EXHIBIT 4

NO. B168705

IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT

DIVISION FOUR

GIL N. MILEIKOWSKY, M.D.,

Plaintiff and Appellant,

v.

TENET HEALTHSYSTEM-ENCINO-TARZANA REGIONAL MEDICAL CENTER,

Respondent and Appellee.

BRIEF AMICUS CURIAE OF UNION OF AMERICAN PHYSICIANS AND DENTISTS IN SUPPORT OF APPELLANT

On Appeal from the Decision of the Los Angeles County Superior Court
Case No. BS079131 before Honorable David P. Yaffe

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SUMMARY OF ARGUMENT

Dr. Mileikowsky had his hospital privileges revoked by a non-physician "hearing officer" because he allegedly engaged in improper "ex parte communication" with his medical peer reviewers by sending them a copy of his brief to the hearing officer. The substance and procedure of this decision were unlawful. The substance was irrational because the Hospital official prosecuting this termination case was simultaneously sent a copy of the doctor's brief: it is not "ex parte communication" to communicate in writing with a judge, arbitrator or other neutral when all parties are served with a copy.

The procedural problem with this decision is even more significant: the decision here was made by a Hospital attorney rather than by this physicians' professional peers. This is contrary to California statutes requiring that physicians be the primary judges of whether another physician will continue having staff privileges. Business & Professions Code section 809.05 provides clearly: "It is the policy of this state that peer review be performed by licentiates." This is subject to few exceptions, none of which is applicable here. Bus. & Prof Code section 809.2 requires the hearing be held before one's peers or a mutually-selected arbitrator, and prohibits a hearing officer from having any vote. Business and Professions Code section 2282(c) requires "that the medical staff shall be self-governing with respect to the professional work performed in the hospital." Such self-governance cannot exist if lay hearing officers engaged by Hospital management are free on their own to refuse to renew physicians' staff privileges.

The California Supreme Court has noted "Given the statutory and

regulatory scheme, it is clear that applications for staff privileges are the province of the hospital's medical staff committee. [cites] Although a hospital's administrative governing body makes the ultimate decision about whether to grant or deny staff privileges, it does so based on the recommendation of its medical staff committee." Alexander v. Superior Ct. (1993) 5 Cal. 4th 1218, 1224. Such allocation of responsibilities was violated here. The Legislature has designed a system to protect patients by requiring that hospitals have organized medical staffs which internally regulate the practice. This system protects medicine from excessive interference from hospital managers possibly concerned more with hospital finances than with quality of care. Allowing medical staff members to decide who will continue in staff membership, with only limited review by the hospital board, is a vital public policy which must be enforced here.

STATEMENT OF THE CASE

Petitioner Gil Mileikowsky, M.D. was first granted staff privileges at Tenet's Encino-Tarzana Regional Medical Center in 1986. They were thereafter renewed every two years until 1999. Administration failed to send Petitioner a copy of the notice and application required for his reapplication in 1999 (which violated the Hospital bylaws). Thus, the Hospital's deadline passed without his having reapplied. He filed a petition for writ of mandate and an order of the Los Angeles Superior Court (O'Brien, J.) reinstated his application. In the meantime, the Hospital bylaws were amended to broaden the grounds for denying renewal of staff privileges. Asserting a violation of the new bylaw provision, the Medical Executive Committee denied Petitioner's application on January 11, 2000 on the grounds he was "disruptive", without citing any problem with patient

care. He appealed to the Staff's Judicial Review Committee. While that appeal was pending, he continued to work at the Hospital. In June 2000, he was designated by a malpractice plaintiff as an expert witness against a physician who was one of the Hospital's leading income producers. He also complained to various outside agencies about quality of care and overcharging issues. On November 13, 2000, he met with FBI prosecutors on these issues. On November 16, 2000, the Hospital summarily suspended his privileges. He appealed from that suspension, as he had not had a patient in the hospital at the time, nor heard of any patient complaint.[1]

