No. S259364

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

SUNDAR NATARAJAN, M.D.,

Petitioner and Appellant,

v.

DIGNITY HEALTH,

Respondent.

After an Opinion by the Court of Appeal
Third Appellate District
Case No. C085906

Appeal from a Judgment of the
San Joaquin County Superior Court
Case No. STK-CV-UWM-20164821, Hon. Barbara Kronlund

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF NEITHER PARTY

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Sundar Natarajan, M.D.
v. Dignity Health Appeal
No. S259364

There are no interested entities or parties that must be listed in this certificate under California Rules of Court, rule 8.208.

DATED: November 30, 2020.

By: 
Joseph M. Cachuela

Attorneys for California Medical Association

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to rule 8.520(f) of the California Rules of Court ("CRC"), the California Medical Association ("CMA") hereby requests permission to file the attached *amicus curiae* brief in support of neither party in the above-captioned case.

There are no persons or entities to be identified under rule 8.520(f)(4) of the California Rules of Court.

I. INTERESTS OF *AMICUS CURIAE* APPLICANT

CMA is a non-profit, incorporated professional physician association of approximately 50,000 members, most of whom practice medicine in all modes and specialties throughout California. CMA's primary purposes are "to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession." CMA and its members share the objective of promoting high quality, safe, and cost-effective health care for the people of California.

CMA has a specialty section comprised of approximately one hundred organized medical staffs throughout California, known as the Organized Medical Staff Section ("OMSS"). CMA and OMSS are committed to the complementary goals of (1) safeguarding the ability of physicians to treat their patients effectively, free of arbitrary disruptions, and (2) preserving and strengthening the ability of organized medical staffs to be self-governing and independent in discharging their responsibilities to ensure high quality and safe medical care. To this end, CMA and OMSS advocate for hospital peer review systems that are effective, efficient, and fair.

II. PURPOSE OF THE *AMICUS CURIAE* BRIEF

CMA believes its proposed *amicus curiae* brief can assist the Court by bringing the expertise and experience of California's "house of medicine" to bear on the primary issue raised in this case. The proper interpretation and application of a bias disqualification standard for peer review hearing officers will impact multiple parties in a peer review proceeding with overlapping, albeit also competing interests. On the one hand, medical staffs and their medical executive committees are charged with primary responsibility to conduct peer review and impose discipline on physicians in an effective and consistent manner. On the other hand, physicians subject to peer review are entitled to fair and efficient procedures to protect their vested interests in hospital privileges. CMA represents all these interests and was the sponsor of Senate Bill no. 1211 that codified the peer review standards collectively known as the Peer Review Law, Business and Professions Code sections 809 *et seq*.

Without taking a position on the ultimate outcome of this case, CMA's proposed amicus brief explores the legislative history of the peer review statute and peer review's inherent potential for abuse. The brief delves into the role of hearing officers and demonstrates how they can wield influence over the outcome of a peer review proceeding. Finally, the brief propounds a contextualized approach for disqualifying hearing officers for bias; one broader and more functional than the narrow standard set forth by the Appellate Court, that can take account of the centralized governance structure of many large hospital systems that predominate in California.

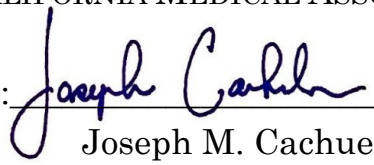
III. CONCLUSION

For the foregoing reasons, CMA respectfully requests that the Court accept and file the attached *amicus curiae* brief.

DATED: November 30, 2020

Respectfully,

Center for Legal Affairs
CALIFORNIA MEDICAL ASSOCIATION

By: 
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AMICUS CURIAE BRIEF

I
INTRODUCTION

At stake in this case is the resolution of a fundamental question about peer review hearing officers – whether the applicable standard for disqualifying bias reflects the critical influence that hearing officers have in peer review proceedings. On this question, the Court of Appeals' decision is unmoored from the Legislature's intent in enacting the peer review statute, decisional law, and the reality of the current healthcare landscape that is dominated by large hospital systems. The standard crafted by the Appellate Court is too narrow and would fail to disqualify hearing officers with unjustified bias while destroying the professional careers of physicians across the state.

