Hospital privileges for doctors: a game of politics?

By Barbara Hensleigh

Physicians must have hospital privileges in order to provide care to their hospitalized patients. Issues arise in hospitals terminating otherwise capable physicians for improper bureaucratic reasons such as a doctor's clash with management, whistle-blowing or the desire to eliminate competition.

Hospital privileges are granted to physicians to provide medical care to their hospitalized patients. But the ability to provide medical care is not a "privilege." Rather, it is a property interest held by the physician. A hospital cannot indiscriminately decide which physicians provide medical care to patients in its facility.

In the 1970s and 1980s, California courts developed due process "fair procedure" requirements. To limit a physician's privileges, a hospital had to establish that medical care or conduct fell below acceptable standards and adversely affected patient care.

In the 1980s, the California Legislature codified these requirements. A medical "peer review" body at the hospital makes the initial decision of whether a physician is practicing within the standard of care. Peer review must be done on an ongoing basis "exclusively in the interest of maintaining and enhancing quality patient care." Business and Professions Code Section 809.05(d). The Legislature has given the hospital the ultimate decision over a physician's privileges, but requires it to give "great weight" to decisions of peer review bodies. Business and Professions Code Section 809.05(a).

If a medical staff recommends that a physician's privileges be limited or terminated, an administrative hearing body, comprised of physicians practicing at the hospital, hears evidence and makes a decision. A hospital board sits as an appellate body to determine whether the decision was supported by substantial evidence. Typically, the physician must exhaust the hospital's administrative procedures before filing a court action to challenge the action against him.

However, the statutes codifying fair procedure in California are not entirely "fair." For example, the hospital's medical staff alone gets to choose the physicians who will be the "jurors" and the hearing officer at the administrative hearing. "Jurors" with a hospital-based practice such as a physician reliant on a hospital contract for his livelihood, may be vulnerable to pressure. The unhappy acronym applied to these jurors is "RAPE," which stands for Radiologist, Anesthesiologist, Pathologist and Emergency room physician.

The hearing officer also decides what material is admitted into evidence. The hearing officer can sit with the "jurors" in deliberation and often drafts their decision. Nonetheless, despite these issues, the process can work when hospitals act in good faith with the focus on patient care.

After the Legislature codified fair procedure requirements, courts generally deferred to hospitals in writ proceedings where doctors challenged final administrative decisions against them.

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Some wrong-minded hospitals use these privileges to eliminate doctors who have competed against the hospital or to stifle those that oppose the administration. Whistle-blowers also could have their privileges curtailed under the guise of violating "medical standards."

The pendulum began to shift so much in favor of the hospitals that frustrated lawyers stopped representing physicians in these proceedings altogether.

Courts, however, are once again scrutinizing actions by hospitals. A physician alleging discrimination based on race was not required to exhaust administrative remedies before suing in court. *Payne v. Anaheim Memorial Med. Center* (2005) 130 Cal. App. 4th 729. The administrative remedies at the hospital are not designed to address discrimination. A hospital cannot use the anti-SLAPP statutes to get rid of a physician's lawsuit for the wrongful termination of his privileges if the hospital cannot show it followed the proper procedures. *Smith v. Adventist Health Systems/West* (2010) 190 Cal. App. 4th 40. Finally, a physician is not obligated to exhaust administrative remedies before filing suit where the case involves retaliation against the physician for whistle-blowing. *Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal. App. 4th 987.

