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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUNDAR NATARAJAN, M.D., Petitioner and Appellant, v. DIGNITY HEALTH, Respondent.	Case No. C085906 County of San Joaquin Superior Court No. STK-CV-UWM-20164821

PETITION FOR REVIEW

AFTER THE PUBLISHED DECISION BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT
OF NOVEMBER 20, 2019

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rules 8.208, 8.488)

This form is being submitted on behalf of Petitioner and Appellant Sundar Natarajan, M.D. Pursuant to California Rules of Court, Rule 8.208, Petitioner and Appellant Sundar Natarajan, M.D. identifies the following entities or persons:

1. S. Natarajan Medical Corporation, dba Central Valley Hospitalists.

The undersigned certifies that the above-listed entity has either: (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (California Rules of Court, Rule 8.208(e)(1)); or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves (California Rules of Court, Rule 8.208(e)(2)).

The undersigned certifies that the foregoing statement is correct.

Dated: November 27, 2019.

Stephen D. Schear

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PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner SUNDAR NATARAJAN, M.D., by and through counsel, hereby petitions for review, pursuant to California Rules of Court, rule 8.500, subdivision (b), following the published decision of the Third Appellate District, filed November 20, 2019. A copy of the decision is attached to this petition as Exhibit 1.

STATEMENT OF THE ISSUE PRESENTED

Doctors depend on hospital privileges to practice medicine, a fact long-recognized by California courts. Under California law, hospitals have the power to terminate physicians' privileges for problems with their medical care or professional behavior, but only after quasi-judicial administrative hearings intended to protect doctors' fundamental right to practice their profession. These hearings are critically important to physicians, since the loss of a hearing may destroy a physician's career.

Hospitals generally select the hearing officers to preside over hearings. The physician who is the subject of the hearing has no right to participate in the appointment of the hearing officer. The subject physician does have a right to voir dire the appointed hearing officer, and the option to then make a challenge to the hearing officer's service based on a claim of bias. The hearing officer rules on the bias challenge.

Natarajan v. Dignity Health ("*Natarajan"*) presents the issue of what standard of bias applies to hearing officers in private hospital hearings held pursuant to Business and Professions Code § 809 et seq. There is now a clear split of authority on this question.

In *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, this Court held that an ad hoc hearing officer presiding over a county administrative hearing should have been disqualified because of an appearance of bias generated by the possibility of future work for the hiring entity. In *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474, the Sixth District held that *Haas* applies to hospital hearings, and that the correct standard for disqualification of a hospital hearing officer is the appearance of bias. In *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 996, a case involving a private hospital, this Court cited *Haas* and *Yaqub* in a context that suggested that those cases applied to private hospital hearings. However, *El-Attar* did not expressly address whether the *Haas* doctrine applies in private hospital hearings.

In *Natarajan,* Defendant Dignity Health ("Dignity") was an economic competitor of Dr. Natarajan. It initiated an investigation of his practice that resulted in a recommendation to terminate his privileges based primarily on a claim of delinquent medical record-keeping. After Dr. Natarajan requested a hearing on the recommendation, Dignity unilaterally appointed an ad hoc hearing officer. At the time of the appointment, Dignity had previously retained the selected hearing officer on nine other occasions, and the hearing officer was eligible for unlimited future hearing officer appointments at 33 other Dignity hospitals. Dr. Natarajan challenged the appointment based on the hearing officer's appearance of bias under *Haas* and *Yaqub*. The hearing officer overruled the challenge and presided over the hearing, which Dr. Natarajan lost.

The Court of Appeal held that *Haas* does not apply to private hospital hearings, that *Yaqub* was wrongly decided and has no precedential value, and that a physician must prove actual bias to disqualify a hearing officer. It

affirmed the hearing decision because Dr. Natarajan had not proven that the hearing officer was actually biased against him. (Exhibit 1, *Natarajan* Slip Opinion ("Op.") pp. 6-11.)

The question presented by this case is whether physicians with privileges at a private hospital have the right to disqualify a hearing officer with an appearance of bias under *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, or rather must prove actual bias.

WHY REVIEW SHOULD BE GRANTED

I. REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICTS BETWEEN *NATARAJAN* AND *YAQUB,* AND BETWEEN *NATARAJAN* AND *APPLEBAUM V. BOARD OF DIRECTORS.*

Yaqub and *Natarajan* are the only published cases that address the standard that should be used when evaluating whether a hospital hearing officer is impartial. *Yaqub* held that hearing officers should be disqualified if they have an appearance of bias due to a past relationship with the hospital and the possibility of future employment by the hiring entity. *Yaqub* defined the appearance of bias standard using two different tests. First, it adopted the objective test set forth in *Haas,* 27 Cal.4th at 1029, "whether the economic realities make the design of the fee system vulnerable to a 'possible temptation' to the 'average man' as judge." (*Yaqub,* 122 Cal.App.4th at 485.) This test disqualifies an ad hoc hearing officer who has the possibility of future employment with the hiring entity. *Yaqub* also used a second objective test taken from the California Code of Judicial Ethics, "whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence." (*Id.,* 122 Cal.App.4th at 486.)

In *Natarajan,* the Third District not only disagreed with *Yaqub* and rejected the appearance of bias standard*,* it asserted that *Yaqub* has no precedential value, but is rather a "derelict on the waters of the law." (Op., p. 9.) Given *Natarajan's* statement that *Yaqub* is a derelict, the conflict between the Third District and the Sixth District could not be more clear. *Natarajan* thus meets the standard for review under California Rule of Court 8.500, subd. (b) – "when necessary to secure uniformity of decision."

Natarajan also conflicts with an earlier Third District case, *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, on the question of whether the "fair hearing procedure" required in hospital hearings is substantively different than the due process required in government administrative hearings. In *Applebaum,* the Court held that although fair hearing procedure and constitutional due process have different origins, the extent of protection of an individual is the same. (*Id.,* 104 Cal.App.3d at 657-658.) *Applebaum* also held that constitutional due process precedents were applicable when analyzing the fairness of hospital hearings. (*Id.,* at 658.) In *Natarajan,* on the other hand, the Court emphasized the difference between constitutional due process and fair hearing procedure as the primary reason for its holding that a physician with privileges at a private hospital cannot disqualify a hearing officer with an appearance of bias. (Op., pp. 6-11.)

II. REVIEW SHOULD BE GRANTED BECAUSE THE UNRESOLVED QUESTION OF WHAT STANDARD OF IMPARTIALITY SHOULD BE USED IN HOSPITAL HEARINGS IS IMPORTANT TO THE HOSPITAL INDUSTRY, PHYSICIANS, AND THE PUBLIC HEALTH.

A. California Hospitals and Hospital Hearing Officers Agree That the Issue Presented in this Case Is Very Important.

Dr. Natarajan and the hospital industry disagree on the standard of impartiality that should apply to hospital hearing officers. On one point they do agree. They are in accord that the resolution of the issues raised in this case are extremely important for a well-functioning hospital hearing process. This case also meets the second criteria of Rule 8-500, subd. (b) – "to settle an important question of law."

In the Court of Appeal, amicus briefs were filed by the California Hospital Association (CHA); the California Medical Association (CMA); and a group of hospital systems that included John Muir Health, Kaiser, MemorialCare, Providence St. Joseph, Sharp Healthcare, Sutter Health and the Regents of the University of California. The hospitals asserted that "This case is of vital interest to every organization, public and private, that routinely conducts administrative hearings, particularly in a specialized area." (Hospitals' Amicus Brief, Nov. 30. 2018, p. 9.) Two additional amicus briefs were filed by current hospital hearing officers.

After the Court of Appeal issued an unpublished opinion on October 22, 2019, requests for publication were filed by Respondent Dignity Health ("Dignity"), the CHA, Sharp Healthcare, Providence St. Joseph Health and two hearing officers, Glenda Zarbock and Patrick Moore.

In requesting publication, Dignity correctly stated that *Natarajan* is the first case to hold that "constitutional due process" is substantively different than "fair hearing procedure" and that physicians are therefore not

entitled to due process in hospital hearings. Dignity also correctly observed that *Natarajan* is an "express repudiation" of *Yaqub*, the only other published decision on hearing officer bias; and that *Natarajan* is the first case to hold that the standard of actual bias applies to a claim of financial conflict-of-interests of a hearing officer, rather than the appearance of bias standard used in *Haas* and *Yaqub.* (Dignity Request for Publication, Nov. 7, 2019.)