To be sure, the issue posed before the Court is fraught with complex, oft-competing factors. With about 50,000 individual members and 100 organized medical staff members, the California Medical Association ("CMA") is in a unique position to assist the Court in navigating the important questions about peer review hearing officers in this appeal. CMA advocates on behalf of medical staffs and their leaders who seek efficient and effective peer review to preserve the highest quality and safest medical care possible in their hospitals. CMA also advocates for individual physicians who are entitled to fair procedure when their hospital privileges are subject to peer review. Moreover, CMA brings valuable insight as the sponsor of the 1989 legislation that enacted the statute under review here, Business and Professions Code section 809.2.[1]

The facts that underpin this case involve Petitioner and Appellant Sundar Natarajan, M.D.'s ("Dr. Natarajan") loss of

[1] Unless otherwise indicated, all statutory references are to the California Business and Professions Code.

privileges after an adverse peer review decision by Respondent Dignity Health's St. Joseph Medical Center ("Dignity Health"). Dr. Natarajan claims that he did not receive his right to a fair peer review hearing because, among other things, the hearing officer in his peer review proceeding harbored a disqualifying bias. While Dr. Natarajan's claim is the scaffolding on which this question hangs, the issue of peer review hearing officer bias is not unique to his case, nor is it the first time the issue has been heard by the courts. Indeed, the standard for determining disqualifying bias in a peer review hearing officer was established in *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474 ("*Yaqub*"), which framed the issue as "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.* at 486.

While CMA is neutral in this case and takes no position on the ultimate outcome of Dr. Natarajan's appeal, CMA does believe that *Yaqub*'s approach to analyzing hearing officer bias is the proper interpretation and application of a legal standard for hearing officer impartiality. By this amicus curiae brief, CMA wishes to help the Court establish the most appropriate standard for hearing officer impartiality for the benefit of all medical staffs, California physicians and their patients, and future peer review proceedings. CMA advocates not for any of the parties but for a hearing officer impartiality standard that is rooted in common law fair procedure principles and abides with the statutory language of section 809.2. Accordingly, CMA presents the legislative history of the peer review statute to understand its genesis and intent behind its drafting. CMA also discusses social and cognitive science research showing the influence hearing officers can have in peer review proceedings. CMA addresses how the Appellate Court's narrow interpretation of the standard for hearing officer impartiality would frustrate the purpose of peer review and be detrimental to the profession of medicine, delivery

of healthcare, and public safety in the state. Finally, CMA wishes to impress upon the Court the importance of understanding how different hospital governance structures can affect hearing officer bias, especially in large multi-hospital systems.

CMA believes taking account of these issues is vital to establishing a hearing officer impartiality standard that will serve all sides in a peer review proceeding and meet the twin purposes of peer review: "The primary purpose of the peer review process is to protect the health and welfare of the people of California [and] the interest of California's acute care facilities by providing a means of removing incompetent physicians from a hospital's staff. Another purpose, also if not equally important, is to protect competent practitioners from being barred from practice for arbitrary or discriminatory reasons." *Mileikowsky v. West Hills Hosp. & Med. Ctr.* (2009) 45 Cal.4th 1259, 1267 ("*Mileikowsky*").

II
INTERESTS OF AMICUS CURIAE

CMA is a non-profit, incorporated professional physician association of approximately 50,000 members, most of whom practice medicine in all modes and specialties throughout California. CMA's primary purposes are "to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession." CMA and its members share the objective of promoting high quality, safe, and cost-effective health care for the people of California.

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staffs to be self-governing and independent in discharging their responsibilities to ensure high quality and safe medical care. To this end, CMA and OMSS advocate for hospital peer review systems that are effective, efficient, and fair.

III
DISCUSSION

The issue in this appeal concerning impartiality of hearing officers implicates the core, competing concerns for a fair and effective peer review system. Hearing officers are like Charon, the Greek mythological ferryman guiding souls across the river Styx to their final destiny. Hearing officers play a vital role whose importance and influence cannot be underestimated. Careful scrutiny must be paid to ensure that hearing officers serve their charges well and help deliver results in peer review that are fair and just.

A. Hearing Officers Are Critical In Peer Review Proceedings.

1. Hearing Officers Assume A Central Role With Expansive Powers.

While the use of hearing officers is not required by law, the inclusion of hearing officers in peer review proceedings by medical staffs is nearly ubiquitous across the state. Section 809.2, subdivision (a) provides that peer reviewing proceedings shall be held "as determined by the peer review body" or its designee. Bus. & Prof. Code §809.2(a). Section 809 relies upon Business & Professions Code section 805's definition of "peer review body" to mean "the medical or professional staff" of a "health care facility." Bus. & Prof. Code §809(b). Thus, the law does afford medical staffs some discretion in how peer review proceedings are conducted. Functionally, however, the use of hearing officers to preside over peer review proceedings is virtually universal. Indeed, both CMA's model medical staff bylaws, as well as those

of the California Hospital Association, provide for the appointment of hearing officers in peer review proceedings.

