EXHIBIT 3

NO: B150337
(Los Angeles Superior Court Nos. BC 233153, BS 056525)

IN THE COURT OF APPEAL
STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT
DIVISION 4

GIL N. MILEIKOWSKY, M.D.,

Plaintiff and Petitioner

v.

SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES,

Respondent,

TENET HEALTHSYSTEMS, ET AL.,

Real Parties in Interest and Defendants

Related Appeal Pending

AMICUS BRIEF OF UNION OF AMERICAN PHYSICIANS AND DENTISTS IN SUPPORT OF PETITIONER

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

UAPD thanks the Court for this opportunity to present additional precedent applicable to this case. The Superior Court erred in holding that a physician must await a hospital's administrative review process before the court can grant relief against the hospital's violation of the limits on summary suspensions in Bus. & Prof. Code §809.5 (pre-hearing suspensions only "where the failure to take that action may result in an imminent danger to the health of any individual"). Appellate courts have rejected the administrative exhaustion argument in upholding preliminary injunctions reinstating physicians pending the outcome of medical staff privileges procedures. Volpicelli v. Torrance Mem. Hosp. (1980) 109 Cal. App.3d 242. Moreover, similar rights concerning disciplinary procedures have been enforced by appellate courts through writ of mandate. Mounger v. Gates (1987) 193 Cal. App.3d 1248 (finding question of administrative exhaustion of claimed violations of Public Safety Officers Procedural Bill of Rights to be an issue of public importance warranting mandamus relief, and holding exhaustion not required).

Here Petitioner was also deprived of his common-law right to fair procedure: he was suspended without having a reasonable time to respond to charges, based in part on evidence presented ex parte to the decision-makers, and without being provided a copy of the charges. Appellate courts have indicated that for an employer to give an employee only one day to prepare a response violates due process; here petitioner was given just one-half hour.

II. RELIEF BY WAY OF INJUNCTION OR MANDAMUS IS AVAILABLE PENDING ADMINISTRATIVE REVIEW

In Volpicelli v. Torrance Mem. Hosp. (1980) 109 Cal. App. 3d 242, the Court upheld a preliminary injunction reinstating a physician's staff privileges terminated without prior hearing. The Court rejected the administrative exhaustion defense:

> The doctrine of exhaustion of administrative remedies has not hardened into inflexible dogma. (Ogo Associates v. City of Torrance (1974) 37 Cal. App.3d 830, 834). It is excused where its pursuit would be futile, idle or useless. (Jacobs v. State Bd. of Optometry (1978) 81 Cal. App.3d 1022, 1030), or would result in irreparable harm. (Ogo Associates v. City of Torrance, supra, p. 834; Cal. Administrative Agency Practice (Cont. Ed. Bar 1970) §4.69, p. 250.)
>
> Id. at 253.

The Court explained the irreparable harm in loss of physician privileges even in circumstances far less severe than here:

> The nature of a physician's right to practice medicine within a hospital is not merely a personal right; it is a property interest which directly relates to the pursuit of his livelihood. [cite] Such interest is clearly a fundamental one [cite]. 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. [cite]
>
> In the case before us, plaintiff had been a member of the staff of defendant hospital continuously for 18 years when defendants terminated his membership. Assuming that the termination was without notice and hearing, it is patently clear that plaintiff has been deprived of due process of law and that such deprivation of due process would, as the trial court noted, be irreparable. Defendants argue that the fact that plaintiff retained staff membership in two other hospitals precluded any harm from him from being irreparable. But this argument is illusory since plaintiff, as a physician, has a fundamental right to fully and capably practice his procession. Exclusion from one hospital out of three, with the one hospital being a burn center, certainly can bear substantially upon plaintiff's ability to fully practice his profession. As the trial court noted, defendant hospital had a unique burn center not available at other hospitals.
>
> Id. at 248.

Thus the Superior Court here clearly erred in requiring exhaustion. The administrative remedy being provided here is for the underlying termination, not for the violation of Petitioner's protection against pre-hearing suspension under Bus. & Prof. Code §809.5. The loss of a hearing is itself an irreparable harm. Moreover, a physician's right to stay on the job is critical to having a meaningful administrative remedy, for it allows him or her access to the income necessary to put on a defense, as well as to witnesses and documents.

Similar procedural rights have been enforced pending the outcome of administrative proceedings under the analogous Public Safety Officers Procedural Bill of Rights, Gov. Code §3300 et seq. In Mounger v. Gates (1987) 193 Cal. App.3d 1248, the Court of Appeal issued a writ of mandate where plaintiffs had alleged they were interrogated and disciplined in violation of that statute's requirements for prior notice and copies of charges. The Superior Court had dismissed the action for failure to exhaust administrative appeals of their discipline. The Court held no exhaustion requirement applied, and noted:

> the administrative appeal Mounger elected to pursue was from the discipline imposed and not from the violation of his procedural rights during the interrogation. The doctrine of exhaustion of administrative remedies 'does not apply if the remedy is inadequate.' [cite]
>
> Id. at 1256.

