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

EDWARD D. SMALLEY,

Plaintiff and Appellant,

v.

STEPHEN B. MANN, D.D.S.,

Defendant and Respondent.

H035663

(Santa Cruz County

Super. Ct. No. CV158339)

In this dental malpractice action, a jury found defendant and respondent Dr. Stephen B. Mann had not committed malpractice in treating plaintiff and appellant Edward D. Smalley. On appeal, Smalley challenges the trial court's in limine order excluding evidence of the Monterey Bay Dental Society and California Dental Association's peer review decision regarding his treatment with Dr. Mann on a number of grounds.

We review the admissibility of the peer review decision under Evidence Code section 1157,¹ which limits the discovery of the records and proceedings of professional society peer review committees and the compelled testimony of persons who attend peer review committee meetings, and hold that the Monterey Bay Dental Society (MBDS) and the California Dental Association (CDA) were peer review societies within the meaning

¹ All further statutory references are to the Evidence Code unless otherwise stated.

of section 1157. We also hold that the peer review decision in this case was inadmissible under section 1157 and that the trial court did not err when it ruled that Smalley's experts could not testify regarding the peer review decision. We will therefore affirm the judgment.

FACTS

After his long-time dentist (Dr. Michael Eurs) retired, Smalley started treating with Dr. Mann. During the five-year period from August 2001 until August 2006, Dr. Mann performed a number of restorations on Smalley's teeth, including crowns, bridges, implants, and veneers. He also repaired broken teeth and did a root canal and two extractions. During that time, Dr. Mann worked on 23 teeth; he installed crowns on 19 teeth, eight of which had dental implants. (Dr. George Yellich installed the dental implants; Dr. Mann installed the crowns on the implants.) The crowns on three teeth (Nos. 2, 8, 10) fractured and had to be repaired. One tooth fractured at the gum line and an existing bridge was redone and extended to include that tooth. Crowns had to be replaced or recemented.

Toward the end of the treatment, Smalley became dissatisfied and asked Dr. Mann for an accounting. According to Smalley, the accounting revealed that he had paid Dr. Mann \$22,000. Citing problems with his restorations, Smalley asked Dr. Mann for a refund. Dr. Mann told Smalley he could not afford to pay him a refund and suggested Smalley submit his claim to the peer review process offered by the CDA. Dr. Mann explained that if Smalley obtained a decision in his favor in the peer review process, then Mann's insurance company would pay his claim.

In November 2006, Smalley filed a request for peer review with the CDA and its local component, the MBDS. As part of the review process, Smalley signed a patient agreement in which he "consent[ed] to the review by the [MBDS] and the CDA according to the CDA's policies and procedures." The patient agreement provided: "By

virtue of the *California Evidence Code* Section 1157, neither the records nor any proceedings relating to this matter of the [MBDS's] Peer Review Committee, or of the CDA's Council on Peer Review can be provided or used to reveal information in any manner." In the patient agreement, Smalley (1) acknowledged that "Peer Review is an evaluative rather than judicial process"; (2) agreed to sign a "Release of All Claims form should the committee determine that a refund is in order"; (3) acknowledged that there would be no recovery for "pain and/or suffering" or wage loss; and (4) agreed to waive certain procedural rights, including representation by an attorney, the right to conduct discovery, the right to cross-examine Dr. Mann, and the right to present opposing evidence.

Smalley submitted a letter to the peer review committee in which he alleged that Dr. Mann's work "has resulted in a rapid bone loss, a bridge removed, an additional root canal, extraction of teeth that were healthy prior to the restoration, a misaligned bite, missing teeth, unsightly stubs where my teeth used to be, and now three needed additional implants." He complained that it was painful to chew; that his jaw popped; that he spoke with a lisp or a whistle; that he could not eat without biting his tongue, lips and cheeks; that food spit out of his mouth when he chewed; and that people stared at him. He told the committee he had returned to Dr. Eurs, who had resumed his dental practice. On a separate claim form, Smalley claimed he paid "approximately \$35,000 for this restoration"; in the letter he said he had spent \$40,300 "[t]o date."

A committee of three dentists from the MBDS reviewed Smalley's case. The committee reviewed Smalley's letter and claim form, as well as information from Dr. Mann, subsequent treating dentists, and Smalley's dental insurance company. On January 4, 2007, the dentists on the MBDS peer review committee examined Smalley's teeth.

On February 27, 2007, the peer review committee sent Smalley a written decision in the form of a letter on CDA letterhead (hereafter resolution letter). The committee

found that Smalley's complaints regarding the porcelain crowns on teeth Nos. 2, 4 through 14, and 21 through 31 were "valid," but concluded that the x-ray evidence did not support his claim of bone loss around the implants in three teeth on the lower right side. The committee concluded that Smalley was entitled to a refund of \$23,161.50 (\$18,939 to Smalley and \$4,222.50 to his dental insurer) and directed Dr. Mann to pay Smalley and his dental insurance company within 10 days of receipt of Smalley's "Release of All Claims" form. The committee "determined that no further harm was caused. Therefore, no corrective treatment is in order." The committee noted that Smalley had "a preexisting para-functional condition, with evidence of heavy wear [that] can cause [his] teeth to fracture."

In an addendum to the resolution letter, the committee explained that the porcelain crowns were "unacceptable due to breakages and occlusion problems" and noted that Smalley was a "bruxer" (a person who grinds his teeth) with "evidence of heavy wear on anterior teeth."

Neither the resolution letter nor the addendum identified the dentists that did the peer review; both documents were signed "Peer Review Committee." At deposition, Smalley could not recall the names of any of the dentists on the peer review panel. The names of the peer review committee members were never identified and none of the committee members was ever disclosed as either a percipient witness or an expert witness.