Although there is no legal requirement that hearing officers must preside over peer review hearings, the peer review statutes prescribe certain functions for hearing officers when they are utilized. Sections 809.2 and 809.3 establish the statutory powers of hearing officers in peer review proceedings. Generally, hearing officers are charged with ensuring decorum and procedural compliance with the law. Bus. & Prof. Code §809.2(d) (hearing officer may "impose any safeguards the protection of the peer review process and justice requires"); but see *Mileikowsky*, 45 Cal.4th at 1270-71 (hearing officers have no power to issue procedural sanctions terminating a peer review hearing). Hearing officers control the pre-hearing discovery process and have the authority to rule upon any party's request for access to information and its relevance. Bus. & Prof. Code §809.2(d). Hearing officers also decide the admissibility and relevance of witnesses and documents in the peer review hearing. Bus. & Prof. Code §809.3(a)(4). They have express authority to grant or deny continuances. Bus. & Prof. Code §§809.2(d) & (g). Finally, hearing officers also have unilateral authority to rule on challenges to their own impartiality and the impartiality of any peer review panel member. Bus. & Prof. Code §809.2(c).

Courts have extended the authority of hearing officers to "impose any safeguards the protection of the peer review process and justice requires" under section 809 beyond the discrete functions listed in the statute. Bus. & Prof. Code §809.2(d). Functionally, section 809 requires hearing officers to exercise a certain level of discretion in order to properly balance the competing interests of the parties while maintaining the fairness of the peer review proceeding. See *Unnamed Physician v. Bd. of Trustees of Saint Agnes Med. Ctr.* (2001) 113 Cal.App.4th 607, 627 (affirming hearing officer authority to amend or reverse evidentiary rulings) ("*Unnamed Physician*"). Hearing officers

may issue gag or protective orders to preserve the integrity of evidence, protect confidential information, and prevent the harassment of witnesses. *Sadeghi v. Sharp Memorial Medical Center Chula Vista* (2013) 221 Cal.App.4th 598, 619 (holding that hearing officer order restricting ex parte communication by physician was an appropriate safeguard to protect the peer review process).

The Appellate Court gives passing acknowledgment to the ability of medical staffs to expand upon the minimum procedural requirements set forth under section 809 but fails to give due consideration to the discretion often afforded to hearing officers in carrying out their duty to protect the peer review process and uphold justice. To be sure, the peer review statute allows medical staffs to establish procedural protections beyond the minimum requirements established in the code. *See* Bus. & Prof. Code §809.6(a) ("The parties are bound by any additional notice and hearing provisions contained in any applicable professional society or medical staff bylaws which are not inconsistent with Sections 809.1 to 809.4, inclusive"). Thus, many medical staff bylaws, including CMA's model medical staff bylaws, contain provisions that allow hearing officers to take certain discretionary actions, such as limiting the scope of examination, and setting reasonable time limits on each party's presentation of its case. Courts have condoned a hearing officer's authority to ask clarifying questions of witnesses during a proceeding, answer legal and procedural questions posed by the panel members, and participate in and serve as the legal advisor to the panel during deliberations. See, e.g.*, Powell v. Bear Valley Cmty. Hosp.* (2018) 22 Cal.App.5th 263, 280 (condoning hearing officer asking witnesses clarifying questions). Hearing officers may even go so far as to recommend to the hearing panel that the proceeding be dismissed for a physician's failure to cooperate. See *Mileikowsky* 45 Cal.4th at 527.

As the Legislature emphasized in section 809, "peer review,

fairly conducted, is essential to preserving the highest standards of medical practice." Bus. & Prof. Code §809(a)(3). Hearing officers, through their authority to control the sequence of events and ensure compliance with the law and the requirements of justice, are the arbiters of fairness in the peer review process. Indeed, recognition of their critical role is essential to ensuring that physicians duly receive their right to a fair hearing.

2. As Legal Experts, Hearing Officers Can Have Heavy Influence Over Physician Peer Review Panelists.

Section 809 clearly establishes that the authority to decide the proposed disciplinary action resides with the peer review body, but the expansive role of hearing officers undoubtedly allows them, wittingly or not, to tip the balance of the proceedings. Because of this potential for considerable influence, it is almost universal that medical staffs and hospitals appoint experienced healthcare attorneys to be hearing officers. Just as members of the peer review body must possess the expertise necessary to make medical determinations that are integral to quality assurance, so too are attorney hearing officers best equipped – with their legal training, experience, and background – to serve fairness and efficiency in peer review proceedings. In this aspect, hearing officers are much like judges, and have similar powers to rule on the admissibility and relevance of evidence and set parameters on the scope of examination.

