No. 2 Civ. G-OO8913
Orange County Superior Court
No. 58-78-77

IN THE COURT OF APPEAL OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PAUL D. ROSENBLIT, MD,
Petitioner-Appellant,

Petitioner-Appellant,

v.

FOUNTAIN VALLEY REGIONAL HOSPITAL AND MEDICAL CENTER, A CALIFORNIA CORPORATION,

Respondent.

AMICUS CURIAE BRIEF OF CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF PETITIONER-APPELLANT

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I. INTRODUCTION

This case involves a decision to exclude a physician from practicing in a hospital. The physician was first suspended summarily based on two allegations:

1) That he left the hospital for a four day vacation and a three day medical conference without arranging for coverage of his hospitalized patients by another physician with privileges at the hospital, and
2) That his care of thirty patients had been substandard.

The hearing and appellate panels concluded that the first allegation was not true, but that the physician's exclusion was warranted, and should be made permanent, presumably on the basis of one or more of the thirty cases.

The question for this Court is whether this physician had a reasonable opportunity to demonstrate to an unbiased panel his argument that his care in these cases was not substandard, but rather reflected a treatment regimen which, while different than that practiced by the other endocrinologists at the hospital, was within the recognized standard of care.

The answer to this question is plainly no. Most troublesome is the fact that this physician was never offered an opportunity to copy the medical records in the thirty cases. This basic unfairness was compounded by numerous other problems. First, Dr. Rosenblit never got a Notice of Charges which set forth specifically what aspects of his care in each of the thirty cases was alleged to be substandard. Second, the hearing officer coducted voir dire of the hearing panel off the record,

in secret. Third, Dr. Rosenblit was required to bear the burden of proving his "innocence", an unfair burden made even more onerous not only by the lack of adequate notice of the charges and access to the medical records, but also by the actions of the hearing officer. For example, Dr. Kravitz, the "prosecutor", repeatedly stated that there were numerous medical journal articles that contradicted the articles which Dr. Rosenblit presented to defend his care, yet the hearing officer never required that even a single such journal article be introduced or even named. The hearing officer also indicated that the prosecutor did not have to admit as evidence documents that he referred to in the hearing, that Dr. Rosenblit could not force him to admit those documents, and that the hearing panel was not required to consider all the evidence which Dr. Rosenblit submitted.

Finally, it is impossible to tell from the hearing panel's decision what it concluded with respect to any of the criticisms levelled in any of the charts. This further exacerbates the burden of proof problem and is fully inadequate given the substantial evidence reviewed to which the Court is restricted. The inadequacy of the decision was not corrected by the "appellate decision", which merely repeated the conclusory statement of the hearing panel. We file this brief to bring to the Court's attention the profound importance of fair peer review for the delivery of

quality patient care in this State, and to explain why it is imperative in the current legal and economic environment that the trial court's order be reversed.[1]

Our amicus brief begins by discussing the reasons why Dr. Rosenblit did not have a reasonable opportunity to demonstrate that his care was not substandard. We point out why the procedure afforded Dr. Rosenblit violated the requisites of a fair hearing as established by the case law. We further explain how the legislature's 1979 and 1982 amendments to the Code of Civil Procedure §1094.5(d) have virtually eliminated independent review by the courts of these proceedings. While procedural fairness may be afforded through some combination of administrative and judicial review, judicial oversight can be limited to essentially an appellate review only if there is a reasonable opportunity to develop a complete record at the evidentiary level. We discuss the reasons why this record does not permit effective judicial review under the substantial evidence test.

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[1] By making this appearance, the Association seeks only to insure Dr. Rosenblit will be subject to a credentialing process which is both substantively rational and procedurally fair. The Association takes no position with respect to Dr. Rosenblit's qualifications. However, while we agree that a decision by the Medical Board of California not to proceed with a licensure action is irrelevant to the bona fides of a medical staff privileging determination, Bonner v. Sisters of Providence Corp. (1987) 194 Cal.App.3d 437, 444-447, 239 Cal.Rptr 530, the December 5, 1989 letter to Dr. Rosenblit from the Medical Board goes much further. Contrary to the suggestion in Respondent's Brief at footnote 6 that this letter "simply states Mr. Rodriquez's conclusion that petitioner did not violate the California Medical Practice Act", that letter goes on to state "it was the opinion of the Board that the quality of care rendered by you was well above the community standard." While the Association does not believe that such a determination

by the Medical Board or one of its divisions is necessarily determinative, it is most certainly not "irrelevant".

Finally, we point out why the ramifications of this case will extend far beyond these parties and will ultimately have a bearing on the quality of care enjoyed by the people of this State.

II. LEGAL DISCUSSION

A. This Court Must Remand This Case For A "Fair Hearing" Which Will Generate A Record Sufficient To Permit Effective Judicial Review.

California courts have repeatedly recognized that physicians cannot be deprived staff privileges for reasons that lack a demonstrable nexus to quality patient care, or by procedures that are not fundamentally fair. **See, e.g.,** Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614, 166 Cal.Rptr 826; Anton v. San Antonio Community Hospital (1977) 19 Cal.3d 802, 140 Cal.Rptr 442; Volpicelli v. Jared Sydney Torrance Memorial Hospital (1980) 109 Cal.App.3d 242, 167 Cal.Rptr 610; Applebaum v. Board of Directors of Barton Memorial Hospital (1980) 104 Cal.App.3d 648, 163 Cal.Rptr 831; Hackethal v. Loma Linda Community Hospital Corp. (1979) 91 Cal.App.3d 59, 153 Cal.Rptr 783; Ascherman v. St. Francis Memorial Hospital (1975) 45 Cal.App.3d 507, 119 Cal.Rptr 507.