The CHA asserted that publication was necessary to bring clarity to the standard that applies to hearing officers. It stated that failure to publish *Natarajan* would maintain uncertainty that "would still loom over every hearing officer appointment decision." (CHA Request for Publication, November 8, 2019, pp. 1-2.) The CHA wrote that "[w]ithout clarification from this Court, *Yaqub* will continue to incorrectly set the standard for hearing officer neutrality for both public and private hospitals." (*Id.* at p. 3.) The CHA noted the continued confusion about whether the standard for hospital hearing officers is the appearance of bias or actual bias. (*Id.* at p. 4.) It concluded that "the topics addressed in *Natarajan* – hearing officer neutrality, section 809.2, objective standards, and the difference between fair procedure and constitutional due process—are critical to peer review and impact the health of nearly all Californians." (*Id.,* at p. 5.) The request for publication by Providence St. Joseph Health described how uncertainty has plagued the selection of hearing officers since *Yaqub* was decided 15 years ago.

Following the requests for publication, on November 20, 2019, the Court of Appeal ordered *Natarajan* published. However, the publication of *Natarajan* does not eliminate the uncertainty of what standard of bias applies to hospital hearing officers. To the contrary, it magnifies that uncertainty, since the only two published Court of Appeal opinions on the

issue of hearing officer bias are directly in conflict.

B. The Standard Applicable to Hearing Officers Is Extremely Important to Physicians.

In *Wyatt v. Tahoe Forest Hospital* (1959) 174 Cal.App.2d 709, 715-716, the Court held for the first time that fair hearings were required before a hospital could deny a physician privileges. That decision was based on the recognition that most physicians cannot practice medicine without access to a hospital. (*Ibid.*) The purpose of the hearings was to protect a physician from losing the ability to practice without good cause. (*Ibid.*) In *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267-68, this Court recognized that the effect of a denial of privileges extends beyond the denial of access to a particular hospital. Adverse hospital hearing decisions are reported to the Medical Board of California and the National Practitioners Data Bank. *Mileikowsky* quoted with approval an article that described how hospital discipline "can have an immediate and devastating effect on a practitioner's career." The Court recognized that a denial of hospital privileges "may have the affect of ending the physician's career." (*Ibid.*)

An adverse hearing decision, unless overturned through a writ of mandate, also forecloses any action by the physician for wrongful termination of privileges, bad faith peer review, intentional interference with the right to practice one's profession, unfair procedure, and other common law torts arising from the events related to the hearing. (*Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465, 485-486.)[1]

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[1] Whistleblowers who report problems with patient care have an independent statutory right to sue a hospital under Health and Safety Code 1278.5. (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 687.)

Physicians facing hospital hearings thus have a tremendous amount at stake. An unfair hearing can both cost them careers created after more than a decade of medical school and residency training and deny them the opportunity to ever have their own claims of wrong-doing heard in a neutral civil forum.

In hospital hearings, hearing officers have a tremendous ability to influence the outcome. It is the hearing officers who decide whether to grant challenges to their own impartiality. (Business and Professions Code § 809.2, subd. (c).)[2] After rejecting that challenge, they decide, inter alia, challenges to the impartiality of hearing panel members who constitute the professional jury (Section 809.2, subd. (c)); pre-hearing discovery and other motions (Section 809.2 subds. (d)(e)(f) and (g)); and what evidence the hearing panel will see and what will be excluded (Section 809.3, subd. (a)(4)). In addition, in many hearings, as in Dr. Natarajan's, the hearing officers deliberate with the hearing panel with no record of what they tell the panel. (Petitioner's Administrative Record ("PAR") 19 PAR 4528; Augmented Administrative Record ("AAR") 306.) The ability of an experienced hospital attorney to give unrecorded instructions to hearing panel physicians, who are usually in their first hospital hearing, provides a virtually unlimited opportunity for a hearing officer to influence the hearing panel.

For physicians, the question of whether they are entitled to an impartial hearing officer without the appearance of bias is thus extremely important.

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[2] All statutory references are to the Business and Professions Code unless otherwise noted.

C. Impartial Hearing Officers Are Important to Patients.

California currently has a severe shortage of physicians.[3] Section 809, subd. (a)(4) recognizes that unfair hearings not only damage the physicians who unfairly lose their privileges, but also the public, which loses access to competent practitioners. In addition, unfair hospital hearings undermine the integrity of hospital peer review, which directly jeopardizes the quality of care provided to patients.

III. THE LEGAL QUESTIONS CREATED BY *NATARAJAN* ARE IMPORTANT TO RESOLVE AS MATTERS OF LAW.

Due process does not constitute a standard set of procedures applicable to all tribunals in the same way. The type and extent of necessary due process protections depend on the interest at stake, the damage done by a wrongful deprivation of that interest, the value of procedural safeguards and the costs of those safeguards. (*Haas, supra,* 27 Cal.4th at 1035, citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 335.) However, the *Mathews* cost-benefit analysis does not apply to the question of impartial adjudicators, because the necessity of an impartial adjudicator is qualitatively different than other due process protections, and so fundamental to our system of law. (*Haas,* at 1035-1036.) Impartial adjudicators are required not only to reduce the possibility of erroneous decisions, but also to protect our system of law from biased tribunals. (*Ibid.*)

Natarajan recognizes that "[t]here is a core protection even under fair procedure of an impartial decider." (Op., p. 7.) Nonetheless, it holds that hearing officers with an appearance of bias are acceptable in hospital hearings. Deciding whether actual bias or the appearance bias is the

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[3] (California Health Care Foundation, https://www.chcf.org/publication/cure-californias-doctor-shortage/)

applicable standard to determine a hospital hearing officer's impartiality is a question that should be answered to help ensure the integrity of one of California's important quasi-judicial systems of justice.

It is also important for this Court to resolve the conflict between *Natarajan* and *Applebaum v. Board of Directors, supra,* on the question of whether fair hearing procedure provides lesser protection than constitutional due process. The impact of the *Natarajan* holding on this issue can be expected to extend well beyond the selection of hearing officers. For example, hospitals can be expected to argue that hearing panel members with an appearance of bias are acceptable "fair procedure" even if their service would violate due process due to financial conflicts of interest. Hospitals are also likely to argue that the failure to provide any of the procedural safeguards provided in Section 809.1 et seq. or in the common law is an insufficient reason to render a hearing "unfair," because physicians are not entitled to due process.

The importance of this holding is particularly profound given the high stakes for physicians in the outcome of hospital hearings described above. This Court has historically attempted to protect physicians from unfair hearings. In *Rosner v. Eden Township Hospital Dist.* (1962) 58 Cal.2d 592, 598, the Court held that hospitals were not permitted to use standards for the exclusion of doctors that were so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application. In *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 823-825, this Court held that a physician has a fundamental vested property right to maintain hospital privileges unless the hospital proves that he failed to meet reasonable standards of the hospital. In *Mileikowsky, supra,* 45 Cal.4th at 1267, the Court affirmed that physicians have a property interest in hospital privileges directly connected to their livelihood.

It then held that a hearing officer could not terminate a physician's hearing based on alleged discovery misconduct because to do so would exceed his authority.

If this Court does not grant review, hospitals will be empowered under *Natarajan* to take physicians' fundamental vested property interests without due process, using hearing officers whose appointment may be unlawful, if *Yaqub* rather than *Natarajan* correctly states California law.[4]

IV. THE LAW REGARDING THE SELECTION OF HOSPITAL HEARING OFFICERS IS HIGHLY UNCERTAIN.

The five requests for publication of *Natarajan* likely arose at least in part from self-serving motives, since publication would give hospitals a freer hand when selecting hearing officers. However, there is no denying that the CHA and the hospitals are accurate in their assertions that California law is currently in a high state of uncertainty on the question of the standard of impartiality for hospital hearing officers. This uncertainty is shown not only by the conflict between *Yaqub* and *Natarajan* described above. It is also demonstrated by the following facts:

The CHA, which represents 400 California hospitals that have 97 per cent of the patient beds in the state, asserts that *Haas* and *Yaqub* do not apply to private hospitals. (CHA Amicus Brief, Nov. 30, 2018, pp. 2, 28-31.) On the other hand, the CMA, which represents approximately 45,000 California physicians, takes the position that *Haas* and *Yaqub* do apply to private hospitals. (CMA Amicus Brief, Dec. 20, 2018, pp. 6, 24-26.) When the two leading health industry organizations take opposite views on an unsettled important question of law, Supreme Court review is necessary

[4] Dr. Natarajan reserves any claim that the decision in *Natarajan* violates his federal due process rights for determination by federal courts.

to ensure that the law is clear, so that it can be applied both correctly and uniformly.