Given the expansive impact of hearing officers in peer review proceedings, it is unsurprising that it has become the industry standard for skilled healthcare attorneys to fill the role. An experienced healthcare attorney is an expert on both peer review procedures and the nuanced legal considerations necessary to effectuate the nebulous task of "impos[ing] any safeguards the protection of the peer review process and justice requires." Bus. & Prof. Code §809.2(d). To be sure, only attorneys appear on the rosters of available and highly experienced hearing

officers maintained by the California Society of Healthcare Attorneys ("CSHA"), the only such list available in California. *See* CSHA Website, Page: CSHA's Hearing Officer Program, CSHA Hearing Officers at <https:// www.csha.info/csha-hearing-officers> (as of Nov. 13, 2020). These attorneys have at least five years of experience practicing health care law (the vast majority have decades of experience) and attest to being familiar with the current statutes, regulations, cases, common bylaws, and other provisions governing peer review in California. *Id.*

The experience and knowledge required of CSHA's attorney hearing officers is necessary to navigate the myriad procedural and evidentiary issues that often arise during peer review proceedings. The present case is no exception. By the court's description, Dr. Natarajan's peer review process entailed "a nearly year-long series of evidentiary hearings" with an administrative record of close to 10,000 pages and a nine-volume transcript. *Natarajan v. Dignity Health* (2019) 42 Cal.App.5th 383, 387. There is little doubt that the physician members of the peer review panel worked closely with the hearing officer during the proceedings and relied upon the hearing officer's expertise to address the legal matters that arose throughout the process. In the present case and beyond, this dynamic between the hearing officer and the panel members can result in the hearing officer having tremendous influence over the proceedings, despite having no voting role. *See* Bus. & Prof. Code §809.2(b). This sentiment is well supported by empirical research.

Precisely because of a hearing officer's legal expertise, deference is often given to them by the peer review panel. Specifically, peer review proceedings involve one set of experts with specialized knowledge who must rely on other experts outside their sphere of knowledge. That is, on the one hand, physician peer reviewers no doubt are highly educated and experts on clinical and medical topics put before them. Attorney hearing officers, on the other hand, are experts on legal matters

that arise in peer review, including understanding and applying relevant medical staff bylaws. As such, while a peer review panel may be able to effectively evaluate clinical judgement, such a panel would understandably lack a sophisticated awareness of peer review procedures compared to the hearing officer. Thus, similar to the judge and jury relying on an expert's testimony or the jury relying upon the judge to provide the jury instructions and rulings on question of law, a peer review panel would rely on a hearing officer to provide instructions, determine the admissibility of evidence, and ensure procedural justice in peer review proceedings. Because the hearing officer is essentially the expert on the legal aspects of the peer review proceeding, deference is often given to the hearing officer by the peer review panel.

There is real risk that hearing officers, by virtue of their expertise, can exert tremendous influence over the non-legal physician members of the peer review panel given how closely the parties work together, even though hearing officers have no vote in the outcome of a peer review proceeding. *See* Bus. & Prof. Code §809.2(b). Empirical research confirms this risk to be real. For example, research suggests that deference is strongly linked to the perception of procedural justice, such as a fair proceeding. *See* Tyler & Krochik, *Deference to Authority as a Basis for Managing Ideological Conflict* (2013) 88 Chi.-Kent L. Rev. 433, 445. In a 2008 study of peer review in California, peer review participants, including physician reviewers and physicians reviewed, highly rated the effectiveness of a peer review hearing to ensure both individual rights and proper process. Lumetra, Comprehensive Study of Peer Review in California Final Report (2008) p. 93. As such, the satisfaction by peer review participants regarding procedural justice would suggest that deference to hearing officers is highly likely since the hearing officers are in charge of ensuring such rights and proper process during a peer review proceeding.

While direct research on the impact of legal experts on peer review panels are lacking, empirical research on the impact of judicial commentary on juries or expert testimony on judges and juries can provide insight on the significant impact hearing officers have in a peer review setting. In an experiment regarding the impact of judicial commentary on juries, researchers found that a jury had fewer pre-deliberation guilty verdicts and hung juries if the judge provided a summary of evidence along with jury instructions. Katzev & Wishart, The Impact of Judicial Commentary Concerning Eyewitness Identifications on Jury Decision Making (1985) 76 J. CRIM. L. & CRIMINOLOGY 733, 739. But, if the judge provided commentary on the findings regarding eyewitness identification, juries delivered even fewer pre-deliberation guilty verdicts and had even less of a likelihood of a hung jury. *Ibid*. The researchers concluded that "judicial instructions have a significant influence on several dimensions of the jury decision-making process." *Id*. at 741. Conversely, in another study, juries were more willing to consider an inadmissible testimony if severely admonished by the judge to disregard it. *See* Wolf & Montgomery, Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors (1977) 7 J. APPLIED PSYCH. 205. Regardless, just like a non-voting judge may influence perception on evidence and thereby the verdict via their commentary or instruction, a non-voting hearing officer may influence a peer review panel to consider evidence differently and reach a different conclusion compared to a lack of instruction or intervention by the hearing officer.