It is similarly well established that the concept of fair procedure is not fixed, Ezekial v. Winkley (1977) 20 Cal.3d 267, 278, 142 Cal.Rptr 418; rather, it must expand and develop as new circumstances arise. Courts have recognized this principle and applied it in the context of medical staff privileges disputes. See, e.g., Ezekial v. Winkley, supra (fair hearing rights extended to residents); Applebaum v. Board of Directors (1980) 104 Cal.App.3d 648, 658, 163 Cal.Rptr

831 (fair procedure rights must include impartiality of adjudicators); Hackethal v. California Medical Association (1982) 138 Cal.App.3d 435, 444, 187 Cal.Rptr 811 (fair hearing rights include right of access to evidence forming the basis of charges).

For all the reasons set forth below, there is no reasonable assurance that the correct result was reached in this case. In these circumstances, this case must be remanded so that the medical staff may hold a fair hearing. Hackethal v. Loma Linda Community Hospital Corp. (1979) 91 Cal.App.3d 59, 153 Cal.Rptr 783.

Before discussing the numerous procedural errors in this case, we must take issue with the discussion in Respondent's brief of the standard of review. The suggestion that "the trial court's finding that Appellant received a "fair trial" of this matter in the Hospital... must be upheld if it is supported by substantial evidence" (R.B. at 13), is not correct. As Respondent's attorneys are well aware, having represented the hospital in the Huang case, "both the trial court and the Appellate court review the administrative record to determine whether its findings are supported by substantial evidence in light of the entire record [citations]." Huang v. Board of Directors, St. Francis Medical Center (1990) 220 Cal.App.3d 1286, 270 Cal.Rptr 41, review denied July 10, 1990. With respect to questions of law, including the question of whether Dr. Rosenblit received a "fair hearing", this Court must review the administrative record de novo. See generally Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614, 166 Cal. Rptr. 826; Hackethal

v. California Medical Association (1982) 138 Cal.App.3d 435,448, 187 Cal.Rptr 811.

1. Dr. Rosenblit was never offered an opportunity to copy the medical records in the challenged cases.

California decisional and statutory law compel the conclusion that a physician who has been denied medical staff privileges be granted the right to all information necessary to rebut the charges against him. That right includes not only "an opportunity to confront and cross-examine the accusers and to examine and refute the evidence," Hackethal v. California Medical Association (1982) 138 Cal.App.3d 435, 442, 187 Cal.Rptr 811, but also "require[s] disclosure of evidence forming the basis of the charges" against a physician as well as "any evidence made available to the members of the panel." **Id.** at 444. The refusal to permit an accused physician to make copies of the medical records at issue plainly violates the core of this right.

Although Respondent's brief states that "there is not one word of evidence in the record that supports this naked claim [that Dr. Rosenblit's experts would only have been able to review the medical records if they had come to the hospital] there is in fact overwhelming evidence that this was exactly what would have been required. After Dr. Kravitz challenged Dr. Rosenblit's principal expert witness at the hearing, Dr. Davidson, on the grounds that Dr. Davidson had not reviewed the underlying charts, the testimony ran as follows:

Dr. Rosenblit:

* * *

Now, with regard to the fact that a person cannot judge the entire medical care without looking at the chart, in order to prepare for this hearing, I was to bring expert witnesses who were allowed to — who should have been allowed to have access to those charts. But we were denied by Dr. Kravitz copies of those charts, and we were denied those copies of those charts, I had my attorney ask — write a letter to go — to again ask for copies of the charts, and again they were denied. So my people were not allowed access.

Dr. Kravitz: All right, I have to answer that. You don't make copies of charts and send them out. This is confidential information, the patients' names and other things that are involved.

You have witnesses, you bring them down to the hospital, we would have been glad to have you review that chart with your witnesses. So let's not say you were denied access and your witnesses access to the chart, that's an absolute wrong, absolute lie.

Dr. Rosenblit: Did you ever ask me to bring my witnesses to this hospital in any letters?

Dr. Kravitz: Let's not go into that, because this is not the situation we are talking about. I am not going to tell you what to do.

Dr. Rosenblit: OK, let's stick to the medical portion of this thing.

The Hearing Officer: I'd like to know, Dr. Kravitz, was there a request to look at the original charts?

Ms. Vanover: No.

Dr. Kravitz: To look at them? The original charts?

Dr. Rosenblit looked at them. He didn't ask for his witnesses to look at them. But I would have gladly given that request. If they came down here they would have seen the original charts. Absolutely.

(CT: 172-173 [Emphasis added]).

It is clear from this transcript that not only was Dr. Rosenblit not given the opportunity to have a copy service come in and copy the charts so that he could send them out for medical expert review, but had Dr. Rosenblit specifically requested to do this, his request would have been denied. It is also clear that Dr. Kravitz did not offer Dr. Rosenblit even the opportunity to have his witnesses review the charts in the hospital's medical records room. Additional evidence that Dr. Rosenblit did not have an opportunity to copy the charts includes the fact that he made detailed summaries of these charts so that his experts would have some way of assessing his care, (CT: 511-549).

The hospital's refusal to make copies of the medical records available to Dr. Rosenblit was clearly prejudicial, as it was used against Dr. Rosenblit to undermine the credibility of Dr. Rosenblit's main witness, Dr. Davidson (CT: 161-162, 164, 169-171), and because another witness which Dr. Rosenblit had wanted to call refused to act as an expert because he didn't have copies of the underlying charts, (AOB at 42, lines 4-7). It should be noted in passing that no objection was raised to the accuracy of the summaries of the charts, summaries which Dr.

Rosenblit prepared based on his understanding from Dr. Kravitz' comments that he was the only one who could review the original records.

2. Dr. Rosenblit never received a notice setting forth specifically what aspects of his care in each of the 30 cases was alleged to be substandard.