The Legislature has provided little guidance on the selection of hearing officers. The only statute that describes the selection process is Business and Professions Code § 809.2, subds. (b) and (c). The statute does not state who shall select the hearing officer or require any particular process for that selection. None of the parties have found any legislative history that sheds any light on the intention of the Legislature when it enacted Section 809.2 subds. (b) and (c).

Section 809 subd. (b) provides that a hearing officer shall not gain a "direct financial benefit from the outcome." However, the statute provides no language indicating whether that requirement is the exclusive grounds for disqualifying a hearing officer, as contended by Dignity, the CHA and the other hospital systems, or whether a hearing officer can be challenged for other reasons indicating a lack of impartiality, as argued by Dr. Natarajan and the CMA. (Dr. Natarajan's Opening Brief ("AOB") p. 32, CMA Amicus Brief, pp. 21-24.) Section 809.2, subd. (b) also does not define what constitutes a "direct financial benefit from the outcome," leaving the question unanswered as to what that means. Is that phrase limited to bribes, bonuses or explicit promises for future employment to a hearing officer conditioned on the hospital prevailing in the hearing? Or does is it include the "direct, personal, substantial and pecuniary interest" described in *Haas, supra,* 27 Cal.4th at 1031-1032, that arises when an ad hoc hearing officer can be repeatedly retained by the hiring entity? The meaning and effect of Section 809.2, subd. (b) are outstanding questions that need to be resolved by this Court.

Likewise, Section 809.2, subd. (c) permits a physician to conduct voir dire and to challenge the hearing officer's impartiality, but it provides

no guidance as to whether the standard used for deciding on the hearing officer's impartiality is actual bias or the appearance of bias.

California courts have also provided little guidance on what standard should be applied to hospital hearing officers. In the 60 years since California courts first required hospital fair hearings in *Wyatt v Tahoe Forest Hospital, supra, Yaqub* and *Natarajan* are the only cases to address whether the standard applicable to disqualification of hospital hearing officers is actual bias or the appearance of bias. It is now time for that issue to be decided by this Court.

V. THERE WILL BE SERIOUS PRACTICAL PROBLEMS WITH HOSPITAL HEARINGS IF THE COURT DOES NOT GRANT REVIEW.

In *Natarajan,* there is considerably more evidence than in *Yaqub* that the appointed hearing officer, Robert Singer, had a financial conflict of interest, as will be discussed further below. Nonetheless, Dignity did not hesitate to appoint Mr. Singer as a hearing officer for nine different hearings before it appointed him to serve in this case. It did so despite the fact that under *Yaqub* and *Haas* he was not qualified to serve, due to the possibility of future employment by Dignity and other evidence of an appearance of bias. (AAR 318.)[5]

In their amicus briefs, the CHA, the hospital systems and the hospital attorneys who serve as hearing officers made it clear that they prefer to use experienced hospital attorneys as hearing officers, rather than retired judges or justices available through JAMS or the American Arbitration

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[5] AAR 318 is a summary of the billings submitted by the hearing officer to Dignity for payment that was admitted into the administrative record by the trial court. Dignity has not contested the accuracy of the summary.

Association. The stated reason for that preference is that only experienced hospital attorneys have the "specialized knowledge" to preside over hospital hearings. (CHA Amicus Brief, Nov. 30, 2018, p. 15; John Muir and other Hospital Systems Amicus Brief, Nov. 30, 2018, p. 20; Coppo, et al Hearing Officers Amicus Brief, Nov. 30, 2018, p. 12.) Experienced hospital attorneys who serve as hearing officers generate their income from hospitals. There is also a possibility or probability that the hospitals' preference for experienced hospital attorneys flows at least in part from an expectation that they will generally rule favorably for the hospitals.

In any event, there is little or no doubt that if this Court does not grant review, hospitals will decide it is perfectly safe for them to repeatedly appoint their preferred hospital attorneys as hearing officers due to the *Natarajan* decision.

As a practical matter, it is virtually impossible to prove actual bias absent an express admission of bias by the hearing officer. There is no reason to expect that any of the experienced hospital attorneys customarily appointed as hearing officers would ever admit actual bias against a physician. Thus, the hospitals will have a virtually unlimited ability to appoint whomever they like as hearing officers, and physicians' right to voir dire the hearing officer and to challenge a hearing officer on grounds of bias under Section 809.2, subd. (c) will be rendered effectively meaningless.

There is no data on the number of hospital hearings that are held each year. However, the Hospitals have asserted that such hearings are not rare. (Hospitals' Amicus Brief, p. 12.) Although hospital hearings may not be uncommon, Court of Appeal decisions addressing the standard of bias applicable to hospital hearing officers are exceedingly rare. *Yaqub* and *Natarajan* are the only two published cases in the sixty years since *Wyatt* was decided. If this Court does not grant review of *Natarajan,* the Court

may not have another opportunity to clarify this issue for five or ten years, or more. If in fact *Yaqub* was correctly decided, and *Natarajan* was not, then many hospital hearings going forward will be unfair to physicians because the hearing officers have an appearance of bias and should have been disqualified. Physicians may have their careers unfairly devastated or destroyed following hearings that were unfair and not in compliance with California law.

STATEMENT OF THE CASE

On May 18, 2016, Dr. Natarajan filed a Petition for Administrative Mandamus pursuant to Code of Civil Procedure § 1094.5 in the Superior Court of San Joaquin County. (1 CT 1-23.) Dr. Natarajan alleged that he had not received a fair administrative hearing from Respondent Dignity Health before it terminated his hospital privileges. (*Ibid.*)

The trial court granted Dr. Natarajan's Motion to Augment the Record to discover information that the hearing officer Robert Singer had refused to provide at his voir dire. (1 CT 372-374.) It ordered the hearing officer's deposition and required him to produce, inter alia, his fee agreement and his bills to Dignity. Dignity filed a Petition for a Writ of Prohibition in the Court of Appeal to challenge the augmentation, but its Petition was summarily denied on November 4, 2016. (Court of Appeal Case No. C083162.) The hearing officer refused to attend the deposition and filed a motion for a protective order to prevent it. (2 CT 435, 455-456.) The trial court denied his motion and again ordered his deposition. (3 CT 847-849.) After the hearing officer's deposition, Dr. Natarajan filed a second motion to augment the record to add the transcript and documents from the deposition that was granted in part. (8 CT 2185-2186.) The original record from the hospital hearing is contained in Petitioner's

Administrative Record ("PAR"). The augmentation to the record is contained in the Augmented Administrative Record. ("AAR").

After briefing and oral arguments on Dr. Natarajan's Petition, the Court tentatively denied the Writ. (8 CT 2188-2192.) Dignity prepared a Statement of Findings of Fact and Conclusions of Law that the Court issued. (9 CT 2513.) The Court denied the Petition on the grounds that the hearing officer's opportunity to obtain future work at Dignity hospitals other than St. Joseph Medical Center was not a "direct financial benefit" under Section 809.2(b) and that the hospital had used objective standards in the hearing. (9 CT 2520.)

The Judgment denying the Petition was filed on September 27, 2017. (9 CT 2523-2524.) Dr. Natarajan filed a Notice of Appeal on November 6, 2017. (9 CT 2563.) After the parties briefed the case, five different amicus curiae briefs were filed. Dr. Natarajan filed a consolidated answer to the two amicus briefs of the California Hospital Association and California hospitals (John Muir Health, et al.) and a second consolidated answer to two amicus briefs submitted by hospital hearing officers. Dignity filed an answer to the amicus brief of the California Medical Association.

The Court of Appeal issued an unpublished decision on October 22, 2019, affirming the trial court's denial of Dr. Natarajan's Petition for Writ of Mandate.