Similarly, as a legal expert providing instruction and commentary on process, hearing officers may, like expert witnesses, sensitize peer review panels to particular factors of consideration or evidence, which could impact how they view particular evidence. As an example, a study showed that after hearing expert testimony on reconstructive memory and factors

affecting memory, jurors gave less weight to the witness's confidence in determining the credibility of a witness. *See* Cutler et al., Expert Testimony and Jury Decision Making: An Empirical Analysis (1989) 7 BEHAVIORAL SCIENCES & THE LAW 215, 223; Hosch *et al.*, Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions (1980) 4 LAW AND HUMAN BEHAVIOR 287, 294. Depending on whether the prosecution or defense uses the expert testimony, the researchers suggested that the results showed an increased or decreased likelihood of convictions. See *id.* at 223. Because hearing officers, in a similar manner, often answer questions or participate in deliberations with the peer review panel, they act like an expert witness and may influence the sensitivity or skepticism of the peer review panel toward particular evidence, which would inadvertently affect the decision of the peer review panel.

For that reason, no matter how well-intentioned, a hearing officer, like judges in a trial, may unintentionally rule on discovery or evidence challenges or, like experts testifying in a trial, may answer particular questions for the peer review panel in a manner that increases the likelihood of a certain outcome. See, e.g., Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials* (1985) 38 STAN. L. REV. 89, 123-124 (study results suggest that judges might "leak" or send their true underlying feelings, beliefs, or expectations about the trial outcome to jurors via comments or rulings). If an official, like a judge or a hearing officer, internally expects a certain outcome, that expectation can subtly manifest, leading to an "interpersonal expectancy effect" or more informally, "a self-fulfilling prophecy." See *id.* (citing to Rosenthal, Experimenter Effects in Behavioral Research (1976)). As an example of how much an expert's opinion could influence the decision, the Federal Judicial Center found that 96.55% of responding federal district court judges stated that a disputed issue was resolved in a manner consistent with the advice or testimony of a court-

appointed expert, suggesting that there was deference given to the court-appointed experts by both judges and juries and that the expert's testimony was greatly influential. Cecil & Willging, Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence (1993) pp. 52, 55. Similarly, because the hearing officer, like the court-appointed expert, is the non-biased, neutral expert on the peer review process, their decision, commentary, participation in deliberation, or expectation of an outcome has a high likelihood of steering the outcome.

This is not to say that hearing officer intentionally or recklessly influence peer review case outcomes. Cognitive science shows that expert biases often are latent as experts may apply "[f]iltering and other cognitive processes … sometimes at a cost of missing and ignoring important information, fixation and escalation of commitment, and bias." Dror et al., Cognitive Bias and Its Impact on Expert Witnesses and the Court (2015) 54 JUDGES' J. 8. For that reason, "[i]t is very important to note that cognitive biases work without awareness, so biased experts may think and be incorrectly convinced that they are objective, and be unjustifiably confident in their conclusions." *Id.* at 9.

In the context of peer review, research suggests that physicians on the peer review panel (who vote on the ultimate issues) would defer to and be influenced by attorney experts serving as hearing officers. As such, hearing officers who cannot vote on the ultimate outcome of a peer review proceeding may still have dominating influence when legal or procedural issues are dispositive in the proceeding, as often is the case. Indeed, research suggests that, due to such deference, hearing officers may greatly influence peer review proceedings and outcomes unwittingly, even when they believe they are being neutral and objective.

B. A Broad Neutrality Standard for Hearing Officers Ensures Fairness.

The potentially significant influence that hearing officers may exercise warrants special efforts to prevent undue interference in peer review proceedings. Hearing officers who, unwittingly or not, tilt the outcome of a peer review decision frustrate "the policy of this state that peer review by performed by [physician] licentiates." Bus. & Prof. Code §809.05. A robust and clear impartiality standard rooted in procedural due process principles of fairness is essential, especially because the statute entrusts hearing officers to be the sole arbiters of the standard in self-policing themselves against disqualifying biases. *See* Bus. & Prof. Code §809.2(b).

1. Legislative History of Business and Professions Code Section 809.2.

California Business and Professions Code section 809.2 was originally enacted in 1989. *See* Senate Bill No. 1211 (1989-1990 Reg. Sess.) as introduced Mar. 8, 1989 ("S.B. 1211"). In its original form, the bill codified specific procedural rights for individual physicians before, during and after a peer review hearing. *Id*. at §§2-7. The provisions of the bill were intended by the state Legislature to be incorporated into medical staff bylaws of organized medical staffs. Assem. Amend. To Sen. Bill No. 1211 (1989-1990 Reg. Sess.) July 17, 1989, p.3. The provisions apply in all cases where a "peer review body" is required to make an "805 or 805.01 report" if an adverse peer review action is taken. *See* S.B. 1211, §2 (codified as section 809.1(a)).