California case law, as well as medical staff bylaws,[2] obligate hospitals to provide an aggrieved physician with specific notices of the charges against him or her. Adequate notice of the charges is basic to a physician's ability to prepare a defense. Applebaum v. Board of Directors (1980) 104 Cal.App.3d 648, 657, 163 Cal.Rptr 831; Mullane v. Central Hanover B. & T. Co. (1950) 339 U.S. 306, 314, 94 L.Ed. 865 ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance ....") **[Citations omitted].** Consequently, it is not surprising that California courts rigorously enforce the requirement of adequate notice. **See generally** Miller v. Eisenhower

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[2] In addition to the constitutional and common law right to notice, physicians have a contractual right. A hospital's medical staff bylaws, which constitute a contract between the hospital and its staff, bind the hospital to the provisions requiring notice as set forth in those bylaws. **See generally** St. John's Hospital Medical Staff v. St. John Regional Medical Center (S.D. 1976) 245 N.W.2d 472 (holding that bylaws unilaterally adopted by the hospital governing board and not approved by the medical staff were null and void); Hillsman v. Sutter Community Hospitals (1984) 153 Cal.App.3d 743, 200 Cal.Rptr 605 (medical staff bylaws could serve as a basis that a physician was terminated from employment with a hospital in violation of an implied contract).

Medical Center (1980) 27 Cal.3d 614, 166 Cal.Rptr 826.[3] Without being apprised of the specific charges, an aggrieved physician will be unable to formulate an effective response.

Indeed, the importance of notice in a medical staff proceeding is greater than in most administrative hearings for two reasons. First, and most important, physicians have no subpoena power in these proceedings. Thus, they are not assured of the opportunity to require the attendance of any witness, or to "recall" an adverse "surprise" witness at a later time when they are prepared to undertake appropriate cross-examination. For this reason, any suggestion that "surprise" can be fairly dealt with through continuances is simply not true. Second, the issues to be resolved in the typical medical staff hearing involve complex questions of professional judgment. To defend against these charges adequately, a physician must be afforded a reasonable opportunity to review what may be extensive medical information and obtain expert testimony. Neither of these activities can be accomplished overnight. Obtaining expert testimony may be particularly time-consuming as experts must be given an opportunity to review the relevant record and prepare an opinion when their schedules permit.

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[3] In Miller, the California Supreme Court held that the form of notice, which stated that a physician had been rejected from staff membership and privileges at a hospital on the basis of recommendations received from other physicians, fell short of advising the physician of the full scope of the inquiry to be pursued at the hearing, including an internship which occurred 14 years previously. The Court ruled, hence, that any uncertainty or vagueness appearing in the physician's answers at that hearing on the subject of the internship could not support a finding that the physician had been untruthful.

The "notice" provided to Dr. Rosenblit in the letter dated February 2, 1988 plainly does not give Dr. Rosenblit sufficient information to prepare a defense against the specified charges. Even after this notice was "supplemented" by the March 4th and March 14th letters, Dr. Rosenblit had no way of knowing what aspect of his care was being challenged in each case and why. Particularly given the fact that the whole case against Dr. Rosenblit turned on technical questions concerning insulin dosages, etc., the Notice of Charges was wholly inadequate.

3. The medical staff must assume the burden of proving the charges against a physician.

Under California law, a public agency must carry the burden of proof against a public employee at an evidentiary hearing before the agency can discipline the employee. See La Prade v. Department of Water and Power (1945) 27 Cal.2d 47, 51, 162 P.2d 13 (employee may not bear burden of proof at employee disciplinary proceeding); Steen v. City of Los Angeles (1948) 31 Cal.2d 542, 547, 190 P.2d 937 (same); Martin v. State Personnel Board (1972) 26 Cal.App.3d 573, 582, 103 Cal.Rptr.306 (same); Parker v. City of Fountain Valley (1981) 127 Cal.App.3d 99, 116, 179 Cal.Rptr 351 (same); Pitkin v. Board of Supervisors (1978) 82 Cal.App.3d 652, 147 Cal.Rptr 502 (county regulations imposing burden of proof on employee invalid).

It is also well established that the fair procedure doctrine affords an individual the same level of protection afforded by the due process clause of the California Constitution. See generally Applebaum v. Board of Directors (1980) 104

Cal.App.3d 648, 657, 163 Cal.Rptr 831; Lasko v. Valley Presbyterian Hospital (1986) 180 Cal.App.3d 519, 528, 225 Cal.Rptr 603; Hackethal v. California Medical Association (1982) 138 Cal.App.3d 435, 442, 187 Cal.Rptr. 811. Thus, physicians cannot be made to bear the burden of proving their "innocence" in a medical staff privileging dispute.[4]

The California Supreme Court's decision in Anton v. San Antonio Community Hospital (1977) 19 Cal.3d 802, 140 Cal.Rptr 442, 567 P.2d 1162, supports this result. In that case, the physician argued that a medical staff bylaw which shifted the burden of proof to him at the JRC hearing violated the doctrine of fair procedure. The Supreme Court concluded that the hospital's application of its burden of proof bylaw did not violate the doctrine of fair procedure because the burden of proof bylaw, when coupled with the bylaw regarding grounds for appellate review by the governing board, contemplated a substantial showing by the charging committee in support of any recommendation to suspend a physician's medical staff privileges. **Id.** at 829-30. Thus, the Court concluded that the bylaws, when read as a whole, did not contemplate a decision based wholly upon the burdens of production and proof.

While the Supreme Court did not expressly require that the hospital assume and satisfy the burden of proving the charges against a physician before suspending the

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[4] The Association believes that new applicants should be required to carry the burden of producing information which allows for resolution of reasonable doubts concerning their current competence. Except as provided above for initial applicants, the medical executive committee should bear the ultimate burden of proof in establishing that a physician should be excluded or expelled from medical staff membership.

physician's medical staff privileges, it plainly rejected as unfair a procedure which permits a decision based wholly upon the burdens of production and proof. Moreover, the opinion has been read by two Courts of Appeal to prohibit the placement of the burden of proof on the party subject to the discipline. See Parker v. City of Fountain Valley (1981) 127 Cal.App.3d at 116, 179 Cal.Rptr. 351 ("... the record revealed that the agency exercising a disciplinary power [in Anton] did in fact assume the burden at some stage of the proceeding"); Pipkin v. Board of Supervisors (1978) 82 Cal.App.3d at 658, 147 Cal.Rptr. 502 ([Anton] "does not support the placing of the burden of proof on a disciplined employee."). But see Gill v. Mercy Hospital (1988) 199 Cal.App.3d 889, 245 Cal.Rptr 304; Smith v. Vallejo General Hospital (1985) 170 Cal.App.3d 450, 459-60, 216 Cal.Rptr 189; and Marmion v. Mercy Hospital and Medical Center (1983) 145 Cal.App.3d 72, 96, 193 Cal.Rptr 225.