PROCEDURAL HISTORY

Smalley rejected the peer review award and sued Dr. Mann for professional negligence. The case went to trial on November 30, 2009. Smalley was 74 or 75 years old at the time of trial. In his trial brief, Smalley claimed \$82,556.50 for past dental expenses; \$10,000 for future treatment; and \$250,000 in general damages.

On the first day of trial, the trial judge heard motions in limine. Smalley's motion in limine No. 4 argued that "all documents relating to the" peer review process were admissible in evidence. Dr. Mann's motion in limine No. 14 argued that any and all evidence of the MBDS's intervention and decision should be excluded on six different grounds: (1) that it was barred by the provisions of the Patient Agreement; (2) that it is hearsay; (3) that it constitutes an offer to compromise; (4) that it is improper expert testimony; (5) that exclusion would further the legislative intent behind section 1157; and (6) that it was barred by section 352 because it would be unfair and prejudicial to Dr. Mann and would mislead the jury. Dr. Mann also argued that if the peer review was solely a fee dispute, as Smalley alleged, then the evidence was irrelevant, since the amount of the fee was not at issue in the litigation.

The trial court denied Smalley's motion in limine No. 4, granted Dr. Mann's motion in limine No. 14, and excluded all evidence of the peer review process and decision. The court stated, "I don't think that anything that came out of the peer review proceedings is admissible both on the basis of a contractual agreement that plaintiff entered into and agreed to submit the matter to peer review and, also, anything that would come out of the findings of the peer review committee would be hearsay." The court also reasoned that the evidence was "arguably" covered by section 1157 and that it was "settlement discussions[,] offers to compromise." The court stated, "I just can't imagine how you would overcome the hearsay problem associated with any of this evidence."

Smalley argued that this evidence was not barred by section 1157 because that code section only bars *discovery* of peer review evidence, not the *admission* of such evidence at trial. Smalley argued that he was not seeking to discover peer review records; instead, he sought admission of the resolution letter and all of the other documents relating to the peer review process. The court stated, "I think [the] California Supreme Court dealt with this in [*Fox v. Kramer* (2000) 22 Cal.4th 531 (*Fox*)] where they expressly said plaintiff can't use it at trial when it's precluded from obtaining

discovery. . . . So, on all grounds, it's not going to be admissible." When Smalley's counsel inquired whether he would be permitted to introduce evidence that Dr. Mann suggested Smalley go through the peer review process, arguing that it was an admission against interest, the court responded, "No. That would be inadmissible on [section] 352 grounds because the jury is going to want to know what the process is all about."

Both Smalley and Dr. Mann presented expert witness testimony at trial.² The jury concluded, in a special verdict, that Dr. Mann was not negligent in his diagnosis or treatment of Smalley. Smalley appeals.

DISCUSSION

I. Contentions on Appeal

Smalley attacks the trial court's ruling on the motions in limine regarding the peer review evidence on a variety of grounds. His primary contention is that the peer review evidence is not made inadmissible by section 1157. As a threshold issue, he argues that the CDA and the MBDS are not Business and Professions Code section 805 peer review bodies whose decisions are subject to section 1157. He also asserts that section 1157 only bars the *discovery* of peer review records and not the *admission* of the peer review committee's resolution letter at trial because the committee sent its resolution letter directly to Smalley. Smalley argues that the court should have allowed him and his experts to testify regarding the peer review process and that it was not necessary to subpoena anyone from the peer review committee to testify about the committee's decision.

² Dr. Mann's expert was John Baron, D.D.S.; Smalley's experts were John Derdivanis, D.D.S. and Mike Chen, D.D.S.; Smalley also disclosed Dr. Eurs as a nonretained expert.

Smalley also argues that this evidence is not inadmissible hearsay because it is subject to the business records exception (§ 1271). He asserts that he was not contractually barred from introducing the peer review evidence because the patient agreement is “trickily worded,” defective, adhesive, unenforceable, and misrepresents the law regarding section 1157. He contends that the peer review decision is not an offer of compromise because it is analogous to an arbitration award and did not come from Dr. Mann. He asserts that peer review evidence is highly relevant expert opinion, but not improper. He contends that the peer review evidence is not misleading and is more probative than prejudicial (§ 352). We begin by addressing the admissibility of this evidence under section 1157.

II. Section 1157

Section 1157 provides in relevant part: “(a) Neither the proceedings nor the records of organized committees of medical [or other professional] 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, or for that peer review body, . . . or dental review . . . committees of local . . . dental . . . societies, . . . , shall be subject to discovery. [¶] (b) Except as hereinafter provided, no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting. [¶] (c) The prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting, . . .”

Section 1157 preserves the confidentiality of the proceedings and records of peer review bodies and of organized committees of hospitals and specified professional associations charged with evaluating and improving the quality of care rendered by their members. (§ 1157; *West Covina Hospital v. Superior Court* (1986) 41 Cal.3d 846, 854

(*West Covina*.) Subject to certain exceptions, these proceedings and records are not subject to discovery (§ 1157, subd. (a)) and no one in attendance at the meetings of such committees may be required to testify regarding what transpired at the meeting (§ 1157, subd. (b)).

