April 27, 1988

The Honorable Malcolm Lucas, Chief Justice
The Honorable Associate Justices of the
Supreme Court of California
4250 State Building, 350 McAllister Street
San Francisco, CA 94102

Re: Gill v. Mercy Hospital

No.: _____
5th Civ. No. F008277

Dear Chief Justice Lucas and Associate Justices:

On behalf of the California Medical Association, we respectfully request that this Court decertify the opinion in the above-entitled case or grant the review requested by Petitioner Zora S. Gill, M.D.[1]

The California Medical Association is a non-profit unincorporated professional association of approximately 33,000 physicians practicing in the State of California. CMA's membership includes most of the California physicians who are engaged in the private practice of medicine, in all specialties. The Association's primary purposes are: "... to promote the science and art of medicine, the care and well-being of patients, the protection of the public health, and the betterment of the medical profession ...".

A. INTRODUCTION

A procedure which permits the prosecutor to select the evidence which it will divulge, determine whether legal representation will be permitted, shift the burden of proof, permit a witness for the prosecution to participate in the jury's deliberations, and limit judicial review to a search for substantial evidence supporting the verdict, is neither "fair" nor reasonably calculated to determine the truth. Yet this is in essence the procedure upheld by the Court of Appeal in this case. Relying primarily on this Court's opinion in Anton v. San Antonio Community Hospital (1977) 19 Cal.3d 802 (Anton I), the Court of Appeal ruled that Dr. Gill received a fair hearing despite the fact that:

1) he did not have access to evidence — his monitor reports — which was directly relevant to the charges that he exhibited a pattern of substandard

---

[1] We also understand that similar issues are raised in another case pending before this Court, Sywak v. O'Connor Hospital No. (6th Civ.) No. H001982.

medical judgment and technique, and indeed, directly relevant to the case upon which the Judicial Review Committee expressed the greatest concern;

2) he was precluded from having an attorney represent him, and because he was notified in the notice of charges that no attorney would be permitted, he was wholly precluded from even making the case that he needed an attorney to represent him;[2]

3) even though he did not have legal counsel, he was not permitted to present rebuttal evidence directly following the presentation of each monitor report, as he repeatedly requested, but was required to wait until after the case against him had been fully presented before he was afforded any chance to rebut the charges;

4) even though he did not have any subpoena power or right to discovery, or even access to directly relevant and potentially exculpatory information in the hospital's possession, he was required to prove "by an appropriate showing that the charges or grounds involved lack any factual basis or that such basis or any action based thereon is either arbitrary, unreasonable or capricious";

5) the hospital administrator, a person of substantial power and a witness against him, sat in on the Judicial Review Committee's deliberations; and

6) the court reviewed the "record" thus created under the "substantial evidence test".

Anton I does not support the Court of Appeal's decision in this case. To the extent this Court's rulings on the right to counsel and burden-of-proof issues provide any support for the Gill opinion, they were entirely correct in the context of the Anton I decision which contemplated a full "postdeprivation" hearing before a court. Subsequent to this Court's decision in Anton I, the legislature in effect overturned the portion of the Anton I holding requiring independent review by a court. See Code of Civil Procedure §1094.5(d). In Anton v. San Antonio Community Hospital (1982) 132 Cal.App.3d 638, (Anton II) Division 2 of the Fourth District Court of Appeal, properly ruled that this legislation was not unconstitutional. Unfortunately, no court has analyzed the impact of the elimination of the full hearing before the court on the requisites

---

[2] It should be noted that the bylaw upheld in Anton I contemplated the exercise of discretion by the Judicial Review Committee in determining whether legal representation should be permitted on a case-by-case basis. It is unclear from the appellate court's opinion whether discretion was even exercised in this case; the court's suggestion that a blanket ban on legal representation comports with this Court's ruling in Anton I is plainly erroneous.

necessary for a fair hearing at the medical staff level. While it is clear that procedural fairness may be afforded through some combination of pre- and post-deprivation review and/or administrative and court review, it is also clear that there is a trade-off: a very limited pre-deprivation or administrative review must be coupled with a full post-deprivation or court hearing. Or, to state it differently, if judicial supervision is to be limited to essentially an appellate review, there must be a reasonable opportunity to develop a complete record at the evidentiary level to assure an adequate check against error. The process afforded Dr. Gill did not permit development of such a record.