PETITION FOR REHEARING

On November 4, 2019, Dr. Natarajan filed a Petition for Rehearing contending, inter alia, that the Court of Appeal's opinion misstated Dr. Natarajan's arguments, misstated the law governing fair procedure and misstated and omitted material facts. On November 7 and 8, 2019, requests for publication were filed by Dignity Health, the California Hospital

Association, Sharp Healthcare, Providence St. Joseph Health and two hospital attorneys who sometimes serve as hearing officers, Glenda Zarbock and Patrick Moore.

On November 20, 2019, the Court issued an order modifying its previous Opinion and ordering publication. It did not change the judgment. The Court of Appeal's final Opinion is attached hereto as Exhibit 1. This Petition for Review followed.

STATEMENT OF FACTS

Defendant and Respondent Dignity Health owned and operated St. Joseph's Medical Center. (Op., p. 1.) St. Joseph's Medical Center was a fictitious business name used by Dignity Health. (*Ibid.*) Petitioner and Appellant Dr. Sundar Natarajan is a hospitalist, i.e., a physician who specializes in providing care to patients admitted to a hospital on behalf of primary care physicians. (Op., p. 3.) Without hospital privileges, he therefore cannot practice his speciality.

After serving as director of St. Joseph's hospital program, Dr. Natarajan left that position and set up a competing hospitalist program of his own. (Op., p. 3.) Dignity had a direct financial incentive to terminate Dr. Natarajan's privileges because he was a successful economic competitor to Dignity's own hospitalist service, which was losing approximately $600,000 per year. (6 PAR 1219, 1268; 17 PAR 4170-4177; 19 PAR 4624.)

A Dignity vice-president, not the medical staff, initiated the investigation that led to the termination of Dr. Natarajan's privileges.[6] (6 PAR 1359.) The hospital's Medical Executive Committee never conducted

[6] This fact and other facts referenced below were not included in the *Natarajan* opinion. The omission of facts referenced in this Petition was brought to the Court of Appeal's attention in a Petition for Rehearing filed on November 4, 2019, so this Court may properly consider those additional facts. (Cal. Rule of Court 8.500, subd. (c)(2).)

an investigation of Dr. Natarajan's practice, in violation of its bylaws. (7 PAR 1608-1609; 6 PAR 1371-1379; 18 PAR 4320-4322; 41 PAR 4624.)

After the Medical Executive Committee recommended the termination of Dr. Natarajan's privileges, he promptly requested a hearing. (1 PAR 216-219.) In his hearing request of March 31, 2014, he informed Dignity in writing of its economic conflict-of-interest in selecting the hearing officer, due to the fact that Dignity and Dr. Natarajan were competitors. (*Id.)* He requested the appointment of any of 13 retired judges and a retired Court of Appeal justice set forth in a letter to Dignity, or any other mutually-agreed-upon or neutrally-selected retired judge or attorney, to serve as the hearing officer. (1 PAR 216-219.)

Dignity ignored Dr. Natarajan's request for a mutually-agreed-upon or neutrally-selected hearing officer. Instead, on or before April 1, 2014, Dignity's corporate counsel and/or one of its executives selected the hearing officer; neither the Medical Staff nor the governing body participated in the selection. (1 PAR 238-241, 244-245; AAR 52-59; 19 PAR 4655-4657.) The hearing officer had a more than 30-year friendship with the hospital and medical staff's attorney. (1 PAR 269-271.) The hearing officer's contract was with Dignity and Dignity paid the hearing officer's fees for serving in Dr. Natarajan's case. (AAR 53-55; 178-215; 1 PAR 244.) The hearing officer had been appointed as the hearing officer to preside over nine other Dignity hospital hearings before his appointment as the hearing officer in Dr. Natarajan's case. (AAR 318.)

The hearing officer had received more than $210,000 from Dignity at the time of his appointment, as a result of his previous work for Dignity. (AAR 314-318.) At his voir dire, the hearing officer could not recall any time he had presided over a hospital hearing in which the physician won the hearing. (1 PAR 272-273.) The hearing officer's fee agreement did not

prevent him from working in the future at any of Dignity's 34 hospitals other than arguably St. Joseph's Medical Center. (1 PAR 251-252; 20 PAR 4846-4847; AAR 53-59.) More than one-half of the hearing officer's income in both 2011 and 2014 came from working for Dignity. (AAR 48-50.) In other years between 2010 and 2014, it varied from 13 to 24 percent of his income. (*Ibid.*) Before his deposition in this case, the hearing officer had received approximately $421,000 from Dignity after leaving his law firm to become a hospital hearing officer. (AAR 38-47, AAR 314-318.)

After voir dire, Dr. Natarajan challenged the hearing officer on the grounds that he had the appearance of bias under *Haas* and *Yaqub*. (Op. p. 5, PAR 277-290.) The hearing officer rejected the challenge to his service on the ground that "a factual showing has not been made, and there is no legal justification for disqualification." (Op. p. 5, PAR 290.)

ADDITIONAL CONSIDERATIONS SUPPORTING REVIEW

There are several other reasons supporting review of this case, in addition to resolving the conflict between *Yaqub* and *Natarajan* and resolving important questions of law.

1. The record is unusually well-developed and clear. As described above, at the very beginning of the hospital hearing proceedings, Dr. Natarajan requested a mutually-agreed-upon or neutrally-selected hearing officer due to Dignity's financial conflict-of-interest as an economic competitor. In addition, Dr. Natarajan has consistently asserted that the hearing officer in this case had a disqualifying appearance of bias at every phase of this case. There is no question of waiver or estoppel to muddy the issue presented.

Furthermore, because the trial court permitted Dr. Natarajan to undertake discovery on the hearing officer's financial relationship to

Dignity, the record in this case contains relevant evidence that is not ordinarily available for a court's review in a challenge to a hearing officer's bias: (1) the contract between Dignity and the hearing officer (AAR 52-59); (2) the hearing officer's invoices to Dignity for his work in 11 cases, showing the amounts received by him (AAR 66-302, 318); the "amendment" to the hearing officer's contract requested by the hearing officer on April 17, 2014, which added a three-year prohibition on his work at St. Joseph's Medical Center (AAR 60-61); and deposition testimony by the hearing officer that he proposed that amendment because of Dr. Natarajan's request to see a copy of his contract with Dignity, which originally included no limitation on the hearing officer's ability to work at St. Joseph's. (AAR 34.) The record would allow this Court to make a decision in this case based on an adequate record of the financial relationship between Dignity and the hearing officer.

2. In *Natarajan,* the evidence of an appearance of bias of the hearing officer is stronger than in *Yaqub.* In *Yaqub*, the retired Court of Appeal justice who was serving as the hearing officer through JAMS had served in three prior hearings as the hearing officer for the hospital; he had served once as an arbitrator and once as a mediator in cases involving the hospital; and he had previously been a member of the board of directors of a foundation affiliated with the hospital. (*Id.,* 122 Cal.App.4th at 483-484.) There was no suggestion that the hearing officer depended on work from the hospital for a significant part of his income.

In *Natarajan*, on the other hand, the hearing officer was a hospital attorney whose income consisted entirely of acting as a hearing officer in hospital hearings. (Op., p. 4.) His work for Dignity supplied a very substantial part of his income from 2010 through 2014. (Op., p. 4, n. 7; AAR 48-50.) Furthermore, given that the Natarajan hearing was his tenth

appointment by a Dignity hospital, and that Dignity owned 34 hospitals in California at that time, Singer had clear prospects of substantial additional income arising from Dignity appointments at the time of his voir dire by Dr. Natarajan.

There is no factual distinction that can justify the different results in *Yaqub* and *Natarajan.* *Natarajan* implicitly recognized that it could not distinguish *Yaqub* on a factual basis, and that Robert Singer had an appearance of bias, in its discussion of why an appearance of bias was insufficient to disqualify a hearing officer in a private hospital hearing. (Op. pp. 6-11.) The differing results on these facts demonstrate the irreconcilable conflict between the two cases and the need for review.