A. The MBDS and CDA Are Subject to Section 1157

As a threshold inquiry, we address Smalley’s contention that section 1157 does not bar admission of the peer review committee’s records because it applies only to a “peer review body” as defined in section 805 of the Business and Professions Code and the MBDS and CDA do not fit within that definition. Smalley argues that the MBDS and CDA are not “peer review bod[ies], as defined in Section 805 of the Business and Professions Code” because Dr. Mann made no showing that the MBDS was a peer review committee that is “subject to mandatory reporting, and which exist[s] for the purpose of policing the profession and protecting the public from incompetent or sub-par practitioners.” Smalley contends that the peer review committee in this case is a “voluntary committee that exists to mediate disputes between unhappy patients and dentists in the Monterey Bay Area” and that it “more closely resembles a Better Business Bureau group that exists primarily as a public relations device.”

1. Forfeiture

Dr. Mann argues that Smalley has “waived” this contention by failing to raise it in the trial court. Our review of the record persuades us that there has been no forfeiture. In his motion in limine, Smalley argued that section 1157 does not bar the use of evidence “from an investigation . . . by a dental society which is not aimed at improving the quality of care provided by the dentist, but which instead is aimed at resolving a fee dispute.” In our view, this was sufficient to encompass Smalley’s arguments regarding the nature of

the MBDS and CDA peer review committee. We therefore conclude that this contention has not been forfeited and proceed to the merits of this argument.

2. Analysis of the Merits

The peer review was conducted by the MBDS, a local component of the CDA, which is a constituent organization of the American Dental Association (ADA). (*Salkin v. California Dental Assn.* (1986) 176 Cal.App.3d 1118, 1120 (*Salkin*)). “The ADA is a nonprofit corporation . . . ; its purpose is to ‘encourage the improvement of the health of the public, to promote the art and science of dentistry and to represent the interests of the members of the dental profession and the public which it serves.’ The CDA is a constituent society of the ADA. Its name and territorial jurisdiction are set forth in the ADA charter, and its powers and duties as to membership, finances, and discipline are defined by ADA bylaws. Professional conduct of ADA members is governed by its Principles of Ethics, in conjunction with the code of ethics of each member’s constituent society.” (*California Dental Assn. v. American Dental Assn.* (1979) 23 Cal.3d 346, 350 (*California Dental Assn.*)). The ADA and the CDA are professional organizations of “quasi-public significance” because “[i]n the public view, membership in such organizations may appear to be tangible demonstration of professional competence and skill, professional responsibility, and acceptance by one’s peers.” (*Salkin, supra*, at pp. 1124-1125 [discussing a member’s due process rights].)

Although the peer review here was conducted by the MBDS, the local peer review committee’s decision was subject to “approval and finalization by the CDA.” The peer review was conducted in accordance with procedures set forth in the CDA Peer Review Manual and the CDA Quality Evaluation Manual and the resolution letter and addendum were both issued on CDA letterhead. In addition to conducting peer review evaluations, the CDA has the authority to discipline its members, including censure, suspension, expulsion, or exclusion from membership. (*Salkin, supra*, 176 Cal.App.3d at pp. 1120-

1121; *California Dental Assn.*, *supra*, 23 Cal.3d at p. 350.) Upon initiating the peer review process, the MBDS advised Dr. Mann that if he received three or more adverse peer review decisions in a 24-month period, he “could be referred to the CDA Judicial Council for investigation of possible ethical violations” and that “an adverse Judicial Council decision could result in a report to the Dental Board of California and the National Practitioner Data Bank.” Based on this record and authority, we reject Smalley’s contentions that the MBDS and CDA have no authority for policing the profession or protecting the public and that they exist primarily as a public relations device.

Smalley’s arguments require that we construe the language of section 1157 and Business and Professions Code section 805. “We give effect to statutes according to the usual ordinary import of the language employed in framing them. When statutory language is clear and unambiguous there is no need for construction, and courts should not indulge in it.” (*West Covina*, *supra*, 41 Cal.3d at p. 850.) The interpretation of a statute is a question of law, which we review *de novo*. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

When section 1157 was enacted in 1968, it applied only to the records and proceedings of “organized committees of medical staffs in hospitals having the responsibility of evaluation and improvement of the quality of care” and “medical review committees of local medical societies.” (*Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 626, fn. 1 (*Matchett*)). A 1975 amendment extended the statute’s provisions to “medical-dental staffs in hospitals” and “dental review committees of local . . . dental societies.” (Stats. 1975, ch. 674, § 1, pp. 1468-1469; see Historical and Statutory Notes, 29B West’s Ann. Evidence. Code, pt. 3B (2009 ed.) foll. § 1157, p. 484.) Thus, the peer review committee of the MBDS, a local component of the CDA, is covered by the express language of section 1157, since it is a “dental review committee of [a] local . . . dental society.” (§ 1157, subd. (a).)

Since 1975, section 1157 has been amended several times to expand its scope and extend its provisions to professional societies and review committees representing several types of caregivers, including dental hygienists, veterinarians, registered dietitians, chiropractors, podiatrists, acupuncturists, psychologists, marriage and family therapists, and licensed clinical social workers. (§ 1157; see Historical and Statutory Notes, 29B West's Ann. Evidence Code, pt. 3B, *supra*, at pp. 484-485; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1224, fn. 6 (*Alexander*), disapproved on another ground in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 719-724.)

The 1990 amendment to section 1157 broadened the statute's reach further, extending it to the proceedings and records of "a peer review body, as defined in Section 805 of the Business and Professions Code." (Stats. 1990, ch. 196, § 2; Historical and Statutory Notes, 29B West's Ann. Evidence Code, pt. 3B, *supra*, at p. 485.) Smalley's argument focuses on this provision in section 1157.