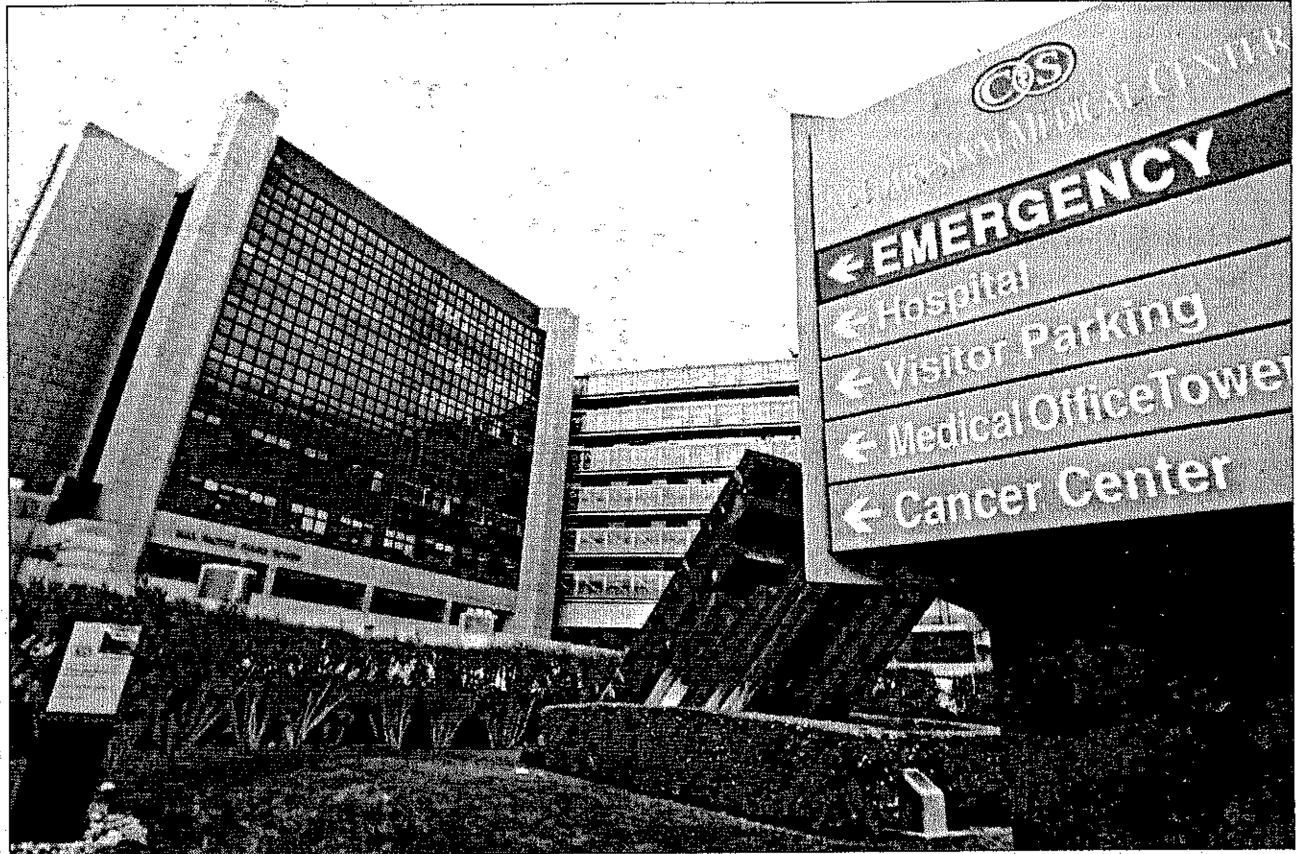
Two court decisions reviewed the qualifications and role of the hearing officer chosen by the medical staff/hospital. A hearing officer cannot serve if he has an expectation of additional retention by the hospital. *Yaqub v. Salinas Valley Memorial Healthcare System Inc.* (2005) 122 Cal. App. 4th 474. The hearing officer also now clearly lacks authority to terminate fair hearing procedures, even as a discovery sanction. *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal. 4th 1259.

As to the administrative hearing itself, the physician is entitled to introduce evidence of the hospital's improper intentions in proposing to terminate the physician's privileges. *Smith v. Selma Community Hosp.* (2008) 164 Cal. App. 4th 1428. In a lawsuit alleging the failure by the hospital to provide an administrative hearing, a physician is entitled to emotional distress and punitive damages. *Shahinian*, 194 Cal. App. 4th at 1002.

A recent case held that courts will not defer to a hospital's interpretation of its own bylaws where medical expertise is unneeded to interpret them. Instead, the bylaws must be interpreted by the body of law governing contract interpretation. *Smith v. Adventist Health Systems/West* (2010) 182 Cal. App. 729.

And finally, it is now clear that hospitals must pay physicians' attorney fees in a writ proceeding where the decision by the hospital to defend the writ proceeding is motivated by bad faith. *Smith v. Selma Community Hosp.* (2010) 188 Cal. App. 4th 1.

But there is more to be done. Some hospitals are still "piling on" charges against a physician before an administrative hearing; i.e., adding complaints about the conduct of a physician or his medical care as a basis for terminating his privileges when those complaints have never been brought to his attention. Then there is the issue of using physicians who are economically dependent on the hospital as jurors in the administrative process. But now, based on these recent court decisions, the public and physicians have at least a fighting chance against hospitals using the privileging system for reasons other than to promote quality patient care.



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The Cedars-Sinai Medical Center in Los Angeles.

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