3. Neither *Yaqub* nor *Natarajan* contain a thorough or complete analysis of the issue presented. *Natarajan* faults the *Yaqub* opinion for not analyzing the distinction between "constitutional due process" and fair hearing procedure and for not discussing the language of Section 809.2. (Op., p. 9.) The absence of any such discussion in *Yaqub* is understandable. At the time *Yaqub* was decided in 2004, California courts of appeal had generally agreed that there is no difference between the scope of protection provided by due process versus fair hearing procedure. Contrary to the *Nararajan* opinion, p. 6, *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1265, cited with approval the *Applebaum* holding that there was no difference in the scope of protection. So did *Lasko v. Valley Presbyterian Hosp.* (1986) 180 Cal.App.3d 519, 528, and *Hackethal v. Cal. Medical Ass'n* (1982) 138 Cal.App.3d 435, 442. It is thus very likely that the hospital in *Yaqub* never argued any distinction between due process and fair hearing procedure and the Court therefore had no reason to address that argument. Likewise, since Dr. Yaqub relied on the *Haas* doctrine to support his argument that he had received an unfair hearing, it is also quite likely

that neither Dr. Yaqub nor the hospital relied on Section 809.2, subds. (b) or (c) in their briefs. *Yaqub* can hardly be faulted for not discussing issues that were likely not raised in the appeal, but it is true that the case did not address those issues.

Natarajan's analysis is likewise incomplete. Both Dr. Natarajan's Opening Brief and Reply Brief discussed this Court's citation of *Haas* and *Yaqub* in *El-Attar v. Hollywood Presbyterian Medical Center, supra,* 56 Cal.4th at 996, a case involving a private hospital. (AOB, p. 31, Reply Brief ("RB"), p. 18.) Dr. Natarajan argued that those citations indicated that this Court believed that *Yaqub* and *Haas* applied to private hospitals. Nonetheless, the Court of Appeal did not discuss *El-Attar's* citation of *Haas* and *Yaqub* in its modified Opinion of November 20, 2019, even after Dr. Natarajan raised this issue again in his Petition for Rehearing, p. 11. Instead, it dismissed *Yaqub* as a "derelict on the waters of the law" because no other case has *followed Yaqub,* without addressing *El-Attar's* citation of the case.

Natarajan also fails to discuss the fact that this Court has determined that hospital hearings are official proceedings because they are authorized by law, subject to review through an administrative writ of mandate, and serve a vital public health function. (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 198-200; AOB, p. 33; RB, p. 22.) *Kibler* held that the Legislature has given hospital hearings "a status comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate." (*Id.*, at p. 200.) *Natarajan* does not provide any rationale or discussion why the weaker standard of actual bias should apply when this Court has explicitly held that hospital hearings are official proceedings with a status comparable to quasi-judicial public agencies.

Natarajan also does not address the question why physicians who work at private hospitals should have less protection from biased hearing officers than physicians who work in public hospitals. (RB, pp. 18-19.) This Court has consistently held that physicians working in public and private hospitals have the same due process protections. In *El-Attar*, 56 Cal.4th at 987, this Court quoted with approval *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 815: "[A] physician may neither be refused admission to, nor expelled from, the staff of a hospital, *whether public or private,* in the absence of a procedure comporting with the minimum common law requirements of procedural due process." (Emphasis by Court in *Anton*.) Likewise, the Legislature has treated both public and private hospitals the same in regard to whether hospital decisions constitute an abuse of discretion. (Code of Civil Procedure § 1094.5, subd. (d.).) Given the high stakes for physicians, there should be at least a reasoned explanation in California law of why doctors in private hospitals are entitled to less protection than their colleagues in public hospitals.

4. *Natarajan* claims for the first time that the enactment of Section 809 et seq. "supplanted" the common law governing fair hearings. (Op., p. 7.) Many cases have held that Section 809 et seq. codified the common law, which is obviously correct. (See *El-Attar*, 56 Cal.4th at 988.) No case before *Natarajan*, however, has ever held that Section 809 et seq. *replaced* the common law.[7] This holding in *Natarajan* appears to be one of the Third District's reasons for finding that *Haas* does not apply to hospital hearings. The Court held that *Haas* cannot be used to interpret the meaning of the words "direct financial benefit" in Section 809.2, subd. (b) because *Haas*

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[7] The Court's use of the term "supplanted" rather than "codified" was intentional. Dr. Natarajan's Petition for Rehearing, p. 9 explained that the Court's use of the term "supplanted" was incorrect, and why, but the Court did not modify its language on that point.

post-dated the enactment of the statute. (Op., p. 10.)

Natarajan recognizes that its view that Section 809 et seq. replaced the common law is contrary to this Court's opinion in *El-Attar,* stating: "but see *El-Attar* at pp. 990, 991, 994 [*seeming* to suggest that principles of common law can apply unless expressly contrary to § 809 et seq.]" (Op., p. 7, emphasis in original.) It is also contrary to long-standing California law as expressed in *Fahlen v. Sutter Central Valley Hospitals, supra*:

> Of course, statutes generally should not be construed to alter or abrogate the common law. We have said that a legislative purpose to do so must clearly and unequivocally appear.

(*Id.,* 58 Cal.4th at 669.) Nothing in section 809 et seq. indicates any intention to replace the common law, much less doing so clearly and unequivocally.

On this point, *Natarajan* is also again in conflict with *Applebaum v Board of Directors, supra,* which held that physicians are entitled to the "prevailing standard of impartiality." (*Id.,* 104 Cal.App.3d at 657-658.) *Haas* establishes a prevailing standard of impartiality which *Natarajan* refuses to apply.

Natarajan's holding on this issue is significant both for purposes of interpreting Section 809 et seq. and for California law in general. It raises questions as to whether the common law can be used to interpret Section 809 et seq.; and whether the long-standing rule that the common law remains valid unless expressly abrogated by the Legislature remains intact. Review should therefore be granted to clarify whether the common law applies to Section 809 et seq.

5. *Fahlen v. Sutter Central Valley Hospitals, supra,* recognizes that peer review may be used by hospitals for the illegitimate reason of retaliation against whistleblowers. (*Id.,* 58 Cal.4th at 677-679.) The

Legislature also recognized that possibility when it amended Health and Safety Code § 1278.5, subd. (d)(2) in 2007 to prohibit retaliation against physician whistleblowers through the termination of hospital privileges. In this case, there is undisputed evidence that Dignity had a substantial financial incentive to use peer review for the illegitimate purpose of eliminating a successful economic competitor. However, since he did not have a whistleblower claim, Dr. Natarajan was forced to defend himself in a forum controlled by the hospital and its medical staff. *Natarajan* fails to consider or address the potential harm to the public health if hospitals are permitted to use peer review as a weapon against economic competitors. This Court should consider whether the appearance of bias rule is necessary to prevent manipulation of hospital hearings by hearing officers who have a financial interest in pleasing the hospitals that hired them.

CONCLUSION

This Court has not reviewed a case directly involving hospital hearings since *El-Attar* was decided over six years ago. The clear conflict between *Natarajan* and *Yaqub* requires this Court's attention now. Unless review is granted, the law governing the standard for disqualifying hospital hearing officers will remain uncertain. If *Natarajan* was incorrectly decided, there is no doubt that some physicians will have their careers damaged, devastated or destroyed as a consequence of unfair hearings. This Court should take this opportunity to settle whether the correct standard for disqualification of hospital hearing officers is actual bias or an appearance of bias. Hospitals, hospital attorneys, physicians and patients will all be served by granting this Petition for Review.

Dated: November 27, 2019

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 8.360, subd. (b)(1)

Pursuant to Rule 8.360, subd. (b)(1), I certify that the attached brief uses the 13 point Times New Roman font and contains 7220 words.

Dated: November 27, 2019

By Stephen D. Schear
Stephen D. Schear
Attorney for Petitioner and Appellant
Sundar Natarajan, M.D.

PROOF OF SERVICE

Re: *Natarajan v. Dignity Health,* Court of Appeal Case No. C085906

I, the undersigned, hereby declare:

I am a citizen of the United States of America over the age of eighteen years. My business address is 2831 Telegraph Avenue, Oakland, CA 94609. I am not a party to this action.

On November 27, 2019, I served this document entitled **Petition for Review** on the following persons/parties by electronically mailing a true and correct copy through the True Filing filing and service electronic mail system to the e-mail addresses, as stated below, and the transmission was reported as complete and no error was reported.

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The Petition for Review was served by U.S. mail, postage prepaid, on:

Clerk, Superior Court of San Joaquin County
180 E. Weber Avenue
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I declare under penalty of perjury the foregoing is true and correct.