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[1]Several weeks later, the Hospital revealed to Petitioner for the first time its rationale for this action. Letter from David Kayne to Petitioner of 12/1/00. For example, it complained of verbal remarks allegedly made by Petitioner (and known to management then) back in February and December 1999. Another management complaint was that it received on 11/16/00 (the day of his suspension) a complaint from the nurses' union that Petitioner was verbally abusing nurses, without identifying any other specific (such as what the comments were about, who they were made to, or when or where they were made). Only two of management's complaints concerned patient care: first, it complained that instead of doing a C-section on a patient (which would have generated additional hospital income), on 10/24/00 he instead used a vacuum more than three times in order to deliver a baby. However, Petitioner has advised UAPD of the following as to this incident: that the baby suffered no complications as a result of such procedure (a C-section could not have been completed any sooner), and no complaint was lodged by the parents. UAPD has reviewed their letter praising the care they received from Dr. Mileikowsky as "outstanding" (and criticizing some nurses). UAPD is advised that the sole witness presented against Petitioner on this incident was a nurse applying a nursing standard, not a standard set for physicians. Second, management alleged that Petitioner took off too much skin in a particular circumcision, but UAPD is advised as follows: that the urologist who examined the child the next day confirmed there was more than enough skin left on. The urologist made a note to this effect at the time, but this was not produced to Petitioner when the Hospital supposedly produced all records concerning this incident

A hospital attorney, Dan Willick, was designated by the Hospital to be the hearing officer for the Judicial Review Committee comprised of several physicians. Dr. Mileikowsky was not permitted representation by counsel. On March 19, 2002, one of the physicians on the Committee (Dr. Pleet) expressed to a hospital manager his concerns with Willick's ruling during the hearing: "Debbie, this is Dr. Pleet calling, my opinion is that Mr. Willick's request to deny Gil from questioning witnesses is outrageous, absolutely outrageous, to change in the middle of the rulings, in the middle of the procedure, * * * I think it is an outrageous thing to do to him." Dr. Pleet later that day told her his view of the three conditions which he believed Willick to have placed on Petitioner's cross-examination of witnesses (that Petitioner not be permitted to ask questions directly, but instead somehow would have to locate a physician on staff willing to cross-examine for Petitioner, and that any such cross-examination be videotaped with a guard in the room): "If Mr. Willick has made these requirements he is out to lunch and should be replaced." See Attachment to 3/19/02 letter from Anna Suda (Christensen & Auer) to Willick.

Immediately after learning of this opposition within this Committee, on March 29, 2002, Willick issued an order terminating the hearing for the stated reason that Petitioner had improperly engaged in "ex parte communication" with the Committee members by sending them a copy of his brief to Willick. However, Petitioner had simultaneously sent a copy of that brief to the Hospital officials prosecuting him.

(Petitioner discovered its existence during the hearing and obtained it directly from the urologist). The sole witness against Petitioner on this incident was a pediatrician who had never performed a circumcision.

Willick's order was then affirmed by the Hospital Board without any vote of the Judicial Review Committee. The Hospital deemed this suspension and termination as ones for "medical disciplinary cause" within the meaning of Bus. & Prof. Code §805 (detrimental to patient care). That means they were reported to the Medical Board of California (the State licensing agency), and means they are automatically reported to every facility at which Petitioner might wish to practice. Bus. & Prof. Code §805.5.

ISSUES PRESENTED

Does it violate the Business & Professions Code provisions on peer review for a non-physician hearing officer to terminate a physician's privileges on his own order, rather than by securing a vote of the physicians' peer review body?

May a physician's privileges be terminated on the grounds of "ex parte communication" when he sent the peer review body a copy of a brief he sent its hearing officer, but also sent this brief to the hospital officials pursuing this physician's termination?

ARGUMENT

I. THE PROCEDURE FOLLOWED HERE DID NOT COMPORT WITH THE STATUTORY REQUIREMENTS FOR THE DECISION-MAKING PROCESS ON STAFF PRIVILEGES

This case is decided alone by the provisions of Business & Professions Code sections 809 et seq. Section 809.05 provides in pertinent part:

> It is the policy of this state that peer review be performed by licentiates. This policy is subject to the following limitations:
> (a) The governing bodies of acute care hospitals have a legitimate function in the peer review process. In all peer review matters, the