Prior to 1989, no California statute specified peer review procedures or the due process rights of licentiates. Rather, California court rulings gradually developed standards of "fair procedure" within the context of peer review. Under existing case law, a physician had the right to "fair procedure" in disciplinary proceedings, to include the right of a licentiate to an unbiased hearing officer. As explained by the California Supreme Court,

"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." *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 815 ("*Anton*").

In addition to codifying procedural rights in the peer review process, the drafters of S.B. 1211 had another goal in mind – to ensure that California physicians would receive the benefit of established state law protections from liability for peer review activities. Such concerns arose against the backdrop of a recently decided US Supreme Court case, *Patrick v. Burget* (1988) 486 U.S. 94, that called into question the adequacy of federal immunity for peer review participants, to include the federal Health Care Quality Improvement Act ("HCQIA"). *See* Assem. Com. on the Administration of Justice, Analysis of Sen. Bill No. 1211 (1989-1990 Reg. Sess.) as amended May 2, 1989, p. 3. According to the authors of S.B. 1211 the bill sought to address these peer review procedural and immunity concerns:

> The purpose of this bill is to provide statutory procedural rights and protections to practitioners subjected to adverse actions and to opt out of the federal peer review statute.
>
> * * * *
>
> This bill would make specified legislative findings and declarations regarding the need for California to opt out of the federal law and design its own peer review system which, if fairly conducted, will preserve the highest standards of medical practice. This bill would provide that a licentiate who is the subject of a final proposed action of a peer review body for which a report is required to be filed shall be entitled to various due process rights before, during, and after a hearing on the matter.

* * * *

> CMA claims this bill would result in a far better system than contemplated by federal law. The sponsor asserts that this bill is needed due to the deficiencies and vagueness of the [HCQIA] and notes that establishing California's own law regarding peer review immunity and procedural due process will allow California state courts to interpret these laws. According to the sponsor, this bill strikes the necessary balance between the need to protect the peer review body from the threat of litigation and the need to provide physicians, who have a right to earn a living at stake, with adequate procedural rights during peer review proceedings. Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1211 (1989-1990 Reg. Sess.) as amended April 12, 1989, pp. 2-6.

There was little debate in the Legislature that existing case law afforded certain procedural rights to physicians subject to a peer review action, nor was it contended that the procedural rights contemplated under the bill were in conflict with those established by the courts. In fact, the Legislature was made aware that "S.B. 1211 includes due process rights and obligations which are consistent with case law." Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1211 (1989-1990 Reg. Sess.) as amended April 12, 1989, p. 9. Rather, the statutory procedural rights set forth in S.B. 1211 were intended, in part, to address concerns that common law "fair procedures" were not being uniformly applied through hospital bylaws. That is, absent statutory procedural standards, there was little certainty that a physician facing peer review proceedings at one hospital would have the same minimum procedural rights as a similarly situated physician governed by different bylaws at another hospital in the

state. As CMA explained, the bill would "[guarantee] licentiates basic due process rights and ensure fair peer review proceedings." Assem. Com. on the Administration of Justice, Analysis of Sen. Bill No. 1211 (1989-1990 Reg. Sess.) as amended May 2, 1989, p. 3. The Legislature, while acknowledging that S.B. 1211 would require the adoption of procedures which may not be required as a matter of the common law doctrine of "fair procedure," used the terms "due process" and "fair procedure" interchangeably. See, e.g., *id*. at pp. 2-3.

After its introduction, S.B. 1211 was amended four times before it was enacted into law. The amendments made on May 2, 1989, are particularly relevant. These revisions added language to section 809.2. subdivision (b) prohibiting hearing officers from gaining a "direct financial benefit from the outcome" of a peer review proceeding. This prohibition mirrored the language in subdivision (a) of section 809.2 barring panel members from receiving a direct financial benefit from the outcome of a hearing. Prior to this amendment, the language of the bill only proscribed hearing officers from "acting as a prosecuting officer or advocate" or voting on the ultimate outcome of a peer review proceeding. *Ibid*. Importantly, the language in subdivision (c) of section 809.2, which existed in the bill's original version, remained unchanged during Legislative consideration. That section provided for the right of a licentiate to challenge the <u>impartiality</u> of a hearing officer. *Id*. at §809.2(c) (emphasis added). Importantly, the impartiality language in subdivision (c) makes no reference to the specific prohibitions for peer review members or hearing officers in subsections (a) and (b). This makes sense from the standpoint of revisionary sequence, as the bill, as originally drafted, allowed peer review members and hearing officers to be challenged for impartiality as the common law concept of due process would require.