The problems inherent in imposing the burden of proof on the physician were exacerbated in this case by the skeletal notice of charges and the failure to give Dr. Rosenblit reasonable access to the charts. These problems were compounded by the fact that throughout the Judicial Review Committee hearing, Dr. Kravitz repeatedly suggested that there were numerous medical journal articles that contradicted the articles which Dr. Rosenblit presented to defend his care, yet the hearing officer never asked Dr. Kravitz to introduce or even name a single such article (CT: 233, 257). Furthermore, the hearing officer indicated that Dr. Kravitz did not have to admit as evidence documents that he referred to in the hearing and

that Dr. Rosenblit could not force Dr. Kravitz to admit those documents (CT: 100-101), and further suggested that the hearing panel was not required to consider all the evidence which Dr. Rosenblit submitted (CT: 252, 291). There was no way under this system that Dr. Rosenblit could prove that the decision to expel him was "unreasonable, not sustained by the evidence or unfounded."

In any event, to the extent the Court's opinion in Anton I 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 is discussed above, physicians in medical staff disciplinary cases have no right to subpoena evidence or witnesses, or to formal discovery. Under these circumstances, it is imperative that the medical staff bear the burden of proof.

The elements of fair procedure as set forth in earlier judicial decisions are no longer sufficient.[5] We will discuss below the changes in the law and economic environment which have entirely changed the nature of an adverse medical staff determination and the risk of error or abuse. However, there is another compelling reason why this Court must reassess the procedural requisites of a peer review hearing. The current case law is predicated on the Supreme Court's opinion in

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[5] Existing case law does not support the procedure afforded to Dr. Rosenblit. Current law does not permit a hospital to divulge selected portions of the charges and evidence, have the hearing officer conduct voir dire in secret and then require the physician to bear the burden of proving that the charges are arbitrary and capricious. Moreover, because of the magnitude of recent changes in the legal and economic environment, it is imperative that this Court consider this case in light not only of existing case law, but also of the purposes of the fair hearing requirements.

Anton v. San Antonio Community Hospital (1977) 19 Cal.3d 802, 140 Cal.Rptr 442 (Anton I). The Court's restrictive approach to fair procedure in Anton I was entirely correct in the context in which it was rendered. Not only were the stakes and risks significantly lower, but at that time, a physician expelled from or not reappointed to a medical staff could obtain a full "post-deprivation" hearing before a court. **Id.** at 825 (medical staff membership is a fundamental, vested right; a court therefore must review its failure to reappoint a physician under the independent judgment standard). However, in 1979, the legislature in effect overturned the portion of Anton I requiring independent review by a court. **See** Code of Civil Procedure section 1094.5(d).

Unfortunately, no court has analyzed the impact of Section 1094.5's elimination of a full court hearing on the specific requisites necessary for a fair hearing at the medical staff level.[6] 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

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[6] In Anton v. San Antonio Community Hospital (1982) 132 Cal.App.3d 638 (Anton II) Division II of the Fourth District Court of Appeal properly ruled that this 1979 amendment was constitutional. In Anton II, the court addressed **inter alia**, the question of the facial constitutionality of Section 1094.5's substantial evidence standard and, in that regard, discussed the significance of the Tex-Cal case (**see** discussion of the case above). The court correctly concluded that since the peer review process must afford a physician fair procedures, the substantial evidence standard is constitutional. However, by contrast to Tex-Cal, the court did not analyze what specific procedures would be necessary to make Section 1094.5(d) constitutionally valid.

opportunity to develop a complete record at the evidentiary level to assure the system provides an adequate check against error.[7]

Numerous cases, including the Supreme 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 & 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, 346, 156 Cal.Rptr 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 excercising 'judicial power'." [Emphasis added].

However, there is only one case in which the California Supreme Court has upheld a decision by the Legislature to accord finality to agency findings that are

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[7] Section 1094.5's amendment also occurred after the California Supreme Court's decision in Westlake Community Hospital v. Superior Court (1976) 17 Cal.3d 465, 131 Cal.Rptr 90, which required a physician to obtain a writ of mandate overturning an adverse peer review decision before bringing an action for damages. Before Westlake, such cases were often brought as tort actions, in which a physician had a right to full review by a jury of an adverse medical staff decision. **See, e.g.,** Willis v. Santa Ana Hosp. Association (1962) 58 Cal.2d 806, 26 Cal.Rptr 640; Ascherman v. San Francisco Medical Society (1974) 39 Cal.App.3d 623, 114 Cal.Rptr 681. We believe Westlake was properly decided. But in formulating procedural requirements, this Court should consider the fact that Section 1094.5(d) in conjunction with the Westlake decision in effect precludes a physician from ever obtaining full review by a court and/or jury in the vast majority of cases.

supported by substantial evidence which, absent the legislation, would be reviewable under the independent judgment test: Tex-Cal Land Management Inc. v. Agricultural Labor Relations Board (1979) 24 Cal.3d 335, 156 Cal.Rptr 1. As is pointed out above, in Tex-Cal the Supreme 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 policies 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, 112 Cal.Rptr 805.