Date: November 27, 2019
Oakland, California

Stephen D. Schear

EXHIBIT 1

COURT OF APPEAL DECISION

NATARAJAN v. DIGNITY HEALTH

Case No. C085906

November 20, 2019

Filed 10/22/19; Modified and Certified for Publication 11/20/19 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

SUNDAR NATARAJAN, Plaintiff and Appellant, v. DIGNITY HEALTH, Defendant and Respondent.	C085906 (Super. Ct. No. STK-CV-UWM-2016-4821)

Plaintiff Sundar Natarajan filed a petition for a writ of administrative mandate to overturn the November 2015 revocation of his staff membership and privileges at St. Joseph's Medical Center of Stockton (St. Joseph's), the fictitious name of an entity that defendant Dignity Health owned and operated.[1] In September 2017, the trial court denied the petition and entered judgment for defendant.

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[1] Although not strictly "administrative" in the classic sense, review pursuant to this writ is appropriate for the internal peer review procedures of a hospital. (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 200.)

Plaintiff does not contest the sufficiency of the evidence in support of the internal decision; rather, his challenge rests on claims of a denial of procedural due process, and seeks to nullify any preclusive effects the internal decision might have on any subsequent action in court (see, e.g., *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 243-244), although he does not explain how he would be entitled to this requested relief without a remand for further internal proceedings.

He argues the circumstances of the hearing officer's relationship with defendant gave rise to an unacceptable risk of bias from a pecuniary interest in future employment with defendant, and the internal decision revoking his staff membership and privileges did not apply objective standards.[2] We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Given the limited nature of the appellate challenge, we omit frequent references in the briefing of both parties to the substantive evidence underlying the decision to revoke plaintiff's staff privileges and membership. We therefore peel from defendant's statement of facts a heavy overlay of disparagement of plaintiff's competence, as well as plaintiff's self-laudatory brush strokes. We also prune plaintiff's references to *other* potential biases in the process leading to the revocation, beyond the claimed pecuniary bias on the part of the hearing officer in favor of defendant that plaintiff argues on appeal. Neither party contests the factual accuracy of the trial court's statement of decision, so we draw most of our background facts from that source, as well as mutually agreed facts in the briefing. (*Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 175, fn. 3.)

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[2] We have allowed a number of amici curiae to file briefs. While some of the briefing provides food for thought, ultimately we are not persuaded that we should allow the expansion of the issues beyond those as the parties have framed them. (*City of Brentwood v. Campbell* (2015) 237 Cal.App.4th 488, 493, fn. 6.)

Plaintiff is a hospitalist, which (as the name suggests) is a specialty that oversees in-patient care at hospitals on behalf of primary care physicians. He was formerly the director of the hospitalist program at St. Joseph's in 2007. He left this position in 2008 to set up a competing hospitalist practice program of his own.

In 2013, the medical staff of St. Joseph's (a self-governing entity)[3] initiated an investigation into plaintiff's procedures. Beginning in 2011, plaintiff had been having persistent problems in completing medical records in a timely fashion, which led to a warning meeting with the staff's executive committee. He acknowledged the problem and resolved to improve; however, by 2013 the issue was still continuing. The chair of the department of medicine notified plaintiff in August 2013 that a committee would be investigating the timeliness of his record-keeping. In addition, the investigatory committee was concerned with whether plaintiff was responding in a timely fashion when on call, and the length of his patients' hospitalizations. The results of the investigation were reported to the staff's executive committee, with a recommendation to revoke plaintiff's staff membership and privileges. The executive committee adopted the recommendation.

Plaintiff appealed this recommendation to the peer review committee. The staff had delegated to the president of St. Joseph's the authority to appoint a hearing officer for

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[3] "Hospitals are required by law to have a medical staff association [that] oversees [the] physicians . . . given staff privileges to admit patients and practice medicine in [its] hospital. [This] . . . is a separate legal entity . . . [that] is required to be self-governing and independently responsible from the hospital for its own duties and for policing its member physicians." (*Hongsathavij v. Queen of Angels Etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1130, fn. 2 (*Hongsathavij*).) The medical staff has the primary duty of peer review. (*El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 992 (*El-Attar*).) The administration cannot act with respect to staff privileges without a recommendation from the peer review panel. (*Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1272 (*Mileikowsky*).)

this process,[4] who generally oversees the peer review proceedings in a neutral role, makes evidentiary rulings, and participates in the committee's deliberations as a legal advisor, without a vote in the committee's decision (a process somewhat akin to the relationship of a trial court and a jury on issues of fact[5]). (See Bus. & Prof. Code, § 809.2, subd. (b) ["the hearing officer shall [not] gain [any] direct financial benefit from the outcome, shall not act as a prosecuting officer or advocate, and shall not be entitled to vote"].)[6] The president selected Robert Singer as the hearing officer.

The hearing officer was a semiretired attorney whose income consisted entirely of acting as a hearing officer in peer reviews. In plaintiff's voir dire of the hearing officer pursuant to the staff bylaws and section 809.2, the hearing officer noted that he acted in this role for Kaiser and Sutter hospitals with almost the same frequency as with Dignity Health hospitals. He had been involved in seven previous peer proceedings at other Dignity Health hospitals and was appointed in two more after his appointment in the present matter, but not otherwise in a peer proceeding at St. Joseph's.[7] The hearing officer could not recall a physician prevailing in any of the matters in which he presided. To avoid the appearance of bias, he had asked that the contract appointing him as hearing officer include a provision barring St. Joseph from appointing him in another peer review

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[4] This was authorized under the staff bylaws, as permitted by law. (*El-Attar*, *supra*, 56 Cal.4th at p. 989.)

[5] E.g., *Mileikowsky*, *supra*, 45 Cal.4th at p. 1269; *Powell v. Bear Valley Community Hospital* (2018) 22 Cal.App.5th 263, 274-275 (*Powell*) (both noting statutory description of review panel as trier of fact).

[6] Undesignated statutory references are to the Business and Professions Code.

[7] In a deposition of the hearing officer taken in connection with the mandate petition, the hearing officer acknowledged slightly more than half of his income in *2011* and *2014* was derived in peer reviews from defendant-affiliated entities and ranged from 0.9 to 24 percent in other years between *2009 and 2013*.

matter for three years, though this did not bar him from acting as a hearing officer in peer reviews at other Dignity Health hospitals. At the conclusion of the voir dire process, the hearing officer denied plaintiff's motion to recuse him, finding that "a factual showing has not been made, and there is no legal justification" for disqualification.

Following a nearly year-long series of evidentiary hearings (generating an administrative record of nearly 10,000 pages and a clerk's transcript of nine volumes), the review committee issued a decision in June 2015, adopting the executive committee's recommendation to revoke plaintiff's staff membership and privileges. In preliminary remarks, it noted staff was expected under the staff bylaws to provide "efficient and high[-]quality care" that specifically includes completing "in a timely fashion the medical and other records for all patients for whom they provide care in the hospital." It concluded "unanimously" that plaintiff "did not meet the standards, policies, and rules applicable as a member of the Medical Staff, and did not exhibit a level [of] performance consistent with efficiency and high[-]quality medical care . . . ." Specifically, plaintiff's records were inadequate in content to the point where even members of the review committee could not readily understand them; he was in violation of Medicare limitations on verbal orders; his patient stays were longer than hospital averages or Medicare standards; he failed to respond promptly to pages from staff; he did not efficiently use consultants; and his shortcomings (which were not premised on any finding of *clinical* incompetence) were both pervasive and unlikely to improve.

Pursuant to the procedure in the staff bylaws, plaintiff appealed the decision of the review committee to St. Joseph's community board (the governing board of the hospital), which assigned the appeal pursuant to the bylaws to a three-person subcommittee. Plaintiff did not contest the sufficiency of the evidence, contending instead that he was denied a fair hearing. Accordingly, the community board's subcommittee did not in its decision address the factual basis for the review committee's decision itself, instead

incorporating the factual findings.[8] By a "majority vote," the subcommittee affirmed the decision of the review committee. The community board issued a resolution en banc approving and adopting the decision of the subcommittee. Plaintiff thereafter initiated the present mandate proceedings in superior court.