Moreover, the stakes and risks at the time Anton I was decided were significantly lower. The current economic pressures and turmoil in the health care services industry are unprecedented.[3] In addition, legislation and court cases since Anton I have rendered the denial, restriction or termination of medical staff membership or clinical privileges devastating to the professional life of a physician. As a result of operation of California and Federal law, such adverse action imposes a stigma on a physician's good name, honor, reputation and integrity; a stigma which, at a minimum, will require that physician to defend him or herself on a number of fronts, potentially including every other medical staff where the physician has or desires to obtain privileges, the state licensing board, the Medi-Cal fraud and abuse unit, Professional Review Organizations, PPOs, HMOs and other third party payors, professional liability carriers, and various enforcement arms of the Federal government including the Department of Health and Human Services, and the Justice Department.

Because of the profound changes in the law and the health care industry which have occurred since this Court's ruling in Anton I, the California Medical Association has carefully reconsidered the requisites of effective peer review. Based upon that review, CMA is sponsoring legislation, Senate Bill 2565 (Keene), legislation which CMA believes to strike the proper balance between the need for efficient peer review and the need for peer review committees to have the presentation of the facts required to reach a proper conclusion. SB 2565 would codify the procedural requirements, including rights to access relevant information, retain an attorney, and have the charging body bear the burden of proof, necessary to permit effective judicial review under the substantial evidence test.

Even if this Court decides not to hear this case, this opinion should not be permitted to stand as precedent.[4] [5]

---

[3] Cf. Reazin v. Blue Cross and Blue Shield of Kansas (D.C.Kan. 1987) 663 F.Supp 1360.

[4] Because the legislature is currently debating this issue, decertification would also serve the goal of giving appropriate deference to

B. LEGAL DISCUSSION

1. Properly Conducted, the Credentialing Process Promotes Optimal Patient Care By Ensuring That Physicians Are Not Granted Privileges To Perform Procedures For Which They Are Unqualified And By Ensuring That Patients Have Access To Qualified Physicians.

Medical staff membership and clinical privileges are of paramount importance not only to physicians but also to their patients, and ultimately to the community as a whole. In a nutshell, by obtaining a clinical privilege, a physician is empowered to provide those clinical services at the hospital that are specifically granted to him or her by the privilege. Generally speaking, only medical staff members can be granted the privilege to admit patients to hospitals and to provide inpatient services. Consequently, medical staff membership is an integral part of a physician's practice. Moreover, as can be seen below, in addition to providing medical services to patients, medical staff members engage in quality assurance activities including credentialing (the process of reviewing the initial and ongoing competence of every physician and other health care practitioner who practices independently in the hospital) and patient-care review (the review of the ongoing quality-of-care provided throughout the hospital). Thus, not only does medical staff membership enable physicians to practice their chosen profession by providing their patients with access to hospitals, but it also provides physicians with a powerful tool for preserving high standards of medical practice.

From the patient's perspective, credentialing provides an important guarantee — a guarantee that medical care will be both available and competent. The medical staff credentialing process, if properly implemented, ensures the ongoing competence of those physicians practicing in hospitals and ensures that qualified physicians are not prohibited from becoming medical staff members or obtaining appropriate clinical privileges in a hospital which serves the community where his or her patients reside. This dual guarantee of accessibility and quality of medical care is critical to the delivery of health care in this state and must not be eroded by the application of unlawful, vague or otherwise unfair standards or procedures.