Business and Professions Code section 805's definition of a "peer review body" includes, in relevant part, "Any medical, psychological, marriage and family therapy, social work, *dental*, or podiatric *professional society* having as members at least 25 percent of the eligible licentiates in the area in which it functions (which must include at least one county), which is not organized for profit and which has been determined to be exempt from taxes pursuant to Section 23701 of the Revenue and Taxation Code." (Bus. & Prof. Code, § 805, subd. (a)(1)(C).)³ The statutory definition of "licentiate" includes "dentist." (*Id.* subd. (a)(2).)

³ Business and Professions Code section 805's definition of a "peer review body" also includes: "(A) A medical or professional staff of any health care facility or clinic licensed under Division 2 (commencing with Section 1200) of the Health and Safety Code or of a facility certified to participate in the federal Medicare Program as an ambulatory surgical center. [¶] (B) A health care service plan registered under Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code or a disability insurer that contracts with licentiates to provide services at alternative rates of payment pursuant to Section 10133 of the Insurance Code. [¶] . . . [¶]"

In our view, the MBDS and the CDA are also covered by the express language of Business and Professions Code section 805, since the CDA is a dental professional society which is not organized for profit. (See *California Dental Assn.*, *supra*, 23 Cal.3d at p. 350.)⁴

Smalley argues that the MBDS and CDA are not “peer review bod[ies], as defined in Section 805 of the Business and Professions Code” because they did not file an “ ‘805 report’ ” in this case. ~(AOB 17-18)~ Business and Professions Code section 805, subdivisions (b), (c), and (e) require that a peer review body file a written report with the “relevant agency” (in this case the Dental Board of California, which regulates the practice of dentistry (Bus. & Prof. Code, §1601.1)) when specified events occur. For example, subdivision (c) of the statute requires an “805 report” when “as a result of an action of [the] peer review body,” for a disciplinary cause or reason: (1) a dentist’s application for staff privileges or membership is denied or rejected; or (2) a dentist’s staff privileges, membership, or employment are terminated or revoked; or (3) restrictions are imposed, or voluntarily accepted, on a dentist’s staff privileges, membership, or employment for 30 days or more in a 12-month period. (Bus. & Prof. Code, § 805,

(D) A committee organized by any entity consisting of or employing more than 25 licentiates of the same class that functions for the purpose of reviewing the quality of professional care provided by members or employees of that entity.” (Bus. & Prof. Code, § 805, subd. (a)(1).)

⁴ Smalley does not challenge the MBDS’s status as a peer review body within the meaning of Business and Professions Code section 805, subdivision (a)(1)(C) on the grounds that its members do not include “at least 25 percent of the eligible licentiates in the area in which it functions,” that it does not serve at least one county, or that it is not tax exempt. These requirements appear to have been undisputed below and there is no evidence relating to these requirements in the record. (But see <<http://www.mbdsdentist.com>> [as of Aug. 5, 2011] [MBDS serves Monterey, Santa Cruz, and San Benito Counties].) For these reasons, we conclude that any challenge based on these statutory requirements has been forfeited and we do not address them further.

subd. (b).) Other circumstances that require a peer review body to file an “805 report” are listed in subdivisions (c) and (e) of section 805, which are quoted in the margin.⁵

In this case, the MBDS and CDA concluded that some of Smalley’s complaints were valid and recommended that Dr. Mann refund him \$23,161.50. Recommending a refund to resolve a disputed claim about the quality of care is not one of the circumstances that require the filing of an “805 report” under Business and Professions Code section 805. That an “805 report” was not required under the circumstances of this case does not mean that the MBDS and the CDA are not peer review bodies within the meaning of Business and Professions Code section 805 and section 1157.

Smalley also argues that the MBDS and the CDA were not peer review bodies within the meaning of Business and Professions Code section 805 because the peer review here “was not launched [to determine] whether Dr. Mann was qualified to practice dentistry, or to be a member of the society, or to renew his dental license.” Instead, it was undertaken to determine whether Smalley “should receive a partial or complete refund . . . , given the outcome of the treatment performed by Dr. MANN.”

The statutory definition of “peer review body” in Business and Professions Code section 805, subdivision (a)(1)(C) includes “any . . . dental . . . professional society” whose members include “at least 25 percent of the eligible [dentists] in the area in which

⁵ Business and Professions Code section 805, subdivision (c) provides in relevant part: “The . . . chief executive officer, medical director, or administrator of any peer review body . . . shall file an 805 report with the relevant agency within 15 days after any of the following occur after notice of either an impending investigation or the denial or rejection of the application for a medical disciplinary cause or reason: [¶] (1) Resignation or leave of absence from membership, staff, or employment. [¶] (2) The withdrawal or abandonment of a licentiate’s application for staff privileges or membership. [¶] (3) The request for renewal of those privileges or membership is withdrawn or abandoned.” Subdivision (e) of the statute provides that an “805 report shall also be filed within 15 days following the imposition of summary suspension of staff privileges, membership, or employment, if the summary suspension remains in effect for a period in excess of 14 days.”

it functions . . . , which is not organized for profit,” and which is tax exempt. The statute does not define “peer review body” by the type of task performed. Section 1157, subdivision (a) provides in relevant part that “[n]either the proceedings nor the records 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 . . . for that peer review body, or . . . dental review . . . committees of local . . . dental . . . societies, . . . , shall be subject to discovery.” Section 1157 applies to peer review bodies that are responsible for “the evaluation and improvement of the quality of care” and is not limited to functions related to the membership in the society or qualifications to practice the profession or renew a professional license. In fact, licensing and license renewal are the province of the “relevant state licensing agency” (i.e., Dental Board) and not the peer review bodies, although, as noted before, peer review bodies must report certain actions that they take that are relevant to a member’s competence or professional conduct to the “relevant agency.” (Bus. & Prof. Code, § 805.) The peer review done by the MBDS and CDA included an evaluation of the quality of care rendered by Dr. Mann. We therefore reject Smalley’s contention that the MBDS was not a peer review body because the purpose of the peer review was not to determine “whether Dr. Mann was qualified to practice dentistry, or to be a member of the society, or to renew his dental license.”