Although the Legislative analysis on S.B. 1211 thoroughly explored the various due process rights of licentiates before,

during, and after the peer review hearing, there was little mention made of the qualifications and impartiality of the hearing officer. In fact, the procedural rights concerning the hearing officer, when mentioned at all, were briefly described as "the right to […] challenge the impartiality of the hearing officer, if any." Assem. Com. on the Administration of Justice, Analysis of Sen. Bill No. 1211 (1989-1990 Reg. Sess.) as amended July 17, 1989, p. 2. This sentiment reflects that language found in subdivision (c) of section 809.2, which allows hearing officers to be challenged on the grounds of "impartiality." Bus. & Prof. Code §809.2(c). Notably, despite the amendment to subdivision (b) of section 809.2, the Legislative analysis is devoid of any reference to that provision in its original or amended forms. However, there is substantial more analysis dedicated to the bill's provisions on the impartiality of panel members. This analysis is instructive, given the similar language requiring both the hearing officer and panel members to be impartial, and, separately, prohibiting the hearing officer and panel members from gaining a "direct financial benefit from the outcome" of the hearing. Bus. & Prof. Code §§809.2(a) & (b).

Here, the Legislative analysis repeatedly emphasized that the bill provided licentiates with the right to an unbiased hearing panel and the right to voir dire and challenge the impartiality of panel members. *See, e.g.*, Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1211 (1989-1990 Reg. Sess.) as amended April 12, 1989, p. 3. Importantly, the two analyses prepared for the Assembly Subcommittee on the Administration of Justice, go into further detail, specifying that the bill also prohibits panel members from gaining a direct economic benefit from the outcome of the hearing. Notably, the Legislative analysis of this language does not suggest, even indirectly, that disqualification of a panel member for partiality under subdivision (c) of section 809.2 is limited strictly to a showing that the panel member will receive a direct financial benefit from the proceedings as provided

in section 809.2 subdivision (a). Stated differently, the definition of "impartial" as used in the bill, as evidenced by the Legislature, is not constrained to a panel member's inextricable financial interests in the results of the hearing.

Thus, the implication is that neither the drafters of S.B. 1211 nor the Legislature intended subdivision (b) of section 809.2 to define or narrow the general impartiality standard found in subdivision (c). That is, a hearing officer's disqualification due to impartiality is not based solely on the prohibitions specified in subdivision (b); to conclude otherwise would be antithetical to both the revisional history of the bill and the treatment of the "impartiality" standard as separate from and broader than the "direct financial benefit" prohibition in the Legislature's analyses. The statutory language and construction simply do not support the notion that hearing officer disqualification under section 809.2 may be based only on a showing that the hearing officer will receive a "direct financial benefit from the outcome" of the peer review proceeding. Rather, the Legislative history suggests that the impartiality requirement of section 809.2 must be interpreted more broadly, consistent with common law procedural due process principles on hearing officer bias.

2. The Business and Professions Code Requires Impartiality.

The requirement for hearing officer neutrality is grounded in two subdivisions of section 809.2. *First*, the statute expressly prohibits hearing officers from engaging in certain conduct that would inherently constitute undue influence over a peer review proceeding. That is, hearing officers "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." Bus. & Prof. Code §809.2(b); see also *Mileikowsky*, 45 Cal.4th at 1271 ("The purpose for providing a physician with a review of the peer review committee's recommendation is to secure for the physician

an independent review of that recommendation by a qualified person or entity, here the reviewing panel [of physicians]"). *Second*, the statute broadly allows hearing officers to be challenged on the grounds of "impartiality." *Id.* at §809.2(c).

As discussed in Section III(B)(1), subdivision (b) of section 809.2 does not, and was never intended to, define or limit the requirement for impartiality in subdivision (c). While the functions evincing undue influence specifically enumerated in subdivision (b) would certainly disqualify a hearing officer for bias, narrowing the "impartiality" requirement to those functions exclusively would certainly handicap the peer review statute beyond any practical application. Under such a narrow interpretation, for instance, a hearing officer who has a personal relationship with one or more of the panel members or a professional relationship with the CEO of the hospital would not be disqualified for impermissible bias under section 809.2. Certainly, such a thin veneer of protection against bias was not the Legislature's intent in providing "statutory procedural rights and protections" to licentiates facing adverse actions. Sen. Rules Com., Off. Of Sen. Floor Analysis, 3d reading analysis of Sen. Bill No. 1211 (1989-1990 Reg. Sess.) as amended May 2, 1989, p. 2. Rather, the principles of common law procedural process as applied to the facts at issue, not any limiting language in section 809.2, must guide the enforcement of the impartiality standard for hearing officers.

As explained by the California Supreme Court, "[a] hospital's duty to provide certain protections to a physician in proceedings to deny staff privileges was grounded originally in the common law doctrine of fair procedure." *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 986 ("*El-Attar*"). In *Pisker v. Pacific Coast Soc. of Orthodontists* (1969) 1 Cal. 3d 160, 166, the Court held that a dentist has a "judicially enforceable right" to have his application for membership to a dental association "considered in a manner

comporting with the fundamentals of due process." Extending such a holding to hospital peer review, the Court held that "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." *Anton*, 19 Cal.3d at 815.