2. Denial, Restriction Or Termination Of Medical Staff Membership And/or Appropriate Clinical Privileges Is Devastating To A Physician's Professional Reputation.

---

the legislative branch.

[5] By filing this letter, the California Medical Association seeks only to ensure that medical staff credentialling processes be both substantively rational and procedurally fair. The Association takes no position with respect to Dr. Gill's professional qualifications.

The ramifications of a denial, restriction or termination of medical staff membership or clinical privileges cannot be considered in isolation and far transcend the limitation on a physician's ability to treat patients in a particular hospital. California courts have long recognized that the refusal of access to a hospital could have the effect of denying to a qualified physician the right to fully practice his or her profession. See Volpicelli v. Jared Sydney Torrance Memorial Hospital (1980 109 Cal.App.3d 242, 248 (observing "It is a generally accepted principle that a hospital's refusal to permit a physician to conduct his practice in the hospital, as a practical matter, may well have the effect of denying him the right to capably practice his profession"). As will be discussed below, legislation and court cases since this Court's decision in Anton I have rendered the denial, restriction or termination of medical staff membership or clinical privileges devastating to the professional life of a physician.

Today, a physician who suffers a denial, restriction or termination of clinical privileges for medical disciplinary reasons is reported to the Board of Medical Quality Assurance, the state licensing agency for physicians. Business & Professions Code §805. When a physician seeks to obtain or renew his or her staff privileges at any hospital, the law now requires that this hospital contact the Board of Medical Quality Assurance to determine whether or not an "805 Report" has been filed by any other hospital. Business & Professions Code §805.5. A failure to comply with either of these requirements is a misdemeanor. As a result of the 805 and 805.5 requirements, a physician who suffers a denial, restriction, or a revocation of medical staff privileges or membership runs the severe risk of investigation by the Board of Medical Quality Assurance and by any hospital where he or she presently enjoys membership or seeks to enjoy membership. Indeed, as a result of a recent court ruling, hospitals have a duty to ensure that the medical staff is appropriately credentialing its members and the failure to do so may be negligence. See Elam v. College Park Hospital (1982) 132 Cal.App.3d 332. Hospitals understandably are reluctant to grant medical staff membership to any physician who has had membership or privileges denied or restricted at another hospital, and the Elam obligation may well impose an affirmative duty on medical staffs to investigate carefully all 805 reports filed by other hospitals on existing medical staff members.

The effects of an adverse privileges determination are not limited the physician's ability to practice medicine in California. To the contrary, pursuant to the Health Care Quality Improvement Act (HCQIA) 42 U.S.C. §§11101-11152, the 805 report/805.5 investigation requirements have essentially been extended nationwide. Pursuant to the HCQIA, state boards of medical examiners must report adverse action taken by them against a Physician to the United States Department of Health and Human Services (DHHS). 42 U.S.C. §§11132, 11134(b). Similarly, hospitals and other health care entities which take adverse action based on a physician's competence or professional conduct that adversely affects a physician's membership or clinical privileges must report these actions to the state board of medical examiners which in

turn must report them to DHHS. 42 U.S.C. §§11133 and 11134. Additionally, hospitals have a duty, pursuant to the HCQIA, to request information about a physician from DHHS before they initially grant the physician privileges and every two years thereafter 42 U.S.C. §11135. Once information concerning an adverse privilege determination is reported to DHHS, DHHS is empowered, through the Medicare and Medicaid Patient and Program Protection Act and the Peer Review Improvement Act, 42 U.S.C. §1320a-7 et seq. and 1320c et seq., to initiate investigations of physicians and exclude them from the Medicare and/or Medicaid programs.[6]

Moreover, even without the operation of California or Federal law, the simple realities of the medical profession today place great importance upon the retention of medical staff privileges. Among other things, lack of privileges may hamper a physician's attempts to maintain professional liability insurance. Additionally, physicians who fail to qualify for or

maintain privileges may find their opportunities to provide care to patients who receive health care benefits from HMOs, PPOs and other delivery systems and/or receive care from ambulatory care centers severely curtailed if not entirely foreclosed. Furthermore, privilege restrictions may permanently disrupt referral and consultation practices of other physicians.