The ALRA incorporates a number of procedural safeguards including:

1) Separation of prosecutorial from adjudicatory functions — Labor Code Section

1149;

2) Unbiased decisionmakers — Labor Code Section 1150;

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

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

5) Notice, written pleadings and evidentiary hearings which "shall so far as practica-

ble, be conducted in accordance with the Evidence Code" — Labor Code Section

1160.2; and

6) A requirement that orders be accompanied by findings based on the preponder-

ance of the reported evidence — Labor Code Section 1160.3.

The truncated process offered Dr. Rosenblit 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.

4. Voir dire of the hearing panel off the record and out of the presence of the physician under review does not afford a meaningful opportunity to test the panel members' potential biases.

California constitutional and decisional law require, and the parties to this lawsuit agree, that a physician subjected to a professional disciplinary hearing must be granted the right to an impartial tribunal, **see** Applebaum v. Board of Directors (1980) 104 Cal.App.3d 648, 163 Cal.Rptr. 831, as well as the ability to meaningfully test the biases, if any, of the individuals who will hear and decide the charges against him or her. **See** Hackethal v. California Medical Association (1982) 138 Cal.App.3d 435, 187 Cal.Rptr. 811; Lasko v. Valley Presbyterian Hosp. (1986) 180 Cal.App.3d 519, 225 Cal.Rptr. 603. Notwithstanding the fact that fundamental notions of due process, as dictated by federal and state law, recognize that the assurances of an impartial tribunal cannot be achieved absent

effective and probing questioning of the individual tribunal members in the presence of the person accused of wrongdoing, the respondents to this lawsuit have taken the position that the hearing officer may conduct voir dire in secret, off the record and outside the presence of the person whose case is to be heard. The law does not countenance such a result.[8]

Neither the Federal nor California legal systems sanction anything less than voir dire of tribunal members in the presence of the accused when the constitutional requisites of due process mandate impartiality, such as is the case here. Indeed, both United States and California Supreme Courts have considered the issue and have concluded that voir dire is an indispensible element of a fair hearing. **See** Rosales-Lopez V. United States (1981) 451 U.S. 182, 188, 68 L.Ed.2d 22 (stating "without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instruction and evaluate the evidence cannot be fulfilled."); **see** Pantos v. City and County of San Francisco (1984) 151 Cal.App. 3d 258, 264, 198 Cal.Rptr. 489 (stating "[e]ffective voir dire is a safeguard to a fair trial before an impartial jury"); **see also** Tapia v. Barker (1984) 160 Cal.App.3d 761, 765, 206 Cal.Rptr. 803 (stating "

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[8] Respondent's suggestion that Dr. Rosenblit waived his right to challenge the fairness of the hearing panel is not well taken. Dr. Rosenblit was not represented by counsel at the hearing. Under these circumstances, his failure to challenge the hearing officer's statements that the hearing officer was "satisfied that each of them feel that they are not biased" and "that they can give him a fair hearing" (CT: 92) is certainly understandable. Dr. Rosenblit had no reason to know how aberrant the procedure followed by the hearing officer in this case was nor of the potential ramifications of his failure to object. See generally Borror v. Department of Investment, Division of Real Estate (1971) 15 Cal.App.3d 531, 544 n.3, 92 Cal.Rptr 525 (licensee is not estopped from raising the issue of the alleged obligation of a hearing officer to personally advise her of her right to counsel because of the failure to raise the issue at the administrative level). Dr. Rosenblit most certainly did not waive his right to an impartial tribunal.

. . . a litigant in a jury trial has a constitutional right to a fair trial by twelve impartial jurors.")

This right to voir dire extends to medical staff disciplinary hearings. In Hackethal v. California Medical Association (1982) 138 Cal.App.3d 435, 187 Cal.Rptr. 811, the court discussed the requisites of an impartial tribunal at some length. In that case, a physician who charged that he was arbitrarily excluded from membership in two professional organizations sought a writ of mandate ordering the associations to reinstate his membership.[9] Following the local society's initiation of disciplinary proceedings against him, Dr. Hackethal was afforded a hearing. At the hearing, Dr. Hackethal's counsel conducted "some voir dire of individual members of the Judicial Council but the referee unduly limited the amount and manner of such examination." Ultimately, the physician was expelled from the organizations, an expulsion which was overturned by the trial court. On appeal, Dr. Hackethal argued for affirmance on the grounds, among others, that his ability to voir dire the judicial council was unduly limited.

In analyzing Dr. Hackethal's challenge, the Court emphasized a physician's right to an impartial panel. Relying upon Applebaum v. Board of Directors (1980) 104 Cal.App.3d 648, 163 Cal.Rptr. 831,[10] the Hackethal court explained that this right

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[9] Although the Hackethal case involved disciplinary action by a medical society rather than a medical staff, the court's analysis is fully applicable in the medical staff context. See Lasko v. Valley Presbyterian Hospital (1986) 180 Cal.App.3d 519, 225 Cal.Rptr 603, discussed more fully below.

[10] Applebaum, **supra,** is the leading California decision discussing a physician's right to be heard before an impartial tribunal. In that case, the Court concluded that where the instigator of the charges

is just a component of California's due process and fair hearing requirements. The Court was unwilling to compromise a physician's right to an impartial panel. Recognizing that the objective of a physician's right to an impartial panel "is to have a panel composed of members that do not harbor a state of mind that would preclude a fair hearing," the Court stated that "[b]iased decision makers are impermissible and the probability of unfairness is to be avoided." **Id.** at 442, 443. Recognizing the real potential for a lack of impartiality in the context of medical staff disciplinary case, the Hackethal court indicated that there are at least two circumstances under which disqualification of a hearing committee member should occur.

First, the Court recognized that disqualification should occur if the member is actually biased, that is, if the member is unable to judge the case fairly on the evidence presented at the hearing. **Id.** at 443. Second, the court added that disqualification should also occur when "human experience teaches that the probability of actual bias is too high to be constitutionally tolerable". **Id.** The Hackethal court went on to define those situations in which the "probability of actual bias by a panel member is too high". Examples of such situations listed by the court include:

1. A member has a direct pecuniary interest in the outcome;

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against an obstetrician also conducted the investigation and participated in the adjudication, "the risk of prejudgment or bias was too high to maintain the guarantee of fair procedure." **Id.** at 660.