In summary, we conclude that section 1157 applies to the peer review in this case because the MBDS is both “a peer review body, as defined in Section 805 of the Business and Professions Code” and a “dental review committee[.]” of a “local dental societ[y].” (§ 1157.)

B. Section 1157 Bars Admission of the Peer Review Decision and Records

Smalley contends that even if section 1157 applies to the peer review committee in this case, it does not bar him from introducing the peer review records at trial. He argues that section 1157 creates an immunity from discovery, not an evidentiary privilege. He

asserts that if the Legislature had intended to bar admission of peer review evidence, it could have expressly provided that it was “inadmissible” in section 1157, as it has done in other parts of the Evidence Code.

In 1974, prior to the amendments that added dental and other professional societies to section 1157, the Third District Court of Appeal described the legislative policies and concerns relating to the admission of evidence of the records and proceedings of peer review committees in judicial proceedings in *Matchett, supra*, 40 Cal.App.3d at pages 628-630. *Matchett* has been referred to in numerous cases and since it “reflects the various concerns the Legislature balanced in adopting section 1157,” we repeat its oft-quoted analysis here. (*West Covina, supra*, 41 Cal.3d at p. 856 and cases cited therein.) *Matchett* states: “In an accredited hospital, the organized medical staff is responsible to the hospital governing body for the quality of in-hospital medical care; [Citations.] When medical staff committees bear delegated responsibility for the competence of staff practitioners, the quality of . . . care depends heavily upon the committee members’ frankness in evaluating their associates’ medical skills and their objectivity in regulating staff privileges. Although composed of volunteer professionals, these committees are affected with a strong element of public interest. [¶] California law recognizes this public interest by endowing the practitioner-members of hospital staff committees with a measure of immunity from damage claims arising from committee activities. (Civ. Code, § 43.7^[6]; *Ascherman v. San Francisco Medical Society* (1974) 39 Cal.App.3d 623.) [S]ection 1157 expresses a legislative judgment that the public interest in medical staff candor extends beyond damage immunity and requires a degree of confidentiality.” (*Matchett*, at pp. 628-630.)

⁶ This same immunity now applies to “any member of any peer review committee whose purpose is to review the quality of . . . dental . . . services rendered by . . . dentists” (Civ. Code, § 43.7, subd. (b).)

Section 1157 was enacted “in apparent response to” *Kenney v. Superior Court* (1967) 255 Cal.App.2d 106, which “sustained a malpractice plaintiff’s claim to discovery of hospital staff records which might reveal information bearing upon the competence of the defendant doctor.” (*Matchett, supra*, 40 Cal.App.3d at p. 629.) The plaintiffs’ access to medical files revealing committee investigations and appraisals of their peers in *Kenney* raised a public policy question. (*Ibid.*) “Section 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgment that the quality of . . . practice will be elevated by armoring staff inquiries with a measure of confidentiality. [¶] This confidentiality exacts a social cost because it impairs malpractice plaintiffs’ access to evidence. In a damage suit for . . . malpractice against doctor or hospital or both, unavailability of recorded evidence of incompetence might seriously jeopardize or even prevent the plaintiff’s recovery. Section 1157 represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs’ access to evidence.” (*Matchett*, at p. 629.)

The *Matchett* court stated that “section 1157 establishes an immunity from discovery but not an evidentiary privilege in the sense that medical staff records are excluded from evidence. It stands in contrast with . . . section 1156, which expressly subjects to discovery hospital staff studies made for the purpose of reducing morbidity or mortality, but excludes them as evidence. Because discoverability is our only concern, we need not decide whether section 1157 forms an exclusionary rule barring hospital staff records as evidence.” (*Matchett, supra*, 40 Cal.App.4th at p. 629, fn. 3.) Thus, *Matchett* did not reach the question presented here: whether section 1157 bars the introduction of peer review committee records at trial.

Addressing this question, we begin by noting that section 1157 is not completely silent on the question of the admissibility of peer review evidence at trial. Section 1157 expressly addresses the question of trial testimony in subdivision (b), which provides that

“no person in attendance at a meeting of [a peer review committee] shall be required to testify as to what transpired at that meeting.” (*Fox, supra*, 22 Cal.4th at pp. 544-545.) In addition, two Supreme Court cases, *West Covina* and *Fox*, have reviewed the question whether peer review evidence is admissible at trial under section 1157.