3. The Diligent Performance Of Medical Staff Peer Review Activity Is Critical To The Health And Welfare Of The People Of This State.

In making these observations about the profound ramifications of medical staff disciplinary action, the California Medical Association does not wish to discredit in any way the importance of proper peer review. The Association applauds the peer review process. In order to ensure quality patient care, health care services must be regularly monitored and evaluated. A comprehensive quality assurance process is critical to the resolution of problems as well as to the identification of opportunities to improve patient care. Protocols and procedures must be continuously analyzed and revised to reflect new information and technologies. The clinical performance of physicians and health care providers must be repeatedly assessed so that appropriate educational information and training may be provided, and impaired or incompetent individuals may be identified before patients are seriously injured. See generally Elam v. College Park Hospital (1982) 132 Cal.App.3d 332.[7]

---

[6] While the reporting mechanism established by the HCQIA is not currently being implemented, it is expected that the national clearinghouse will be operational in the next several months.

[7] Medical staffs are mandated by California law to assume responsibility for assuring the initial and ongoing competence of every physician, dentist, podiatrist, and in some cases, clinical psychologist, who practices in a

To be effective, this monitoring function must be performed by individuals who have both the expertise necessary to conduct these quality assurance activities and the ability to implement indicated changes. An effective peer review system provides the optimal solution. Medical staffs have both the expertise and familiarity with the health care facility, and the Physicians and other health care Providers involved to conduct effective peer review. Moreover, physicians generally are not paid for these activities, a factor of particular importance given current concerns over the escalating cost of health care.

4. The Credentialing Process Must Be Substantively Rational And Procedurally Fair For The Goals Of Peer Review To Be Achieved.

Just as peer review is necessary to ensure quality patient care, it is critical that the process be accomplished lawfully and fairly. The goals of peer review will be defeated, not promoted, if qualified physicians are wrongfully excluded from hospital medical staffs. As was discussed above, the exclusion of a competent physicians does nothing to promote quality patient care.[8] To the contrary, such exclusion disrupts continuity of care, limits access by patients to competent medical care, and other physicians to competent consultation, coverage, and other assistance.[9] Moreover, not only would wrongful exclusions deprive physicians of their right to practice their chosen profession and patients of their right to enjoy an established physician-patient relationship without unwarranted interference, but they would ultimately jeopardize the continuing viability of the peer review process as a whole. As was also discussed, the peer review system in place in hospitals throughout California and indeed the nation depends upon the volunteer efforts of countless physicians who are themselves subject to the same review. To ensure active participation, the peer review process must be generally perceived to be fundamentally fair and devoted to quality patient care.

5. Since Judicial Review Of Adverse Medical Staff Disciplinary Decisions Is Limited By The Substantial Evidence Test, Physicians Must Be Afforded A Reasonable Opportunity To Develop A Record Before The Peer Review Committee Sufficient To Permit Effective Judicial Review.

---

hospital. See generally 22 California Administrative Code §70703(b), Unterthiner v. Desert Hospital District (1983) 33 Cal.3d 285.

[8] Cf. Tom's, "An Analysis of the Impact of the Loss of Primary Physician on a Patient Population" 4 Journal of Family Practice 115 (1977).

[9] Cf. Rosner v. Eden Township Hospital Dist. (1962) 58 Cal.2d 592 (hospital may not exclude physician because that physician advocates for quality patient care).