2. A member has been the target of personal abuse or criticism from the person before him;

3. A member is enmeshed in other matters involving the person whose rights he is determining;

4. A member may have prejudged the case because of prior participation as an accuser, investigator, fact-finder, or initial decision-maker.

Id. at 443.

The Hackethal Court then upheld the trial court's finding that there had been an undue restriction on the amount and manner of voir dire. Notably, the Court reached this holding despite the fact that each member of the judicial council panel was questioned and denied any preconceived notion of guilt and declared his or her "ability to judge the case fairly on the evidence presented at that hearing and that hearing alone." **Id.** at 439.

As was stated by the Court:

The trial court found an undue restriction on voir dire. Such restriction necessarily had the effect of reducing petitioner's opportunity to expose facts that would require disqualification of individuals on the panel. Voir dire is the traditional and accepted method of selecting an impartial tribunal. The bylaws (Ch.III, Section 1, para.(6)(c)) gave the accused the right to meaningfully challenge council members. To meaningfully exercise that right petitioner

should have been afforded a reasonable opportunity to establish the grounds for challenge. He was not afforded that opportunity.[11]

Id. at 443.

The Hackethal case was recently followed in Lasko v. Valley Presbyterian Hospital (1986) 180 Cal.App.3d 519, 225 Cal.Rptr. 603, which reaffirmed a physician's right to meaningfully voir dire members of a Judicial Review Committee in the context of medical staff disciplinary hearings. In that case, a physician challenged a hospital's decision to suspend his medical staff privileges, on the grounds, among others, that his attempt to voir dire the hearing committee was unduly restricted. Dr. Lasko attempted to ask members of the committee specific questions pertaining to conflict of interest, bias, and prejudice. However, the hearing officer noted the questions and "alleged challenges" for the record and the hearing proceeded.

On appeal, the Court held that Dr. Lasko was not given a reasonable opportunity to establish grounds for a challenge to the members of the committee and hence, was denied his right to a "fair procedure". **Id.** at 530. Although the medical staff bylaws did not expressly specify that the physician had the right to voir dire the hearing panel members, the Court stated that "Basic notions of fairness dictate that an individual whose right to practice his livelihood at a particular hospital is being

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[11] Specifically, the Court recognized that further voir dire would have afforded Dr. Hackethal the opportunity to establish his allegation that the Chairman of the Judicial Council was a business competitor of his or to ascertain whether a constitutionally impermissible combination functions took place during the disciplinary process.

revoked, has a right to examine the members of the tribunal for possible bias against him." **Id.** Consequently, the Court held:

> Appellant was afforded no meaningful opportunity to do so [voir dire], as the hearing officer altogether prevented appellant from asking any questions of the members of the ad hoc hearing committee. "Fairness requires a practical method of testing impartiality." (**Id.** (Hackethal) at p. 444, 186 Cal.Rptr 11.) Voir dire is one such practical method which was denied to appellant in this case. **Id.** at 530.

Plainly, physicians who face disciplinary action must be afforded the right to conduct an examination in a manner that enables them to detect and eliminate biased or otherwise unqualified judicial review committee members. Neither Lasko nor Hackethal suggests that voir dire may be conducted outside the presence of the accused physician, where that physician does not have the ability to perceive the members' demeanor or reactions. To the contrary, these decisions require that physicians be able to meaningfully and effectively test impartiality through personal examination since that is the only practical method of doing so, particularly in the context of a medical staff disciplinary proceeding. The following discussion makes this clear.

In California, it is well-settled that an individual's right to disqualify a juror must be prefaced by a voir dire examination that is sufficiently broad in scope to permit the discovery of bias or other factors warranting the disqualification. **See** People

v. Williams (1981) 29 Cal.3d 392, 404, 174 Cal.Rptr. 317 (expanding permissible scope of voir dire questioning to include questions designed to elicit information helpful to the intelligent exercise of peremptory challenges.) The selection of a fair and impartial jury is accomplished through both the Court and the counsel. The Standards of Judicial Administration, Section 8(a)(1) restates the traditional purpose of voir dire as follows:

> The examination of prospective jurors in a civil case should include all questions necessary to ensure the selection of a fair and impartial jury. During any supplemental examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover possible bias or prejudice with regard to the circumstances of the particular case.

Only through questioning in the presence of the accused can the purposes of voir dire, obtaining an impartial tribunal, be accomplished. Oral questioning assures spontaneous and more truthful responses. Moreover, as the California standards on voir dire expressly recognize, an individual's demeanor and physical reaction to a question is at least as important as his or her verbal responses. The need to observe demeanor when assessing credibility is addressed by Section 8(a)(2) of the Standards of Judicial Administration which expressly directs the trial judge to consider, when exercising his or her discretion as to the form and scope of voir dire questions, "the individual responses or conduct of jurors which may evince

attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case."

The Federal system is similar. Either the parties, their attorneys, or the court itself may conduct the voir dire. In the latter event, however, the parties or their attorneys are generally entitled to supplement the examination. **See** Rule 47, Fed. Rules of Civil Procedure.[12] The Federal rule does not sanction a secret examination by the judge in lieu of voir dire. To the contrary, Federal courts have long recognized that voir dire must be sufficiently broad in scope and length to permit a party to adequately ascertain whether bias or prejudice is present. **See** Art Press Ltd. v. Western Printing Machinery Company (7th Cir. 1986) 791 F.2d 616 (holding that voir dire was unduly restricted when the court rejected any voir dire as to the prospective juror's education in a warranty action).

Plainly, the presence of a physician during the interrogation process is the only "practical" method of determining impartiality. Not only is the physician's presence likely to result in more complete, spontaneous and truthful responses, the personal participation of the physician (or his or her representative) in a medical staff disciplinary case significiant bolsters his or her ability to assess impartiality by observing an individual's physical reactions to a particular question and demeanor generally.