The issue in *West Covina* was whether section 1157 precluded a hospital medical review staff committee member from *voluntarily* testifying about the proceedings of the committee in a medical malpractice action that alleged negligence by a surgeon and negligence by the hospital in granting surgical privileges and retaining the surgeon on its staff. (*West Covina, supra*, 41 Cal.3d at p. 849.) The *West Covina* court construed the language of section 1157, subdivision (b), which provides that no person who attends a meeting of a peer review committee “shall be *required to testify* as to what transpired at that meeting” (italics added). (*West Covina*, at pp. 849-855.) The court distinguished voluntary testimony from compelled testimony and held that “section 1157, subdivision (b) prohibits required testimony but does not preclude voluntary testimony.” (*West Covina*, at pp. 854-855.) The Court explained, “Seeking to promote the voluntary participation of professionals in the peer review process so as to improve the quality of . . . care, the Legislature sought to promote the effectiveness of the committees by protecting the practitioner-members and by providing a measure of confidentiality so as to promote candor and objectivity. However, as *Matchett* recognizes, there are competing concerns such as the interests of victims of medical malpractice.” (*Id.* at p. 854.) The court observed that section 1157 contains some express exceptions⁷ and

⁷ The exceptions discussed in *West Covina* are found in subdivision (c) of section 1157, which provides: “The prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.” (*West Covina, supra*, 41 Cal.3d at pp. 849-850 & fn. 3.) Additional exceptions are found in subdivisions (d) and (e) of section 1157,

reasoned that “by providing exceptions from the prohibitions of compelled discovery and required testimony, the Legislature has recognized that the competing concerns in the designated circumstances take precedence over its intent to promote candor by confidentiality.” (*West Covina*, at pp. 849-850, 854.)

The *West Covina* court reasoned that the “[e]xclusion of compelled testimony alone serves the purposes and has the effects enumerated in *Matchett*. Thus, exclusion of compelled testimony will promote voluntary participation and candor and frankness of committee members. To this extent the Legislature has provided a measure of confidentiality which no doubt will seriously jeopardize and prevent recovery by many malpractice plaintiffs. [¶] Extending the prohibition to voluntary testimony would further promote candor and frankness and would prevent recovery by additional plaintiffs. However, such extension is not essential to the promotion of the legislative purposes, and it is for the Legislature to determine how far to go in promoting its various goals. The Legislature has recognized in subdivisions (c), (d) and (e) [of section 1157] that confidentiality must give way to the need for evidence in the specified circumstances. We have no reason to assume that the Legislature was not carefully balancing the need for confidentiality against the need for evidence in subdivision (b) of the section as well, and there is no justification for courts to strike a different balance.” (*West Covina*, *supra*, 41 Cal.3d at pp. 854-855.)

which provide: “(d) The prohibitions in this section do not apply to medical, dental, [or other enumerated health care professional] committees that exceed 10 percent of the membership of the society, nor to any of those committees if any person serves upon the committee when his or her own conduct or practice is being reviewed. [¶] (e) The amendments made to this section by Chapter 1081 of the Statutes of 1983, or at the 1985 portion of the 1985-86 Regular Session of the Legislature, or at the 1990 portion of the 1989-90 Regular Session of the Legislature, or at the 2000 portion of the 1999-2000 Regular Session of the Legislature, or at the 2011 portion of the 2011-12 Regular Session of the Legislature, do not exclude the discovery or use of relevant evidence in a criminal action.”

Fox also considered the admissibility of peer review evidence at trial. *Fox* was a medical malpractice action in which the plaintiffs (husband and wife) sued two physicians and a hospital for malpractice allegedly arising out of a colonoscopy procedure done on the wife. (*Fox, supra*, 22 Cal.4th at pp. 535-536.) After the procedure was done, the plaintiffs complained to the hospital, and as a result, hospital staff discussed the case at a peer review committee meeting. (*Id.* at p. 535.) Years later, the plaintiffs filed a complaint with the California Department of Health Services (DHS), which assigned Dr. Michael Schnitzer to investigate the matter. As part of his investigation, Dr. Schnitzer reviewed the minutes of the hospital peer review committee meeting and other records and prepared a draft preliminary report. His report was never finalized and DHS took no action against the hospital. (*Id.* at p. 536.) Shortly before trial, the plaintiffs issued a trial subpoena for the DHS draft preliminary report. They also moved to augment their expert witness list to include Dr. Schnitzer and subpoenaed him to testify at trial. The DHS moved to quash the subpoena on the ground that Dr. Schnitzer had relied substantially on the peer review committee materials in formulating his opinions. The defendant doctors made a motion in limine to exclude any reference to the peer review process, and the hospital moved to exclude evidence of the DHS investigation and Dr. Schnitzer's report, on various grounds, including that they were privileged under section 1157. The trial court granted the DHS's and the doctors' motions; it denied the hospital's motion as moot, since it had determined that Dr. Schnitzer was not going to testify. The jury reached a unanimous verdict for the defendants. (*Fox, supra*, at pp. 536-538.)

On appeal in *Fox*, the Supreme Court held that the plaintiffs could not subpoena Dr. Schnitzer to give expert testimony or refer to his report at trial "when his conclusions were based on hospital peer review committee records reviewed in the course of his official duties for a public agency." (*Fox, supra*, 22 Cal.4th at pp. 535, 540.) The court explained that the peer review committee records were immune from discovery under

section 1157. (*Fox*, at p. 540.) The court observed that section 1157, subdivision (a) “ ‘[b]y its terms . . . creates only a privilege against discovery from medical staff committees; it does not create a bar against introduction of evidence’ otherwise properly obtained” and stated, “Literally, section 1157 establishes an immunity from discovery but not an evidentiary privilege in the sense that [peer review] records are excluded from evidence.” (*Fox*, at p. 539, quoting *Matchett*, *supra*, 40 Cal.App.3d at p. 629, fn. 3.) But the court held that the records that are protected from discovery by section 1157 also cannot be subpoenaed for trial. The court explained that the plaintiffs “could not accomplish indirectly what was forbidden to them to do directly, i.e., obtain the equivalent of *discovery* of the contents of hospital peer review committee records, by subpoenaing the testimony or the report of the DHS investigator who reviewed them in the course of his public duties. When, as here, an expert has relied on privileged material to formulate an opinion, the court may exclude his testimony or report as necessary to enforce the privilege.” (*Fox*, at p. 541.)