Numerous cases, including this Court's ruling in Anton I, have held that hearings before an administrative agency need not comport with the formality of a court trial as long as there is a full hearing at some point. See generally Cleveland Board of Education v. Loudermill (1985) 470 U.S. 532; 84 L.Ed.2d 494 at 506 and 507, n.12 ("... the existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures"); Tex-Cal Land Management Inc. v. Agricultural Labor Relations Board (1979) 24 Cal.3d 335, 345-346 1"We therefore hold that the Legislature may accord finality to the findings of a statewide agency that are supported by substantial evidence on the record considered as a whole and are made under safeguards equivalent to those provided by the ALRA for unfair labor practice proceedings, whether or not the California Constitution provides for that agency's exercising `judicial power'." (Emphasis Added).

However, the only case in which this Court has upheld a decision by the Legislature to accord finality to findings of an agency that are supported by substantial evidence which, in the absence of legislation, would be reviewable under the independent judgment test is Tex-Cal Land Management Inc. v. Agricultural Labor Relations Board (1979) 24 Cal.3d 347. As is pointed out above, in Tex-Cal this Court required "safeguards equivalent to those provided by the ALRA for unfair labor practice proceedings", before permitting the legislature to restrict judicial review to that afforded by the substantial evidence test. While that case expressly reserved the question with respect to "standards applicable to the findings of local or private agencies", Id. at 346, prior cases and the policy supporting them suggest that these would be treated no differently. See generally Strumsky v. San Diego County Employees Retirement Association (1974) 11 Cal.3d 28.

The ALRA provides significantly more procedural protection than the process afforded Dr. Gill. The ALRA incorporates a number of procedural safeguards including:

1) Separation of prosecutorial from adjudicatory functions — Labor Code §1149;

2) Unbiased decision-makers — Labor Code §1150;

3) The right to subpoena evidence and witnesses — Labor Code §1151;

4) The right to an attorney — Labor Code §1151.3;

5) Notice, written pleadings and evidentiary hearings which "shall, so far as practicable, be conducted in accordance with the Evidence Code" — Labor Code §1160.2; and

6) A requirement that orders be accompanied by findings based on the preponderance of the reported evidence; Labor Code §1160.3.

The Court of Appeal's decision in the Gill case upholding the Legislature's application of the substantial evidence test plainly cannot stand in the absence of far more procedural protection than was afforded Dr. Gill.[10] The truncated process afforded Dr. Gill does not even approach the level of procedural protection afforded by the ALRA; it plainly did not permit development of a record sufficient to enable judicial review pursuant to the "substantial evidence test" such as to constitute any real check on the decision.

The creation of a record sufficient for court review under the substantial evidence test would be the rare exception, not the rule, following a procedure in which the prosecutor discloses only the evidence which supports the prosecutor's case, precludes the assistance of counsel, and shifts the burden of proof to the accused. As this Court recognized in the Tex-Cal case, significantly more procedure is necessary to assure effective judicial review pursuant to the substantial evidence test. Given the difficulty faced by a non-lawyer in creating an understandable transcript, it is clear that Dr. Gill should have been afforded the right to retain an attorney.[11]

The highly ambiguous "findings" of the Judicial Review Committee strongly suggest Dr. Gill was also denied a fair hearing by improperly being required to bear the burden of proof, contrary to this Court's holding in Anton I.[12] Moreover, to the extent this Court's opinion in Anton I

---

[10] It should be noted that as a result of this Court's decision in Westlake Community Hospital v. Superior Court (1976) 17 Cal.3d 465, 482-486, physicians are foreclosed from pursuing tort remedies unless they first successfully attack the quasi-judicial proceeding in a mandamus proceeding.

[11] The Court of Appeal's references to cases involving the right to have the state pay for an attorney are plainly inapposite. A more helpful precedent is Walters v. National Association of Radiation Survivors (1985) 473 U.S. 305, a case which strongly suggests a right to retain counsel is necessary to assure fairness in medical staff hearings ("While counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding, where as here no such adversary appears, and in addition a claimant or recipient is provided with substitute safeguards such as a competent representative, a decisionmaker whose duty it is to aid the claimant, and significant concessions with respect to the claimant's burden of proof [all reasonable doubts resolved in favor of claimant] the need for counsel is considerably diminished." Id. at 333-334. (Emphasis added).