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[12] Rule 47(a) of the Federal Rules of Civil Procedure provides as follows, "[t]he court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper."

The need for open, liberal and probing questioning in the presence of the accused is particularly acute in the medical staff disciplinary context. Indeed, in medical staff cases, there are fewer structural guarantees of a neutral tribunal than in other cases. For example, in civil and criminal cases, the litigants are entitled to a constitutionally "neutral jury", that is, a jury which is "drawn from a pool which reasonably mirrors the diversity of experiences and relevant view points of those persons in the community who can fairly and impartially try the case." **See** Pantos v. City and County of San Francisco (1984) 151 Cal.App.3d 258, 264, 168 Cal.Rptr. 128. Judges, the alternative trier of fact, are subject to public accountability as they are either elected by the people themselves or are appointed through the governor, an elected official. **See** Article XI, Section 16 of the California Constitution. Moreover, judges have the mandatory duty to recuse themselves from participating in proceedings under a number of circumstances warranting disqualification. **See** Code of Civil Procedure sections 170.1 and 170.3. With respect to disciplinary hearings of state agencies, California law requires that such hearings be conducted by administrative law judges from the Office of Administrative Hearings. **See** Government Code section 11502. Administrative law judges are deemed the employees of the Office of Administrative Hearings, and not the agency to which they are assigned. **See** Government Code section 11370.3. Accordingly, the process concerning the appointment of juries, judges and administrative law judges contains some

structural guarantees that these tribunals be impartial. They are either chosen at random from a cross-section of our community or are publicly accountable.

This is not the case with respect to judicial review committee members in the context of the medical staff disciplinary case. Judicial review committee members, unlike their counterparts, are physicians who often practice in the same specialty in the same locality as the physician subject to the charges (as was the case here). Moreover, they are under no explicit or statutory duty to recuse themselves in the event they feel or perceive they are biased. Under these circumstances, due process requires that members of judicial review committees be subjected to an even more probing process than is needed in the usual case.

Moreover, the need for voir dire is particularly critical given the fact that, generally speaking, the hearing before the judicial review committee is the sole opportunity for the de novo review. **See generally** Code of Civil Procedure section 1094.5. Moreover, medical staff disciplinary hearings, while subject to the "fair hearing" requirement discussed above, are not subject to the strictures and procedural protections of California Code of Civil Procedure. Under these circumstances, this court should be "even more scrupulous to safeguard the impartiality" of judicial review committee members. **Cf.** Coatings Corp. v. Continental Cas. Co. (1968) 393 U.S. 145, 149, 21 L.Ed.2d 301 (stating, "[i]t is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of

arbitrators than judges, since the former have complete free reign to decide the law as well as the facts and are not subject to appellate review.")

Finally, any system of justice, including the medical staff disciplinary process, depends not only on its ability to do justice, but also on its ability to project to the parties and the public "an unimpeachable image of fairness." **See** People v. Williams, **supra, at** 404. The ability to test the impartiality of judicial review committee members certainly can be characterized as a "fixture for preserving that image." **Id.** As will be discussed below, the peer review system in place in hospitals throughout the State of California depends upon the volunteer efforts of countless physicians who are themselves subject to the same review. Under these circumstances, it cannot be doubted that physicians will be much less likely to participate actively in a process which is not generally perceived to be devoted to quality patient care and fundamentally fair.

Under these circumstances, the practical method for voir dire, the method clearly intended by the courts in Hackethal and Lasko, is questioning by the aggrieved physician or his or her attorney. Although reasonable limits pertaining to the number and relevancy of the questions may at times be warranted, a physician, consistent with the decisions above and the guarantees of due process, must be afforded the opportunity to conduct a liberal and probing oral examination of the judicial review committee members — an examination which is calculated to discover possible bias, prejudice, and/or conflicts of interest. There is no way that an accused physician can be expected to make any assessment as to the

impartiality of the panel members when he has not been privy to any of the panel members' responses except second hand through the eyes of the hearing officer who has been retained by the hospital.

5. The JRC decision is entirely conclusory and does not provide this court with any way of determining what the panel concluded.

As noted previously, both the judicial review committee and the appellate panel concluded that, while Dr. Rosenblit had proved that the allegation that he failed to provide coverage for the care of his hospitalized patients was not sustained by the evidence, with respect to the allegations regarding substandard care, the decisions conclude only that:

> Paul D. Rosenblit, MD failed to prove to the satisfaction of the hearing panel... that the recommendation of the Medical Staff Executive Committee... that the medical staff privileges of petitioner be summarily suspended because of his exercise of poor clinical judgment was made unreasonably, not sustained by the evidence, or unfounded. (CT: 340, 376).

There is no way from this decision that either the trial court or this Court can determine what the hearing panel concluded with respect to each of the thirty cases. These findings certainly do not "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, 113 Cal.Rptr. 836, 522 P.2d 12. Particularly given the numerous other problems with this hearing,

these highly ambiguous "findings" do not permit meaningful judicial review under the substantial evidence test.

B. The Failure To Require That Medical Staff Disciplinary Hearings Be Conducted Fairly, In A Manner Which Is Reasonably Calculated To Determine The Truth Will Ultimately Jeopardize The Quality Of Health Care Provided To Hospitalized Patients.

To be sure, this case should be remanded so that Dr. Rosenblit can have a fair hearing. However, this case jeopardizes far more than Dr. Rosenblit's personal interests. It jeopardizes the peer review system itself. The following general discussion puts this case into perspective. We discuss both the importance of medical staff peer review to quality patient care and the devastating ramifications of an adverse peer review determination on an individual physician. We explain why the peer review process must be conducted fairly, and the jeopardy in which patients, physicians and the peer review process itself will be placed if it is not.

1. When properly conducted, the peer review process ensures that physicians will be able to provide necessary care to patients, and, in turn, that patients will have access to high quality medical care.