> government body shall give great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner.
>
> (b) In those instances in which the peer review body's failure to investigate, or initiate disciplinary action, is contrary to the weight of the evidence, the governing body shall have the authority to direct the peer review body to initiate an investigation or a disciplinary action, but only after consultation with the peer review body. * * *
>
> (c) In the event the peer review body fails to take action in response to a direction from the governing body, the governing body shall have the authority to take action against a licentiate. Such action shall only be taken after written notice to the peer review body and shall fully comply with the procedures and rules applicable to peer review proceedings established by Sections 809.1 to 809.6 inclusive.
>
> (d) A governing body and the medical staff shall act exclusively in the interest of maintaining and enhancing quality patient care. * * *

This Section sets forth specified exceptions to its initial rule that medical peers make all privileging decisions, but none of those exceptions apply here. If the Legislature had intended another exception allowing non-licentiates to terminate privileges for improper behavior during a hearing, then the Legislature would have said so. Another exception cannot be judicially grafted onto this statute.

In other statutes, the Legislature made it even clearer how limited the lay hearing officer's role would be. In Section 809.2, it provided:

> If a licentiate timely requests a hearing concerning a final proposed action for which a report is required to be filed under Section 805, the following shall apply:
>
> (a) The hearing shall be held, as determined by the peer review body, before a trier of fact, which shall be an arbitrator or arbitrators selected by a process mutually acceptable to the licentiate and the peer review body, or before a body of unbiased individuals who shall . . . not have acted an accuser, investigator, factfinder, or initial decisionmaker in the same matter, and <u>which shall include, where feasible, an individual practicing the same specialty as the licentiate</u>.
>
> (b) <u>If a hearing officer is selected</u> to preside at a hearing held before a panel, the hearing officer shall gain no direct financial benefit from the outcome, shall not act as a prosecuting officer or advocate, and

shall not be entitled to vote.

(Emphasis added).

Here, the decisionmaker was not a neutral arbitrator chosen in part by the physician, nor was it a panel containing "an individual practicing the same specialty as the licentiate", but rather was the Hospital's attorney serving as hearing officer. This hearing officer was not supposed to be allowed to vote at all, let alone allowed to take the decision out of the hands of the peer review panel.[2]

II. THE STATUTORY REQUIREMENTS FOR PEER REVIEW AND MEDICAL STAFF SELF-GOVERNANCE MEAN THAT OUTSIDERS CANNOT DICTATE STAFF MEMBERSHIP DECISIONS

The Legislature has declared it grounds for discipline for a physician to practice in a hospital lacking a self-governing medical staff. Business and Professions Code Section 2282 provides, in relevant part:

> The regular practice of medicine in a licensed general or specialized hospital having five or more physicians and surgeons on the medical staff, which does not have rules established by the board of directors thereof to govern the operation of the hospital, which rules include, among other provisions, all the following, constitutes unprofessional conduct:
>
> * * *
>
> (c) provision that the medical staff shall be self-governing with respect to the professional

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[2]The Legislature and those designing the peer review system further expressed hostility to attorneys dictating the course of staff privileging hearings in Bus. & Prof. Code section 809.3(c), which prohibits peer review bodies from being represented by counsel if the licentiate is not so represented. What Tenet did here was try to evade this statute by labelling its attorney as "hearing officer" instead of saying he represented the peer review body. However, in court Tenet's attorney represented his firm as counsel for the Medical Staff.

> work performed in the hospital; that the medical staff shall meet periodically and review and analyze at regular intervals their clinical experience; and the medical records of patients shall be the basis for such review and analysis

Similar requirements are contained in Cal. Code Regs. tit. 22 §70701 et seq.[3]

"Given the statutory and regulatory scheme, it is clear that applications for staff privileges are the province of the hospital's medical staff committee. [cites] Although a hospital's administrative governing body makes the ultimate decision about whether to grant or deny staff privileges, it does so based on the recommendation of its medical staff committee.[cites]." Alexander v. Superior Ct. (1993) 5 Cal.4th 1218, 1224-25. The action against Petitioner here is directly contrary to the understanding of the privileging statutes expressed by the Supreme Court in Alexander. The notion behind these statutes was to have a structure by which hospital doctors working in small committees supervised each other's practice of medicine rather than expecting hearing officers or hospital boards to carry out that function:

> [S]ince hospital governing boards are generally composed of laymen, the only effective method of assuring that only competent practitioners are allowed to use the hospital is to seek the advice of the experienced physicians using the

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[3]Note the legislature and agency both chose the broad term "professional work" to describe self-governance, not the narrower phrase "practice of medicine". Professional work includes decisions about staff privileges. This statute would be mere surplusage if all it did was preclude non-physicians from making medical decisions about patients, because there are separate statutory prohibitions against hospital managers practicing medicine without a license. See Business and Professions Code Sections 2052, 2400.