[12] It should be noted that the "findings" of the Judicial Review Committee

stands for the proposition that the medical staff need not bear the burden of proof, it cannot stand in view of the Legislature's subsequent decision to restrict review to the substantial evidence test. As discussed above, Dr. Gill had no right to subpoena evidence or witnesses, to formal discovery, or even to access to directly relevant information concerning his practice which was within the medical staff's possession. If these limitations are not counterbalanced by the availability of full court review, there is no way that he can be required to "prove his innocence" consistent with a reasonable assurance of a correct outcome.

Both of these problems were exacerbated by the fact that Dr. Gill was afforded access only to those monitor reports which the hospital felt supported its case. Indeed, the primary protection afforded by the substantial evidence test, that is, the requirement that the court review the record as a whole, is eliminated if the prosecutor is permitted to prevent disclosure of directly relevant exculpatory information within its control.[13] It must be emphasized that the peer review information pertaining to a physician's conduct in a hospital lies within the exclusive possession and control of the medical staff. A physician cannot "recreate" this evidence by the use of expert witnesses for a number of reasons, not the least of which is the substantial expense, delay, and lack of equivalent credibility likely to be assigned by the judicial review committee to the medical staff's own peer review information.[14] The legislature agrees. Evidence Code §1157(c).

---

do not appear to satisfy this Court's mandate that administrative findings "bridge the analytic gap between the raw evidence and ultimate decision or order". Topanga Association For A Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506. The "findings" most certainly provide no basis for the Gill court's conclusion that the Judicial Review Committee would have come to the same conclusion had it not considered the "spleen case"; at a minimum the matter should have been remanded.

[13] See generally Sunnyside Nurseries v. Agricultural Labor Relations Board (1979) 13 Cal.App.3d 922, 930-931 (courts must review entire record and determine whether conclusion is supported by substantial evidence).

[14] A hypothetical may help exemplify the physician's dilemma. Consider the situation where a hospital plans to investigate the conduct of Physician A and during the investigation seeks opinions from seven doctors. Assume that five of those physicians state that Physician A provides exemplary care. The other two physicians feel otherwise. Now further assume that the hospital decides to go forward with charges and discloses to the physician only the two negative reports. Physician A must now defend him or herself, and, under the Gill court's holding, might never know that five other doctors concluded he or she was an excellent physician. It is clear that Physician A's defense would be significantly bolstered by access to the five positive reports, and

Finally, the "appearance of fairness" if not its fact demands that an adverse witness not be permitted to sit in on the "jury's"deliberations, particularly where that witness has the power of a hospital administrator over the physician "jury" in a medical staff disciplinary case. The Gill court plainly erred in upholding the participation of the hospital administrator in the Judicial Review Committee's deliberations.

C. CONCLUSION

The California Medical Association believes that effective peer review is crucial to the delivery of quality patient can! and that the peer review process must not be so burdensome as to eliminate active participation by the physicians and other health care practitioners who devote untold hours to quality assurance activities. The CMA also believes it is crucial to the continued viability of peer review that the process be, and be perceived to be, fundamentally fair. Incorrect decisions will defeat, not promote, the goals of peer review. The process upheld by the Court of Appeal in the Gill case does not afford any real check against error.

We urge this Court to decertify this case or grant the review that has been requested.

Sincerely,

California Medical Association
Catherine I. Hanson
Astrid G. Meghrigian

By: _____

---

that in the absence of any evidence of those reports in the record, a reviewing court would almost certainly conclude that the two negative reports constituted "substantial evidence" sufficient to support an adverse determination. See also Miller v. Indiana Hospital (3d.Cir.1988) F.2d (1988 U.S.App.LEXIS 4051) ("the substantial evidence test effectively eliminates any application of the antitrust laws to defendants' actions").

Catherine I. Hanson

Attorneys for the
California Medical Association

D:\PLD\AC\gill.ltr