the PRA that were reported to them by Seattle Children's Hospital (SCH) regarding surgical site infections. Records were sent to SCH prior to disclosure and SCH objected.

Key Takeaways from the Ruling

Case Study:

- SCH sought to protect these records under quality improvement privilege (RCW 70.41.200).
- Many records included the words "confidential and protected quality improvement information per RCW 4.24.250 and 70.41.200."
- However, the court ruled that records held by public health agencies were not exempt from disclosure.
- This case highlighted that even if documents were stored with an internal Quality Improvement (QI) committee, they do not automatically become privileged if they exist independently in the files of a public agency.

Strict Construction: RCW 70.41.200 is narrowly interpreted; small missteps can waive protection.

The "Two-Prong" Test: For privilege to apply, records must be generated by a "regularly constituted" committee AND be the actual "proceedings, reports, and written records" of that committee.

No "Backdoor" Immunity: You cannot shield otherwise public or discoverable information simply by providing it to a review committee.

Separate Records: Documents must be "created specifically for" the committee to maintain privilege. General incident reports or mandatory reporting often remain discoverable.

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Key Doctrinal Themes Across All Cases

These five major themes emerge from Coburn through Seattle Children's, providing a comprehensive understanding of peer review privilege in practice:

The "Regularly Constituted" Requirement

Coburn, Fellows, and Corro-Labat all emphasize that privilege only attaches to formally established committees. Ad hoc groups, temporary investigations, and informal gatherings do not qualify. Courts will remain for evidentiary hearings if status is unclear.

Deliberations vs. Outcomes

Anderson established the critical line: committee discussions and reasoning are privileged, but factual results (privilege restrictions, decisions, outcomes) are discoverable. This distinction runs through every case.

No Judicial Exceptions

Venkataraman confirmed the privilege is absolute; courts will not carve out exceptions even for discrimination claims or compelling public policy concerns. The statute's language is unambiguous.

Broad Scope Beyond Malpractice

Audit & Adjustment expanded the privilege to "any civil action," including debt collection, contract disputes, and non-medical contexts. The privilege travels with the records.

The Anti-Tunneling Doctrine

Lowy established that institutions cannot hide independently discoverable facts by storing them exclusively in privileged databases. Courts will compel production of underlying facts when no alternative source exists.

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Practical Guidance for Litigators & Healthcare Institutions

For Plaintiffs' Counsel:

- You cannot access committee deliberations, but you CAN discover the outcomes: privilege restrictions, suspensions, revocations, and factual findings.
- Request the bare facts of credentialing decisions, not the reasoning behind them.
- If a hospital claims all relevant data is locked in a privileged database (Lowy), challenge the "no alternative source" assertion; courts may compel production.
- Discrimination claims offer no carve-out; peer review privilege applies equally in civil rights litigation.

For Defense Counsel & Hospitals:

- Prove formal committee status early and thoroughly; vague assertions will trigger in camera review and potential remand.
- Distinguish between initial credentialing (not privileged) and post-hire quality review (potentially privileged).
- Separate privileged deliberations from discoverable outcomes; don't try to shield the fact of a privilege restriction.
- Document committee composition, charter, meeting minutes, and decision-making authority to withstand judicial scrutiny.
- Avoid storing discoverable facts exclusively in privileged databases; maintain independent records of outcomes and factual findings.


For All Parties:

- RCW 4.24.250 is narrowly construed; ambiguity favors disclosure.
- Courts will conduct in camera review; attorney certifications alone are insufficient.
- The privilege applies in any civil action, not just malpractice.
- Burden of proof rests entirely on the party claiming privilege.

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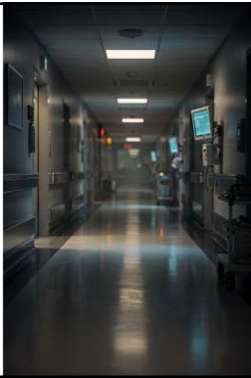
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Where Things Go Wrong

- Most privilege issues are **not intentional**
- Small, **everyday decisions** create real risk
- Minor missteps can lead to **full waiver**

This is where organizations lose protection.



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MISTAKE #1

Improper Disclosure

- Sharing materials **outside** the committee
- Forwarding peer review emails carelessly
- Copying **non-members** on communications
- Informal discussions outside protected settings

Disclosure outside the committee can waive privilege.