> hospital. The medical staff system developed by the professional associations has, therefore, been widely accepted simply because it presents an efficient method of obtaining this advice. . . .
>
> The medical staff system works through a system of committees. For example, the credentials committee review applications for appointment or reappointment to the staff; the medical records committee supervises the required record keeping and periodically evaluates the quality of care given; and the tissue committee determines from preoperative and postoperative diagnoses and pathological reports whether unjustified surgery has been performed. On the basis of the reports of these and other committees the executive committee makes recommendations to the governing board the matter of granting, denying or limiting a doctor's privileges, i.e., the procedures the doctor is allowed undertake in the hospital.
>
> "Hospital Staff Privileges: The Need for Legislation," 17 Stan. L. Rev. 900, 903-904 (1965)

Staff committees cannot as a practical matter effectively monitor the various doctors' practices if the committee can have its decisions usurped by attorneys selected by the Hospital to serve as hearing officers. Also, decisionmakers chosen by a majority of one's peers will have more professional legitimacy, and therefore more respect and authority, than will a regime imposed from outside. Such committees become meaningless if the hospital board can simply use its attorney as a hearing officer to then make dispositive rulings based on procedural issues to strip physicians of their privileges, especially unfair in light of the bylaws banning physicians from using counsel at these hearings.[4]

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[4]In 30 Op.Cal.Atty.Gen. 13 (No. 57-69, July 16, 1957), the Attorney General decided that a hospital board had no legal right to obtain copies of the minutes of the meetings of the hospital medical staff. The Attorney

A narrow view of a hearing officer's authority to impose a terminating sanction for hearing misconduct is supported by extensive case law. The sanction imposed here was essentially a contempt sanction, but such a sanction is impermissible absent a statutory grant of authority. This case law was reviewed and applied in a decision holding that workers compensation hearing officers had no authority to issue contempt sanctions:

> While court commissioners and referees have been authorized in some jurisdictions to punish disobedience of their orders as contempts, it has been held that, in the absence of express authority, such officers have no such power (17 C.J.S. Contempt §53; 17 Am Jur. 2d Contempt §117). It has been held in California that nonjudicial officers have no power to punish for contempt unless specially so authorized by law. (People v. Schwarz, 78 Cal. App. 561, 570, 12 Cal. Jur. 2d Contempt, §39). Our research has

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General discussed Health and Safety Code section 32128, which requires that the medical staff of a local hospital district "be self-governing with respect to the professional work performed in the hospital." At p. 15 the Attorney General noted:

> Nowhere in this section is there any indication that the board should control the conduct or content of the medical staff meetings in any manner other than that set forth in said section. In fact, this section specifies that the staff shall be self-governing with respect to the professional work performed in the hospital. Thus the board cannot exercise any supervision or control over the professional work of the medical staff other than the promulgation of rules necessary to the operation of the hospital or in the best interests of the public health.

Tenet's position conflicts with the Attorney General's opinion, for there is no more effective means for a lay board to control physicians' conduct than to have its attorney deny a physician privileges based on how the physician represented himself in the hearing process. Veto power over questions of staff membership based on conduct at a hearing goes way beyond "the promulgation of rules necessary to the operation of the hospital or in the best interests of the public health." Id. Opinions of the Attorney General are entitled to "great weight." Tiffany v. Sierra Sands Unified School Dist. (1980) 103 Cal.App.3d 218, 227, 162 Cal.Rptr. 669.

> disclosed no California case in which a subordinate officers, court commissioner or referee has been permitted to summarily exercise the power of contempt.
>
> Marcus v. WCAB (1973) 35 Cal. App.3d 598, 605.