DISCUSSION

1.0 The Employment of the Hearing Officer did not Violate the Principles of Fair Procedure

The primary purpose in peer review of the revocation of staff membership and privileges is the protection of the public, which is not outweighed by a physician's procedural protections from arbitrary or discriminatory actions. (*El-Attar*, *supra*, 56 Cal.4th at p. 988; *Medical Staff of Sharp Memorial Hospital v. Superior Court* (2004) 121 Cal.App.4th 173, 182.)

As we emphasized at length 14 years ago (in a decision in which plaintiff's present attorney participated), where the peer review process of a *private* institution is involved, we are concerned only with the principles under common law of *fair procedure* and *not* the constitutional prescriptions of *due process* (which apply only to public entities). (*Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 97, fn. 12, 101-102, & fn. 15 (*Kaiser*).) Thus, "to the extent [plaintiff] relies on cases involving the constitutional right to 'due process,' [his] reliance is misplaced." (*Id.* at p. 102.) Other cases since the early 1980's have made the same point repeatedly. (*Powell*, *supra*, 22 Cal.App.5th at p. 274; *Dougherty v. Haag* (2008) 165 Cal.App.4th 315, 317; *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1265; *Anton v. San Antonio*

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[8] For this reason, although it is the decision of the community board and not the peer review committee that is the subject of administrative mandate proceedings in the trial court (*Hongsathavij*, *supra*, 62 Cal.App.4th at pp. 1136, 1143), our analysis of whether objective standards underlay the revocation must perforce make reference to the decision of the peer review committee in the Discussion.

Community Hospital (1982) 132 Cal.App.3d 638, 653-654 & fn. 4; *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657 (*Applebaum*).)

The former common law in California involving fair procedure was supplanted in 1989 with the enactment of section 809 et seq., part of a *comprehensive* statutory scheme for medical licensing intended to exercise the state's right to opt out of 1986 federal legislation in which the Legislature perceived deficiencies. (*El-Attar*, *supra*, 56 Cal.4th at p. 986 [rights "originally" grounded in common law], 988; *Mileikowsky*, *supra*, 45 Cal.4th at p. 1267; *Powell*, *supra*, 22 Cal.App.5th at p. 273; *Kaiser*, *supra*, 128 Cal.App.4th at p. 97; 100, fn. 13; § 809, subd. (a); but see *El-Attar* at pp. 990, 991, 994 [*seeming* to suggest that principles of common law can apply unless expressly contrary to § 809 et seq.].) In the present case, whether or not the common law is fully superseded is ultimately only of academic interest, as neither party has identified any pre-1989 decisions addressing the central issue on appeal.

There is a core protection even under fair procedure of an impartial decider. (*El-Attar*, *supra*, 56 Cal.4th at pp. 987, 995 [right to neutral adjudicator among core protections under fair procedure]; *Lasko v. Valley Presbyterian Hospital* (1986) 180 Cal.App.3d 519, 528-529 [impartial adjudicator must be included in fair procedure of private institution] (*Lasko*); *Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435, 442 [same] (*Hackethal*); *Applebaum*, *supra*, 104 Cal.App.3d at p. 657 [notice of charges and reasonable ability to respond "are basic to both sets of rights"]; *id.* at p. 658 ["inconceivable" that fair procedure would not also include the right to an impartial adjudicator]; cf. *Kaiser*, *supra*, 128 Cal.App.4th at p. 104 [core protections are "fundamental to *any* fair administrative remedy, whether the remedy is governed by principles of 'fair procedure' or 'due process' "].)

Notwithstanding this plain demarcation distinguishing between constitutional due process and fair procedure, plaintiff takes arms against the dichotomy. Relying on the body of case law involving *constitutional due process* that is not directly applicable,

plaintiff extracts a standard applied to adjudicators. *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 (*Haas*) concluded that this right to an impartial adjudicator *under principles of constitutional due process* is violated where one party has the unilateral right to appoint an ad hoc adjudicator to preside over the dispute[9] where the adjudicator has the prospect of *future* employment[10] in disputes involving the party because this gives rise to the *risk* of a pecuniary risk in the outcome of the case. (*Id*. at p. 1020.) Under the principle of *due process*, "courts have consistently recognized" that this practice under which a party may select an adjudicator whose income is dependent on the volume of cases decided "offends the Constitution" because there is a resulting *temptation* based on pecuniary interest (stemming from the rational self-interest of the selecting party to choose a favorable adjudicator), a risk that incurs "the most unequivocal condemnation and the least forgiving scrutiny" under the "constitutional principles governing disqualification for financial interest" (*id.* at pp. 1024-1025, 1027, 1030-1031); while due process may be flexible, it is strict with respect to pecuniary interests (*id*. at p. 1037). In the context of *due process*, it is the appearance of a reasonable likelihood of possible bias, not any actual bias, that governs.[11] (*Id*. at

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[9] The unilateral right to appoint an adjudicator is not otherwise *of itself* any violation of the core protection of an impartial adjudicator. (*El-Attar*, *supra*, 56 Cal.4th at pp. 987 [citing *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802], 996; *Kaiser*, *supra*, 128 Cal.App.4th at pp. 109-110; see *Haas*, *supra*, 27 Cal.4th at p. 1031 [same rule under due process or fair procedure].)

[10] We have held that this impermissible risk of a pecuniary interest in outcome under *due process* is not established simply with evidence of *past* employment. (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 186-190.) Thus, the present hearing officer's past employment with defendant-controlled entities (and income) is irrelevant.

[11] By contrast, for purposes of *fair procedure* a court does *not* presume bias based on a mere appearance absent a factual showing. (*Powell*, *supra*, 22 Cal.App.5th at p. 280;

pp. 1026, 1034; see *Applebaum*, *supra*, 104 Cal.App.3d at p. 657 [as a matter of *constitutional* law, even possibility of any unfairness is to be avoided].)[12]

The basket in which plaintiff's reliance on *due process* rests is *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474 (*Yaqub*). Without any analysis of the distinction between constitutional due process and fair procedure or citation to the controlling statute (§ 809.2), *Yaqub* simply applied the *Haas* holding (that applied the "least forgiving" scrutiny under due process to claims of pecuniary interest [*Haas*, *supra*, 27 Cal.4th at p. 1025]) to a medical facility[13] in the context of a retired justice being hired on an ad hoc basis in peer review hearings, and reversed because the appointment procedures "were not consistent with the *appearance* of impartiality." (*Yaqub* at pp. 481, 485-486, italics added.) Given *Yaqub*'s failure even to consider the distinction between the strict standard under due process for pecuniary interest and the statutory restatement of the principles of fair procedure limited to a *direct* financial interest in the outcome under section 809.2, we consider *Yaqub* to be a deviation from the strong current of precedent and therefore " ' "a derelict on the waters of the law" ' " that we have not found to be followed on this point in any published decision. (*In re Watford* (2010) 186 Cal.App.4th 684, 691.)[14]

Hongsathavij, *supra*, 62 Cal.App.4th at p. 1142; *Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 494.)

[12] In *Kaiser*, we *assumed* that even if *Haas* applied, plaintiff had forfeited a claim of bias because he failed to raise it in the internal proceedings. (*Kaiser*, *supra*, 128 Cal.App.4th at pp. 109-110.)

[13] *Yaqub* in fact *never identifies* whether the medical facility is private or public. Citing a Web site without any request or demonstration that this is a permissible source of data for this court via judicial notice, defendant asserts that the medical facility was a public institution. We do not need to resolve the question.