In response to the plaintiffs’ argument that section 1157 only immunizes peer review records from pretrial discovery and does not confer immunity from subpoena at trial, the *Fox* court stated: “The distinction that they attempt to draw between the pretrial exchange of information and trial evidence does not withstand scrutiny; [S]ection 1157, subdivision (a), does not bar introduction of evidence voluntarily offered by a participant in the peer review proceedings or voluntarily produced in the course of discovery. But the purpose of the provision—preserving the confidentiality of hospital peer review proceedings—would clearly be undermined if a party in a civil action could obtain through a trial subpoena the same evidence that it was prohibited from obtaining through a pretrial discovery request, i.e., otherwise privileged materials. The Legislature could not have intended such an absurd result. The evidence at issue herein was not subject to compulsory process by a party to a civil action *at any time*.” (*Fox*, *supra*, 22 Cal.4th at p. 542.)

Section 1157 protects the “records” and “proceedings” of specified peer review committees. These terms are construed broadly to limit external access to the peer review process. (*Alexander, supra*, 5 Cal.4th 1218, 1225, fn. 6.) Thus, the protection is not limited to documents *generated by or prepared by* the peer review committee and extends to documents *submitted to* the committee from outside sources. (*Id.* at pp. 1227-1228 [protection extends to physicians’ applications and reapplications for hospital staff privileges].) In addition, the identities of the peer review committee members are so intimately related to the evaluation itself that they fall within the privilege. (*Cedars-Sinai Med. Center v. Superior Court* (1993) 12 Cal.App.4th 579, 588 (*Cedars-Sinai*).) To encourage candid evaluations, the identities of the professionals who serve on peer review committees are protected. (*Id.* at p. 588.)

Without a doubt, the resolution letter was a “record” of the committee. Applying these rules to this case, Smalley was not entitled to obtain the peer review committee’s records through pretrial discovery. (§ 1157, subd. (a).) None of committee members signed the resolution letter or the addendum and Smalley was not entitled to learn their identities through pretrial discovery. (*Cedars-Sinai, supra*, 12 Cal.App.4th at p. 588.) Smalley cannot compel the committee members to testify and none of them has voluntarily agreed to testify. (§ 1157, subd. (b); *West Covina, supra*, 41 Cal.3d at pp. 854-855.) Smalley cannot subpoena the peer review records for trial and accomplish indirectly what section 1157 expressly forbids, the discovery of the records of the peer review committee. (*Fox, supra*, 22 Cal.4th at p. 541.) The question here is whether Smalley can introduce the resolution letter, which says that some of his claims are “valid,” and the other peer review documents in his possession into evidence.

This case is factually distinguishable from *Fox* in one important respect. Unlike the plaintiff in *Fox*, who had not obtained the peer review records before trial, Smalley had already received the resolution letter, which was sent to him directly by the peer review committee when it completed its review of his claim, prior to filing his

malpractice action.⁸ He may also have received a copy of the addendum. Seizing on this point, Smalley argues that peer review proceedings in this case were not confidential since the “outcome of the ‘peer review’ ” (the resolution letter) was voluntarily disclosed to him and that the whole purpose of the peer review process was to provide him with a decision. He asserts that the decision was not secret or subject to any kind of restraint on use⁹ and that the anonymity of the peer review process was preserved by not naming the peer review committee members in the decision.

Section 1157 does not expressly address the admissibility of a peer review committee’s dispute resolution letter that the committee sends directly to the parties to the dispute prior to litigation. Section 1157 contains exceptions from the statute’s prohibitions by which “the Legislature has recognized that the competing concerns” such as the interests of the victims of malpractice “take precedence over its intent to promote candor by confidentiality.” (*West Covina, supra*, 41 Cal.3d at pp. 849-850, 854.) But none of the exceptions in the statute address the situation presented here. The only exception that arguably has any application to this case is found in subdivision (c) of the

⁸ The record is silent on the questions whether the peer review documents were voluntarily produced in discovery and, if so, who produced them. Smalley’s motion in limine specifically mentioned the “dispute resolution letter,” but also sought admission of “all documents relating to” the peer review process. Smalley did not attach copies of the documents he sought to introduce at trial to his motion in limine. The letters and forms described in our statement of facts were attached to Dr. Mann’s motion in limine and to his opposition to Smalley’s motion in limine as exhibits. The resolution letter was addressed to Smalley and indicates that a copy was sent to Dr. Mann.

⁹ Contrary to Smalley’s assertion, this evidence was arguably subject to a restraint on use. Before beginning the peer review process, Smalley agreed in the patient agreement that “By virtue of *California Evidence Code* Section 1157, neither the records nor any proceedings relating to this matter of the dental society’s Peer Review Committee, or of the CDA’s Council on Peer Review can be provided or used to reveal information in any manner.” As we explain *ante*, although Smalley challenges the enforceability of this provision, we shall not reach the issue.

statute, which provides that section 1157 “does not apply to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting.”¹⁰ By its terms, this exception applies to any statements made by Smalley or Dr. Mann, the parties to this malpractice action, at the peer review committee meeting or meetings. Smalley, however, does not seek the admission of any statements he or Dr. Mann made to the peer review committee; he seeks the admission of the peer review committee’s resolution letter. In addition, the “statement by persons in attendance” exception does not apply to malpractice actions. (*University of Southern California v. Superior Court* (1996) 45 Cal.App.4th 1283, 1291.) “ ‘[T]o declare that the immunity is to be set aside when [the health care professional is a party] to the malpractice proceedings would not only achieve an absurd result, but would render sterile the immunity provisions of the statute.’ ” (*Ibid.*, quoting *Schulz v. Superior Court* (1997) 66 Cal.App.3d 440, 445.)