Accord, Morton v. WCAB (1987) 193 Cal. App. 3d 924, 927 ("Generally, administrative agencies are not empowered to adjudge contempt unless such power is expressly conferred by statute. [cite]"); People v. Kainoki (1992) Cal.App. 4th Supp. 8, 12-15.[5]

III. IT IS IRRATIONAL AND AGAINST PUBLIC POLICY TO DEEM A LETTER TO A JUDICIAL PANEL SERVED ON ALL OTHER PARTIES AS IMPERMISSIBLE EX PARTE COMMUNICATION

The substance of rules limiting staff membership is judicially scrutinized to ensure they are not substantively irrational or contrary to public policy. See, e.g., Smith v. Vallejo General Hospital (1985) 170 Cal.App.3d 450, 456, 216 Cal.Rptr. 189; Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614, 626-627, 166 Cal.Rptr. 826; Lewin v. St. Joseph Hospital of Orange (1978) 82 Cal.App.3d 368, 385, 146 Cal.Rptr. 892. Here, Hearing Officer Willick acted unreasonably and violated the public policies encouraging communications between physicians and their peers when he deemed Petitioner's letter to be improper ex parte communications. Willick's decision was contrary to well-settled law about the permissibility of communicating in writing with a decisionmaker, so long as copies of that writing are served on one's opponents. See Rule 5-

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[5]Because of this unbroken string of court decisions, the Legislature amended the Administrative Procedures Act to give administrative agencies the power to initiate contempt proceedings, but giving Superior Court judges alone the power to issue contempt sanctions. Gov. Code §§11455.10-11455.20. Only agency heads may initiate such proceedings. Parris v. Zolin (1996) 12 Cal.4th 839.

300(B)(4) of the State Bar Rules of Professional Conduct (exceptions to the ban on communications with judicial officers about the merits of contested matters include communications "[i]n writing with a copy thereof furnished to such other counsel"). See also Ocasio v. Fashion Inst. of Tech. (SDNY 2000) 86 F. Supp. 2d 371, 375:

> [P]laintiff's allegation that the Court engaged in ex parte communications with the defendants' counsel is also without merit since no ex parte communications ever occurred. Plaintiff's reliance on letters sent by defendants' counsel to the Court as evidence of these purported ex parte communications is misplaced since the defendants' attorney copied plaintiff on all such correspondence.

Accord Lee v. State (Ark.2001) 38 S.W.3d 334, 341 n.1("the letter was hardly an ex parte missive since copies were furnished to all counsel and also all circuit judges"); Young Chevrolet, Inc. v. Texas Motor Vehicle Bd., (Tex. App. 1998) 974 S.W.2d 906, 912.

Even if the state's public policy of encouraging communications between physicians and peer review bodies were not clear from the Business & Professions Code, such policy would also be clear from Evidence Code §1157 and the case law construing it (creating a privilege for communications during peer review proceedings in order to encourage "frankness" and "candor")[6], from the free speech provision of the California Constitution, and from Civil Code §§43.8 and 47(b)(4), (deeming privileged the statements made in medical staff privilege proceedings). For all these reasons, a directive banning all communications by the accused physician with the panel members deciding his case is contrary to public policy. The proper analogy to the instant case would be if the Court Clerk's office were

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[6]Matchett v. Superior Ct. (1974) 40 Cal. App. 3d 623, 628-29; West Covina Hosp. v. Superior Ct. (1986) 41 Cal.3d 846, 852-64; Cedars-Sinai Med. Ctr. v. Superior Ct. (1993) 12 Cal. App. 4th 579, 586-88.

to assert the authority to decide based on its own standards which briefs would be forwarded to the justices on this Court. What the hearing officer did here is no less improper.[7] As an order not to communicate with the panel would be beyond the hearing officer's authority and violative of Petitioner's speech rights, Petitioner could not be punished for violating such order. People v. Gonzales (1996) 12 Cal. 4th 804, 817 ("The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment", citing In re Berry (1968) 68 Cal.2d 137, 147; "we held in Berry that a defendant should not be tried in the municipal court for misdemeanor contempt for violating a temporary restraining order issued by the superior court during a labor dispute, when the superior court's order was violative of defendant's First Amendment rights.")