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. Generally speaking, only a physician who has obtained medical staff

membership has the power to admit patients to hospitals and to provide specific inpatient services. Consequently, medical staff membership is an integral part of a physician's practice. Moreover, 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) (hereinafter collectively "peer review process").

These peer review processes are essential to preserve high standards of medical practice within the hospital. Health care services must be regularly monitored and evaluated in order to resolve problems and to identify 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, 183 Cal.Rptr 156.

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.

Thus, if properly implemented, the peer review process ensures that a qualified physician will obtain and maintain medical staff membership and appropriate clinical privileges in a hospital which serves the community where his or her patients reside. From the patient's perspective, effective peer review ensures that medical care will be both available and competent.

2. If the peer review process is not conducted fairly, it will irremediably harm both patients and physicians and will jeopardize the on-going viability of the process itself.

a. If physicians are improperly denied hospital privileges, patients will be wrongly denied essential care.

Just as peer review is necessary to ensure quality patient care, it is critical that that 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. Such an exclusion of a competent physician does nothing to promote quality care. To the contrary, an improper exclusion limits access by patients to competent medical care, and by other physicians to competent consultation, coverage and other assistance. Thus, arbitrary or unjust exclusion

unfairly deprives patients of the ability to obtain necessary services from their chosen physician at an appropriate hospital and thereby seriously harms the delivery of healthcare.

In light of the above facts, it is evident that wrongfully denying hospital privileges to a physician seriously affects the health and well-being of patients. Moreover, the current economic pressures and turmoil in the health care services industry are unprecedented, further increasing the risk of error or abuse.[13]

b. Denial of medical staff membership and/or clinical privileges is devastating to a physician's ability to practice medicine.

The ramifications of a denial of medical staff membership cannot be considered in isolation. Those ramifications far transcend a physician's inability to treat patients in a particular hospital. California courts have long recognized that the refusal of access to a hospital can have the effect of denying to a qualified licensed physician the right to practice fully his or her profession. See Volpicelli v. Jared Sydney Torrance Mem. Hosp. (1980) 109 Cal.App.3d 242, 248, 167 Cal.Rptr 610, 613 (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.").

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[13] Cf. Reazin v. Blue Cross and Blue Shield of Kansas (D.C.Kan. 1987) 663 F.Supp 1360, aff'd in part (10th Cir. 1990) 899 F.2d 951.

This is even more true now than it was in the past. Legislation and court cases over the past few years have rendered the denial of medical staff membership or clinical privileges devastating to the professional life of a physician. As a result of the operation of both California and federal law, such adverse action imposes a stigma on a physician's good name, honor, reputation and integrity which, at a minimum, will require that physician to defend him or herself on a number of fronts. These fronts potentially include 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, professional liability carriers, and various enforcement arms of the federal government, including the Department of Health and Human Services' Office of the Inspector General and the Justice Department.

Pursuant to California law, if a physician is denied admission to a medical staff for reasons allegedly relating to professional competency, this denial must be reported to the Medical Board of California (MBC, formerly known as the Board of Medical Quality Assurance), the California agency responsible for licensing physicians. **See** Business and Professions Code section 805. When a physician seeks to obtain or renew his staff privileges at any hospital, California law requires that this hospital contact the Medical Board of California to determine whether or not an "805 report" has been filed by any other hospital. **See** Business and Professions Code section 805.5. Failure to comply with these requirements is a misdemeanor. **Id.**

Thus, under California law, a physician who seeks to join a medical staff runs the severe risk that a denial of the application will be investigated by MBC and by any hospital where he or she presently enjoys membership or seeks to enjoy membership. Indeed, 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, 183 Cal.Rptr 156. Hospitals understandably are reluctant to grant medical staff membership to any physician who has been denied membership 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.

Furthermore, the effects of an adverse privileges determination are not limited to the physician's ability to practice medicine in California.[14] To the contrary, pursuant to the Health Care Quality Improvement Act (HCQIA) 42 U.S.C. sections 11101-11152, 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. sections 11132, 11134(b). Similarly, hospitals and other health care entities that take adverse action based on

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[14] Even without the operation of California or federal law, the simple realities of the medical profession today place great importance upon the granting and 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 privileges may find their opportunities to provide care to patients who receive health care benefits from HMO's, PPO's 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.

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. sections 11133, 11133(b), 11134(b). 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. section 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. Sections 1320a-7 **et seq.**, and 42 U.S.C. sections 1320c **et seq.**, to initiate investigations of physicians and exclude them from the Medicare and/or Medicaid programs.[15]

c. If the peer review process is not fairly conducted, the entire process will lose its effectiveness.

Wrongful exclusions not only deprive physicians of the right to practice their chosen profession and patients of their right to enjoy an established physician-patient relationship without unwarranted interference; in addition, such exclusions ultimately jeopardize the continuing viability of the peer review process as a

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[15] The reporting mechanism established by the HCQIA did not become operational until September 1, 1990. Thus, Dr. Rosenblit was not reported under this system.

whole. 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. These physicians devote untold hours without compensation to the performance of these essential quality assurance activities. Such physicians will undoubtedly be much less likely to participate actively in a process which is not generally perceived to be fundamentally fair and devoted to quality patient care.

III. CONCLUSION

The California Medical Association and its physician members are committed to quality patient care and the effective peer review process necessary to maintain that high level of care. The Association firmly believes, however, that neither peer review nor quality care is promoted by the wrongful exclusion of competent physicians from hospital medical staff membership and appropriate clinical privileges. To the contrary, in both the short and long-term, the highest quality of care and the most diligent performance of quality assurance activities depend upon accurate clinical assessments, assessments which can be made only if physicians facing adverse medical staff membership or privileges determination have a real opportunity to defend themselves. The Association respectfully requests that this Court ensure that Dr. Rosenblit be given that chance.

DATE: November 6, 1990 Respectfully submitted,

California Medical Association

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