In our view, the purpose of preserving the confidentiality of peer review proceedings and the goal of promoting the voluntary participation of health care professionals in the peer review process would be seriously undermined if, in cases such as this, where a peer review committee resolves a patient-provider dispute, a party to a civil action was permitted to introduce the decision of the peer review committee as evidence at trial when the peer review committee has not voluntarily produced the report during discovery or agreed to voluntarily testify about the report at trial. (*Fox, supra*, 22 Cal.4th at p. 542.) We note that the admission of the resolution letter alone would have had as much force and effect as if one or more of the committee members had testified. The peer review process depends on the voluntary participation, candor, and frankness of the committee members (*West Covina, supra*, 41 Cal.3d at p. 854), as well

¹⁰ See footnote 8, which sets forth the exceptions stated in section 1157, subdivisions (c), (d), and (e).

as the candor and frankness of health care professionals like Dr. Mann, who submit their disputes to the peer review process and provide information to peer review committees (*Alexander, supra*, 5 Cal.4th at pp. 1227-1228).¹¹ In cases involving patient-provider disputes, the peer review committee will almost always provide the patient with some kind of written decision or resolution of the dispute. To rule such evidence admissible simply because the patient received a copy of the decision, would impact potential committee members' willingness to serve on peer review committees and defeat the purposes of section 1157.

In summary, we hold that section 1157 bars the admission into evidence of the decision of a peer review committee that has resolved a patient-provider dispute in the circumstances presented here, where although the peer review committee provided its decision to the parties to the dispute, the peer review committee has not voluntarily produced the decision during discovery and none of the committee members has voluntarily agreed to testify regarding the peer review process or the committee's decision. (*Fox, supra*, 22 Cal.4th at p. 542.) For these reasons, we conclude that the trial court did not err when it held that the peer review evidence was inadmissible at trial.

III. Exclusion of Expert Testimony Regarding Peer Review Decision

Citing section 801, subdivision (b), Smalley argues that his experts should have been allowed to testify regarding the peer review evidence because it is the type of

¹¹ The peer review committee urged Dr. Mann to respond to Smalley's complaints on a "Treating Dentist's Reply Form" and to provide the committee with "all pertinent data which will enable a complete review" such as "study models, a copy of the treatment record, financial records, all radiographs, copies of relevant insurance forms, and other information [that] you think will assist the committee." The committee advised Dr. Mann that he had the right to appear before the committee, but cautioned him that his submission of the reply form, records and appearance would be his only opportunity to "present his side of the story."

evidence an expert may reasonably rely on in forming an opinion. Smalley asserts the trial court's in limine ruling deprived him of testimony from his experts that their review of the records, including the peer review decision, and their examinations of Smalley led to the conclusion that Dr. Mann's treatment was negligent. He argues that the fact that the peer review committee ordered a refund supported his claim that Dr. Mann failed to meet the standard of care and asserts that the peer review decision would have assisted his expert witnesses in understanding the standard of care in the community.

Section 801 permits an expert to testify to an opinion that is “[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, *that is of a type that reasonably may be relied upon by an expert in forming an opinion* upon the subject to which his testimony relates, *unless an expert is precluded by law from using such matter as the basis of his opinion.*” (§ 801, subd. (b); italics added; *People v. Coleman* (1985) 38 Cal.3d 69, 90.)

In *Fox*, the California Supreme Court explained that the records of peer review committee investigations are privileged from discovery and compelled testimony under section 1157, subdivision (a). (*Fox, supra*, 22 Cal.App.4th at pp. 538.) The *Fox* court also instructed that when “an expert has relied on privileged material to formulate an opinion, the court may exclude [the expert's] testimony or report as necessary to enforce the privilege.” And since we hold that the peer review resolution letter and peer review evidence at issue here were inadmissible under section 1157, the expert witnesses were “precluded by law from using such matter as the basis of [their] opinion[s].” (§ 801, subd. (b).)

Moreover, while section 801 permits an expert to testify about the basis of his or her opinion, it was “not intended to be a channel by which testifying [experts] can place the opinion of innumerable out-of-court [experts] before the jury.” (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 895.)

Finally, there is no evidence that Smalley's experts relied on or reviewed the peer review evidence either to determine the standard of care or to evaluate Dr. Mann's alleged negligence. In his motion in limine, Dr. Mann told the court that Smalley's experts had not testified in deposition that they had reviewed or relied on the peer review evidence. Smalley did not dispute that assertion.¹²

For these reasons, we conclude that the court did not abuse its discretion when it held that the expert witnesses could not testify regarding the peer review evidence.

IV. Hearsay, Enforceability of Patient Agreement, and Other Contentions

Since we hold that the court properly excluded the peer review evidence under section 1157, we shall not reach Smalley's contentions (1) that the peer review decision was admissible under the business records exception to the hearsay rule; (2) that he was not contractually barred from introducing the peer review evidence because the patient agreement is unenforceable; (3) that the peer review decision is not an offer of compromise; and (4) that the peer review evidence is not misleading and is more probative than prejudicial (§ 352).

DISPOSITION

The judgment is affirmed.

¹² Smalley disclosed two retained experts and one non-retained expert. The record on appeal contains only materials relating to the motions in limine. We do not have the deposition testimony or the trial testimony of any of the experts.

Lucero, J.*

I CONCUR:

Bamattre-Manoukian, Acting, P.J.

I CONCUR IN THE JUDGMENT ONLY:

Mihara, J.

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.