IV. THERE WAS NO SUBSTANTIAL EVIDENCE SUPPORTING THE EXTREME SANCTION OF TERMINATION

The trial court's primary concern was that Petitioner was allegedly difficult during the peer review hearing process. This again involved the standards of the legal profession being applied to a very different world. Judges (and often lawyers) have as a high priority getting their hearings done quickly, but nonjudicial self-governance procedures often involve far

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[7]Peer reviewers are not analogous to jurors in a jury trial: (1) peer reviewers are highly-trained professionals better able to disregard any inadmissible evidence given them; (2) peer reviewers are not merely finding facts, but often decide the substantive standards to be applied to the facts; (3) a peer review case cannot be taken away from the panel, as the panel's hearing officer has no vote nor any other power independent of the panel, unlike a trial judge's authority. Given the statutory scheme here, peer reviewers are much more closely analogous to a panel of judges than to a panel of lay jurors.

different priorities. See e.g., Steelworkers v. Warrior & Gulf (1960) 363 U.S. 574, 581 ("The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts."). We expect physicians to ask questions and when they see a problem, to discuss it thoroughly using the Socratic method, not to sit back quietly. Accordingly, it is unfair for a judge to apply lawyerly standards to a physician's conduct in defending himself in a peer review process against loss of his hospital privileges.

The underlying charge against Petitioner seems to be that he is 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. The California Supreme Court has already held that interpersonal difficulties not related to patient care may not be used as grounds for denial of even an initial grant of staff membership:

> An otherwise competent physician, although considered "controversial", outspoken, abrasive, hypercritical, or otherwise personally offensive by some of his hospital colleagues, may nevertheless have the ability to function as a valuable member of the hospital community and should not be denied the opportunity to do so as a result of personal animosities or resentments alone.
>
> Miller v. Eisenhower Med. Ctr., 27 Cal.3d at 632.

Since the Miller decision in 1980, the changes in our healthcare system have increased the likelihood of even the most mild-mannered physician ending up in conflict with others: physicians are carrying greater workloads, for less compensation, and with much more oversight from those managing the world of managed care. Interpersonal conflicts in such a system do not inherently threaten patient care. Indeed, the ability of doctors to freely

disagree with each other (and with other providers or management) 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 termination. Termination is the most drastic remedy available to medical staffs for taking disciplinary action against physicians – and the one most disruptive of regular physician-patient relationships. Termination 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. See 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 v. Bd. Dirs. (1980) 104 Cal.App.3d 640, 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. See 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 physician's patients. See 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 here warrants particular scrutiny. The instant case is in many ways stronger than the physician's claim in Miller, who was not complaining of termination, but of not being allowed to join a hospital's staff for the first time. Deprivation of existing staff privileges has long been deemed by California law to represent the loss of a fundamental property right. See e.g. Anton v. Bd. Dirs. San Antonio Comm. Hosp. (1977) 19 Cal.3d 802; Potvin v. Met. Life Ins. Co. (2000) 22 Cal.4th 1060, 1076-78.

The charge of being "disruptive" is the latest boilerplate charge used by hospital corporations wishing to stifle physician dissent. See, e.g., Clark v. Columbia/HCA (Nev. 2001) 25 P.3d 215 (finding hospital which

terminated physician's privileges for being "disruptive" not immune from liability as management's motive appeared to be retaliatory); Sahlolbel v. Providence Healthcare (2003) ___ Cal.App.4th ___, 2003 DJDAR 11741 (10/24/03) (termination for being "disruptive" reversed by preliminary injunction due to a lack of prior administrative hearing). This latest technique in hospital management is contrary to established California case law and should not be supported by the California judiciary.[8]

CONCLUSION

This case is actually quite simple: by statute, Petitioner's peers must be given a chance to actually vote on whether there is cause to strip him of his privileges. His peers were not allowed to so vote, and thus Petitioner is entitled to relief. The judgment below should be reversed.

Dated:

Respectfully submitted,

DAVIS, COWELL & BOWE, LLP

By: _____
Andrew J. Kahn
Attorney for Amicus UAPD

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[8]The words of the New Jersey Supreme Court are appropriate reminders of the proper role of hospital management vis-a-vis hospital medical staff:

> Hospital officials are properly vested with large measures of managing discretion and to the extent that they exert their efforts toward the elevation of hospital standards and higher medical care, they will receive broad judicial support. But they must never lose sight of the fact that the hospitals are operated not for private ends but for the benefit of the public, and that their existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public.

Greisman v. Newcomb Hospital (N.J. 1963) 192 A.2d 817, 825

CERTIFICATE OF COMPLIANCE
(Cal. Rules of Court, Rule 14(c)(1))

The text of this brief consists of 5,211 words as counted by Word Perfect 9 version word-processing program used to generate the brief.