The trial court's approach here means Bus. & Prof. Code §809.5 can never be enforced by way of injunction, but rather may only be enforced after the administrative proceeding by administrative mandamus under CCP §1094.5 or damages award. This would be contrary to the legislative intent that injunctive relief be available:

> In any suit to challenge an action taken or a restriction imposed which is required to be reported pursuant to Section 805, the court shall, at the conclusion of the action,

> award to a substantially prevailing party the cost of suit, including a reasonable attorney's fee . . . . For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages or permanent injunctive or declaratory relief. For the purpose of this section, a plaintiff shall not be considered to have substantially prevailed when the plaintiff does not obtain an award of damages or permanent injunctive or declaratory relief.
>
> Bus. & Prof. Code §809.9 (emphasis supplied)

No case law or statute supports the Superior Court's refusal here to grant any relief against the defects in Petitioner's suspension until those defects become largely academic.

III. THE BASIC ELEMENTS OF PROCEDURAL DUE PROCESS WERE NOT MET HERE BEFORE PETITIONER WAS SUSPENDED

Common- law rights to fair procedure continue to exist after the enactment of Business & Professions Code sections 805 et seq. See, e.g. Potvin v. Met. Life (2000) 22 Cal.4th 1060, 1065 n.1 (requiring notice and hearing even when not required by statute). The courts have repeatedly held staff physicians' procedural rights are equivalent to public employees' constitutional due process rights. Applebaum v. Bd. Dirs. (1980) 104 Cal. App. 3d 648, 657-58. Public employees' due process rights include those found in Skelly v. State Personnel Board (1975) 13 Cal. 3d 194, 215:

> [D]ue process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

Skelly was violated here in three ways. First, it is undisputed that Petitioner here was not given a copy of the charges. Second, it is undisputed he was given less than an hour to respond. However, applying Skelly , the court in Kempland v. Regents of UC (1984) 155

Cal. App.3d 644, 649, indicated that the employer provided an inadequate opportunity to respond by giving an employee only one day after receipt of the charges against him.

Third, Skelly requirements are also violated if the authority imposing the discipline considers any evidence not provided to the employee, which occurred here during the closed session held here before Petitioner was allowed to enter. Vollstedt v. City of Stockton (1990) 220 Cal. App.3d 265, 275-76 ("the right of a hearing before an administrative tribunal would be meaningless if the tribunal was permitted to base its determination upon information received without the knowledge of the parties."); Parker v. City of Fountain Valley (1981) 127 Cal. App.3d 99, 107-10.

IV. THE MERITS OF THE SECTION 809.5 CLAIM ALSO WARRANT WRIT RELIEF

Petitioner appears to have a meritorious claim that he posed no immediate threat to patients. The allegations against him appear to amount to his being difficult to get along with. However, the same charge could be levelled against many people in the medical profession, as well as in other professions. Medical practice has changed significantly in recent years: physicians are carrying greater workloads, for less compensation, and with much more oversight from those managing the world of managed care. Interpersonal conflicts regularly arise in such a system without threatening patient care – indeed, the ability of doctors to freely disagree with each other (and with other providers) generally serves to prevent errors in patient care. UAPD's experience is that medical staffs generally deal with interpersonal frictions by taking steps far less drastic than summary suspension.

Summary suspension is the most drastic remedy available to medical staffs for taking disciplinary action against physicians. It should only be utilized in the most extreme circumstances, and usually not unless other measures have been tried and failed. Such measures may include, for example:

• Requiring the physician complete further training to address any perceived shortcomings (e.g. Huang v. Board of Directors (1990), 220 Cal.App.3d 1286, 1292 (hospital appeal board recommended that physician accused of verbally abusing and threatening nurse be required to complete behavioral modification course before being placed back on staff); Applebaum (104 Cal.App.3d at 653 (hospital executive committee recommended that physician's obstetrical privileges be suspended until he had completed further training satisfactory to the executive committee and served a probationary period in which he would transfer primary care of any nonroutine delivery to another member of the obstetrics staff).

• Placing a physician on probation for a certain number of procedures or period of time (e.g., Mir v. Charter Suburban Hospital (1994), 27 Cal.App.4th 1471, 1476 (judicial review committee recommended that board-certified cardiovascular and thoracic surgeon be placed on probation for his next ten major abdominal or thoracic surgeries and his next six endoscopies performed at the hospital).