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MISTAKE #2

Mixing Business and Peer Review

Peer Review Function <ul style="list-style-type: none"> • Quality improvement discussions • Physician performance evaluations • Protected deliberations 	Business / Administrative Function <ul style="list-style-type: none"> • Operational decisions • HR and employment discussions • Leadership and board matters
<p>⚠ The Risk Dual-purpose meetings without clear separation can contaminate the entire discussion</p>	<p>The Consequence Mixing functions can remove protection from the entire discussion.</p>

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MISTAKE #3


Poor Documentation Practices

- Vague or **inconsistent labeling** on documents
- Minutes that include **non-peer review content**
- Failure to mark materials as **confidential**
- Overly detailed or **unfocused** documentation

Poor documentation can undermine or defeat privilege.

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MISTAKE #4


Including the Wrong Participants

- Unauthorized Attendees**
Non-members present during protected discussions
- Outside Consultants**
No defined peer review role or authorization
- Non-Committee Staff**
Support staff not formally part of the committee

Including the wrong participants may destroy privilege.

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MISTAKE #5

Using Peer Review Materials for Other Purposes

Peer Review: Materials created for protected review

Repurposing: Used for employment, litigation, or reports

Privilege Lost: Protection destroyed and unprotected

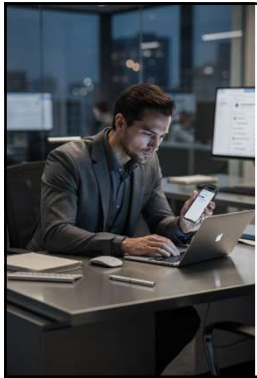
Once peer review materials cross into employment actions, legal proceedings, or external reporting, protection may be permanently lost.

Using peer review materials outside the process can destroy privilege.

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HIGH-RISK SCENARIO


Email & Digital Communications

- Forwarding peer review emails beyond protected recipients
- Broad distribution lists on sensitive communications
- Storing materials in **shared or unsecured** drives
- Informal messaging (text, chat) about peer review issues

Digital communication can easily expand beyond protected boundaries. Once shared broadly, privilege may be lost.

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HIGH-RISK SCENARIO

Multi-Entity Systems

Where Complexity Creates Risk

- Sharing peer review information across **affiliated entities**
- Hospitals vs. parent organizations — **different legal entities**
- Joint committees without **clearly defined structure**
- Assumed shared protection across entities

Privilege may not extend across entities without proper structure.

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HIGH-RISK SCENARIO

Litigation

Discovery Requests
Failing to assert privilege in response to subpoenas or document requests

Inadvertent Production
Unintentionally producing peer review materials in litigation

Testimony
Witnesses referencing protected peer review discussions on the stand

Once disclosed in litigation, privilege may be permanently lost. Missteps during legal proceedings have lasting consequences.

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Best Practice: Get Documentation Right



- Label Documents**
"Confidential Peer Review - Privileged" on all materials
 - Focused Minutes**
Keep meeting notes limited to peer review matters only
 - Avoid Unnecessary Detail**
Less is more — detail can invite scrutiny
 - Secure Storage**
Restricted access — not in general shared folders
- Be intentional — what you document matters.**

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Best Practice: Control Communication



Limit Distribution

Share only with formally designated committee members



No Casual Discussion

Avoid informal conversations outside protected meetings



Secure Systems

Use encrypted, access-controlled channels for all peer review materials



Train Staff

Ensure all participants understand privilege boundaries

Discipline in communication protects privilege.

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Responding to Requests & Investigations



- Centralize all legal review of incoming requests
 - Avoid informal or ad hoc disclosures — route through counsel
 - Use **privilege logs** to document protected materials
 - Engage legal counsel **early** — before responding
- Early, coordinated response protects privilege.**

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Key Takeaways

Structure Matters

Privilege requires a formally established, clearly bounded committee process

Small Mistakes, Big Risk

Everyday decisions — emails, attendees, labels — can waive protection

Discipline Is the Defense

Documentation, communication, and access controls must be consistent

Involve Counsel Early

When risk appears — in litigation, investigations, or complex systems — act fast

Peer review privilege is powerful — but only if you protect it deliberately.

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Questions?

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