[14] Present counsel for plaintiff invoked *Yaqub* in his petition for review in *Kaiser* and faulted the *Kaiser* panel for failing to address *Yaqub* explicitly despite the *Yaqub* decision

Absent the more exacting established constrictions of constitutional due process in the context of pecuniary interest, the Legislature can frame the criteria for impartiality of an adjudicator as it wishes for purposes of the fair procedure a private entity must provide, without being required to meet the *constitutional* threshold for public entities. We do not presuppose that the use some 13 years later of the word "direct" in *Haas* (*Haas, supra*, 27 Cal.4th at p. 1031), to describe the *potential* for partiality in repeat ad hoc employment under due process has any bearing on the statutory phrase "direct financial benefit" (§ 809.2, subd. (b)), enacted in 1989 for purposes of fair procedure. Rather, as the common law had framed examples of biased adjudicators antedating the statute, situations in which adjudicators had a demonstrated unacceptable risk of bias as the result of a tangible interest (as opposed to an expectancy) included those with a *present* pecuniary interest (such as *competitors*) or other personal stake in the outcome; *personal* "embroilment" with the person whose right is at issue (including having been the subject of criticism from the person); prior participation in the process as accuser, investigator, finder of fact, or initial decisionmaker; and adjudicators who act on evidence that had not been subject to adversarial procedures. (*Lasko, supra,* 180 Cal.App.3d at pp. 529-530; *Hackethal, supra,* 138 Cal.App.3d at p. 443; *Applebaum, supra,* 104 Cal.App.3d at pp. 657-658.) Neither party has identified a case decided under fair procedure in which the mere *possible* interest in future employment as an adjudicator was (or was not) a basis for setting aside a decision. In the face of the common law in 1989, we do not believe that the Legislature intended "direct financial benefit" to include an even more ephemeral potential for bias than *Haas*—where the county was at least the only player in the hearing officer game—as opposed to a situation such as the present case in which the

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being brought to its attention. (We take judicial notice sua sponte of our records in *Kaiser*.) The Supreme Court denied the petition. (*Kaiser, supra,* 128 Cal.App.4th at pp. 90, 115.) Our express repudiation of *Yaqub* here illuminates the absence of any need on our part to have addressed *Yaqub* in *Kaiser*.

hearing officer can pursue employment with the *other* hospital networks that have made use of his services. (Cf. *Powell, supra*, 22 Cal.App.5th at p. 280 [no pecuniary interest where peer review income derived from sources other than hospital, i.e., representing plaintiffs as well].) *Had* that been the intent, the Legislature would have described the disqualifying financial benefit as "potential" or "possible," rather than "direct."

Given that we do not find that plaintiff has established a direct financial interest on the part of the hearing officer such that we should set aside the decision of defendant to revoke his staff membership and privileges, we do not need to address the rejoinders of plaintiff to defendant's alternative arguments for upholding the participation of the hearing officer, or plaintiff's immaterial assertion that we should consider potential employment with defendant's hospitals as a whole as opposed to only St. Joseph's, or plaintiff's footnoted suggestions in dictum that rulings of the hearing officer prove actual bias. We thus proceed to plaintiff's remaining argument that the decision to rescind his staff membership and privileges did not employ objective standards.

2.0 The Decision was Based on Objective Standards

Plaintiff contends the revocation did not apply an objective standard in basing it on his untimely completion of medical records. (Although he alludes to other grounds in the decision—untimely responses to pages, late rounds, excessive use of verbal rather than written orders, the manner of his use of consultants, and the length of his patients' hospital stays—these are presented in a half-paragraph of conclusory assertions, and we thus disregard them for want of adequate development of this aspect of his argument. (*Sourcecorp, Inc. v. Shill* (2012) 206 Cal.App.4th 1054, 1061.)) In this regard, he contends his record-keeping shortcoming cannot be judged under a vague standard of failure to provide high-quality medical care, absent any proof that it resulted in an actual adverse impact on any particular patient's care.

Although plaintiff seems to suggest that the *explicit* provisions of the bylaws under which the "basic responsibilities" of staff include providing patients with "high[-]quality

care," including the preparation and completion of "medical and other required records" in timely fashion, is not sufficiently objective, his cited authority is to the contrary. *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 626-629 concluded that a bylaw responsibility to work with others is sufficiently free from vagueness if tied to proof of a substantial danger that failure to meet this standard would result in a failure to provide quality medical care. (Accord, *Gaenslen v. Board of Directors* (1985) 185 Cal.App.3d 563, 569 [willingness and ability to provide high-quality medical care not vague; further detailed description of prohibited conduct impossible or undesirable].) Moreover, proof of actual adverse impact is not required. (*Miller*, at p. 629 [sufficient in denial of admission to staff that applicant "might" not provide quality care]; *Marmion v. Mercy Hospital & Medical Center* (1983) 145 Cal.App.3d 72, 87-88 [potential danger posed by insubordinate resident].) Plaintiff's citation to *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 678, for the purported principle that a hospital must show actual resulting danger to patients is utterly inapposite, as the court was discussing the reason why a *whistleblower* alleging retaliation should not be subjected to the same exhaustion requirement before resort to court after an adverse internal decision; the court did not purport to set forth any principle regarding the need for actual danger as opposed to potential danger.

In the present case, the trial court noted that plaintiff did not provide any evidence that he was *arbitrarily* subject to this record-keeping obligation compared with other physicians. It also noted that the bylaws did not include any provision for progressive discipline. It is thus sufficient under the objective criterion of the timely completion of accurate medical records toward the end of high-quality medical care for defendant to find that plaintiff was unable or unwilling to comply despite past efforts to encourage him to remedy his shortcomings, resulting in records that successor physicians would have trouble interpreting in following up on plaintiff's care.

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs of appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

/s/
Butz, J.

We concur:

/s/
Hull, Acting P.J.

/s/
Renner, J.

Filed 11/20/19

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

SUNDAR NATARAJAN, Plaintiff and Appellant, v. DIGNITY HEALTH, Defendant and Respondent.	C085906 (Super. Ct. No. STK-CV-UWM-2016-4821) ORDER MODIFYING OPINION AND DENYING REHEARING, CERTIFYING OPINION FOR PUBLICATION [NO CHANGE IN JUDGMENT]

APPEAL from a judgment of the Superior Court of San Joaquin County, Barbara A. Kronlund, Judge. Affirmed.

Law Offices of Stephen D. Schear, Stephen D. Schear; Justice First and Jenny Chi-Chin Huang for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Barry S. Landsberg, Doreen W. Shenfeld, Joanna S. McCallum, and Craig S. Rutenberg for Defendant and Respondent.

Davis Wright Tremaine and Terri D. Keville for John Muir Health, Kaiser Foundation Hospitals, MemorialCare Health System, Providence St. Joseph Health, Sharp Healthcare, Sutter Health, and The Regents of the University of California as Amici Curiae on behalf of Defendant and Respondent.

Arent Fox, Lowell C. Brown and Diane Roldán for California Hospital Association as Amicus Curiae on behalf of Defendant and Respondent.

Nossaman, Carlo Coppo; Patrick K. Moore Law Corporation, Patrick K. Moore; Hanson Bridgett and Glenda M. Zarbock as Amici Curiae on behalf of Defendant and Respondent.

John D. Harwell as Amicus Curiae on behalf of Defendant and Respondent.

Francisco J. Silva and Long X. Do for California Medical Association as Amicus Curiae.

THE COURT:

It is ordered that the opinion filed herein on October 22, 2019, be modified as follows:

1. On page 2, in the first full paragraph the words "although he does not explain how he would be entitled to this requested relief without a remand for further internal proceedings" are deleted and the preceding comma is replaced with a period. As modified, this paragraph reads:

> Plaintiff does not contest the sufficiency of the evidence in support of the internal decision; rather, his challenge rests on claims of a denial of procedural due process, and seeks to nullify any preclusive effects the internal decision might have on any subsequent action in court (see, e.g., *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 243-244).

2. On page 3, in the first sentence of the second full paragraph, beginning with "In 2013," the word "initiated" is replaced with the word "conducted."

3. On page 3, in the third sentence of the second full paragraph, the words "by 2013," and "was still" are deleted. The third and fourth sentences are combined by replacing the

words “continuing. The” with “continued, and the” modifying these sentences to read:

> He acknowledged the problem and resolved to improve; however, the issue continued, and the chair of the department of medicine notified plaintiff in August 2013 that a committee would be investigating the timeliness of his record-keeping.

4. On page 4, in the first full paragraph, the following sentence is deleted: “The hearing officer could not recall a physician prevailing in any of the matters in which he presided.”

This modification does not change the judgment.

Appellant’s petition for rehearing filed on November 4, 2019, is denied.

The opinion in the above-entitled matter was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

FOR THE COURT:

/s/
Hull, Acting P.J.

/s/
Butz, J.

/s/
Renner, J.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **TEMP-M2N61G51**
Lower Court Case Number:

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11/27/2019

Date

/s/Stephen Schear

Signature

Schear, Stephen (83806)

Last Name, First Name (PNum)

Law Offices of Stephen D. Schear

Law Firm