• Delaying any recommended suspension of privileges to accommodate the continuity and quality of care received by the physicians patients (e.g., Applebaum, 104 Cal.App.3d at 652-53 (hospital committees recommended that obstetrician's

privileges be suspended after he had completed the care of pregnant patients and delivered them under the supervision of other physicians in the obstetrics department); and

• Summarily suspending the physician's staff privileges for a limited period of time (rather than permanently), as the statutory scheme plainly contemplates. See Bus. & Prof. Code §805(b)(3) (805 report to Medical Board regarding summary suspension of staff privileges required only "if the summary suspension remains in effect for a period in excess of 14 days").

Here, despite Petitioner's 14-year tenure, it appears that the Hospital abruptly imposed the most severe sanction available to it, without ever utilizing (or even considering) the other, less drastic tools available to it. Because of its extreme nature, the Hospital's action warrants particular scrutiny.

V. CONCLUSION

The Court should grant the petition for writ of mandate.

Dated: May 21, 2001

Respectfully submitted,

DAVIS, COWELL & BOWE, LLP

By: _____

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Richard G. McCracken

Attorneys for Amicus Curiae, Union of American Physicians and Dentists

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5/21/2001

PROOF OF SERVICE
STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am employed in the city and county of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 100 Van Ness Avenue, 20th Floor, San Francisco, California 94102.

On May 24, 2001, I served the document(s) described as **AMICUS BRIEF OF UNION OF AMERICAN PHYSICIANS AND DENTISTS IN SUPPORT OF PETITIONER** in this action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

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[X] (BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (BY FAX) At _____ _m., I transmitted, pursuant to Rules 2001 et. seq., the above-described document by facsimile machine (which complied with Rule 2003(3)), to the above-listed fax number(s). The transmission originated from facsimile phone number (415) 626-2860 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.

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Executed on _____, at San Francisco, California.

[ ] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Margo Barlowicz

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May 23, 2001

NO: B150337
(Los Angeles Superior Court Nos. BC 233153, BS 056525)

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GIL N. MILEIKOWSKY, M.D.,

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APPLICATION OF UNION OF AMERICAN PHYSICIANS AND DENTISTS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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Pursuant to CRC Rule 14, Union of American Physicians and Dentists ("UAPD") applies for leave to file the attached amicus brief in this matter in support of Petitioner.

UAPD is an unincorporated association existing for the purpose of representing physicians and dentists. It has several thousand members, and is headquartered in Oakland, California. The bulk of its members live and practice medicine in California. UAPD is interested in the instant case because of its longstanding efforts to ensure that doctors are provided with due process so they do not lose their professional practices for reasons unrelated to the delivery of effective patient care (such as retaliation for exercising one's legal rights or choosing to testify against another physician).

This case is also of grave concern to UAPD because the type of misconduct which Petitioner is accused of – essentially, not getting along with other providers – is commonplace in medical workplaces in this era of "managed care" where physicians' independence has become sharply constricted while their workloads are greater. Interpersonal frictions are inevitable in the modern medical workplace. UAPD believes that loss of privileges is an excessive remedy for this problem, which heretofore has been addressed by most hospitals through less severe steps such as setting conditions on future practice, (using progressive discipline just as in other workplaces).

UAPD has been granted leave to present amicus briefs in numerous cases, including:

American Hospital Association v. NLRB (1991) 499 U.S. 606; 111 S.Ct. 1539;
Arnette v. Dal Cielo (1996) 14 Cal.4th 4;
Grier v. Kizer (1990) 219 Cal.App.3d 422;
Kime v. Bd. of Med. Qual. Assurance (unpub; 3rd Dist. No. 3 Civ. C0065550);
Hillsman v. Sutter Mercy General Hospital (unpub. 3rd Dist. No. Civ. C010535);
Stuart v. Sullivan U.S.D.C. N.J. No. 92-417;
Seymour v. Bd. of Med. Qual. Assur. (unpub; 3rd DCA No. 2 Civ. C000268);
Providence Hospital (1996) 320 NLRB 717, 717 n.1

UAPD's counsel is familiar with the questions involved in this case and the scope of their presentation and believes further argument is needed on the following points:

Appellate courts have recognized the need for immediate relief to enforce procedural due process rights like those involved here rejecting the claim that the administrative process must first run its course, including the decision in Volpicelli v. Torrance Mem. Hosp. (1980) 109 Cal. App. 3d 242, upholding a preliminary injunction for reinstatement in circumstances analogous to those here.

UAPD presents legal precedent not presented by Plaintiff nor by other *amici*. "Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties. Among other services, they facilitate informed judicial consideration of a wide variety of information and points of view that may bear upon important legal questions." Bily v. Arthur Young, 3 Cal. 4th 370, 405 n. 14 (1992). Accordingly, UAPD believes the attached brief is likely to be of assistance to the Court.

Dated: May 18, 2001

Respectfully submitted,

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Margo Banowicz

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May 23, 2001