Dated: December 11, 2003 DAVIS, COWELL & BOWE, LLP

By: _____
Andrew J. Kahn
Attorneys for Amicus Curiae Union of American Physicians and Dentists

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: 595 Market Street, Suite 1400, San Francisco, California 94105.

On December 17, 2003, I served the document(s) described as **BRIEF AMICUS CURIAE OF UNION OF AMERICAN PHYSICIANS AND DENTISTS IN SUPPORT OF APPELLANT** in this action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was executed at San Francisco, California on December 17, 2003.

Joyce A. Archain

NO. B168705

IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT

DIVISION FOUR

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Union of American Physicians & Dentists

Union of American Physicians & Dentists ("UAPD") applies for leave to file the attached amicus brief in this matter. UAPD is an association existing for the purpose of representing physicians and dentists. It has several thousand members, and is headquartered in California, where most of its members live and practice medicine. Nearly all its members are subject to hospital privileging decisions.

UAPD's concern with the instant case arises out of its longstanding view that hospital physicians must (as both a matter of law and policy) be self-governing in matters of staff privileges. In UAPD's view, such self-governance is inconsistent with what occurred here, in that a non-physician (the Hospital's attorney) made the decision on his own whether this physician should retain his hospital privileges.

UAPD has regularly applied for and received leave to file amicus briefs on many legal issues related to health care including privileges, staff self-governance and administrative law.[1]

UAPD's counsel is familiar with the questions involved in this case and the scope of their presentation, and believes further authorities need to

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[1]See, e.g., UAPD has filed amicus briefs, pursuant to leave of court or agency, in the following cases (among others): Providence Hospital (1996) 320 NLRB 717, 717 n.1; 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 Community Hospitals (1984) 153 Cal.App.3d 743; Hillsman v. Mercy General Hospital (unpub. 3rd Dist. no. 3 Civ. C010535); Stuart v. Sullivan USD, DNJ no. 92-417. In addition, the UAPD has as a party represented the interests of physicians in several cases, such as UAPD v. Kizer (1990) 223 Cal.App.3d 490.

be considered by the Court on the argument made by Appellant below that he was entitled to have the continuation of his privileges decided by his medical peers rather than by the Hospital's attorney. The Business and Professions Code mandates that medical staff be self-governing and that privileging decisions be made by one's professional peers. UAPD analyzes the judicial and legislative history of these statutes to show that they bar both the procedure and substance of the decision against Dr. Mileikowsky.[2]

While these arguments comport with those already made by Petitioner, that is unimportant: courts regularly rely on arguments which an amicus alone presented. See, e.g., Mapp v. Ohio (1961) 367 US 643, 646 n. 3 (deciding to impose exclusionary rule on states even though that position urged only by an amicus); Kolstad v. Am. Dental Ass'n (1999) 527 US 526 (relying on argument made only by amici that employers should be exempted from vicarious liability for certain damages if they make good faith efforts to comply with Title VII).

"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 (1992) 3 Cal. 4th 370, 405 n. 14.

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[2]The fact that an organization seeking to file an amicus is generally aligned with one party is immaterial: "[t]here is no rule, however, that amici must be totally disinterested." Hoptowit v Ray (CA 9 1982) 682 F.2d 1237, 1260. Accord, Strasser v. Doorley (CA 1 1970) 432 F.2d 567, 569 ("by the nature of things an amicus is not normally impartial.")

UAPD should be granted leave to file the attached brief.

DATED: December 11, 2003

Respectfully submitted,

DAVIS, COWELL & BOWE, LLP

By: 
Andrew J. Kahn

Attorney for Amicus Curiae
Union of American Physicians &
Dentists

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: 595 Market Street, Suite 1400, San Francisco, California 94105.

On December 17, 2003, I served the document(s) described as **APPLICATION OF UNION OF AMERICAN PHYSICIANS AND DENTISTS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT** in this action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 2

DATE: January 6, 2004

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Gil N. Mileikowsky, M.D.
v.
Teneth Healthsystem, et al.

B168705
Los Angeles County No. BS079131

THE COURT:

Permission to file Amicus Curiae Brief of Union of American Physicians and Dentists is granted. The brief is filed as of the date of this order.