Section 809.2 is part of a statutory scheme that is rooted in this procedural due process common law governing hospital peer review. "The Legislature [] codified the common law fair procedure doctrine in the hospital peer review context by enacting Business and Professions Code sections 809 to 809.8 in 1989." *El-Attar*, 56 Cal.4th at 988; see also *Weinberg v. Cedars-Sinai Med. Ctr.* (2004) 119 Cal.App.4th 1098, 1108 (sections 809 et seq. "essentially codified the requirements previously recognized in case law governing a physician's right to a hearing regarding the termination of his or her staff privileges"); *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1146-47. As the court explained in *Unnamed Physician*, "although [this statutory scheme] delegates to the private sector the responsibility to provide fairly conducted peer review in accordance with due process, including notice, discovery and hearing rights, it also defines what constitutes minimum due process requirements for the review process." *Unnamed Physician*, 93 Cal.App.4th at 622. The common law broadly requires hearing officers to be "impartial." See, e.g., *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 910-11.

The Court of Appeal dedicated ample discussion to the "due process" and "fair procedure" standards, drawing a chasmic distinction between the two standards that is unsupported by the Legislature's own analysis of the statute. See *Natarajan*, 42 Cal.App.5th at 388-91. Like the Legislature and some court decisions, CMA uses the terms "due process" and "fair procedure" interchangeably, even though in some contexts they might have distinct meanings. After all, "[t]he distinction between fair

procedure and due process rights appears to be one of origin and not of the extent of protection afforded an individual; the essence of both rights is fairness." *Applebaum v. Bd. of Directors* (1980) 104 Cal.App.3d. 648, 657 ("*Applebaum*") (emphasis added). The court in *Hackethal v. California Medical Association* (1982) 138 Cal.App.3d 435 ("*Hackethal*"), provided a succinct roadmap for how to consider the two standards in application. "The minimum requirements [for fair procedure] are described in varying ways and may depend upon the action contemplated by the organization and the effect of that action on the individual. If the requirements that have been announced by the cases and literature were compiled the list would closely resemble a list of the requirements of procedural due process." *Id.* at 442. *Hackethal* further states that "fair procedure" requires that an adjudicator must not "harbor a state of mind that would preclude a fair hearing. Disqualification [of the adjudicator] should occur if there is actual bias. Disqualification may also be necessary if a situation exists under which human experience teaches that the probability of actual bias is too high to be constitutionally tolerable." *Id.* at 443 (emphasis added). In contrast, the Appellate Court seems to suggest that an analysis of bias under "fair procedure" requires the narrowest of statutory interpretations. The Appellate Court's understanding of the two standards implies a cavernous and rigid gap in application that is not supported by the legislative history of section 809 nor relevant case law.

Moreover, the Appellate Court's analysis was framed by an interpretation of 809.2 that fails to draw a separation between the specific prohibitions in subdivision (b) and the licentiate's right to challenge the impartiality of the hearing officer, generally, enshrined in subdivision (c). According to the court, if the potential pecuniary interests of a hearing officer are not tantamount to a "direct financial benefit" under subdivision (b), as that term is understood through the more forgiving lens of the

"fair procedure" standard, then no impermissible bias exists. The court, then, would end its analysis at that point, omitting entirely any consideration of broader concern for the hearing officer's impartiality under subdivision (c). However, under a faithful interpretation of the Legislature's intent, any exhaustive analysis of the potential for bias must also consider whether the hearing officer's interests run counter to the impartiality requirement under subdivision (c). Under this analysis, in which both subdivisions (b) and (c) are considered, the Appellate Court's repudiation of the *Yaqub* decision fails. Indeed, while the *Yaqub* court did not mention section 809 in its analysis of hearing officer bias, the court's consideration of the danger of bias is wholly consistent with subdivision (c)'s language that renders a hearing officer susceptible to challenges of impartiality. It is this line of analysis that harmonizes *Yaqub* with the standard of "fair procedure." That is, if the "fair procedure" standard is understood to require, as the *Hackethal* court set forth, that a hearing officer must be disqualified for harboring bias that would be *constitutionally* intolerable, then *Yaqub*'s fact-specific inquiry into the impartiality of a hearing officer based on the potential for bias falls squarely and simultaneously within the ambit of the common law doctrine and section 809.2.

Additionally, the Appellate Court's emphasis on the distinction between the standards for bias under "due process" and "fair procedure" is misplaced within the context of section 809. The statute explicitly exempts many of the public entities that would have been beholden to the less forgiving "due process" standard under the court's analysis. *See* Bus. & Prof. Code §809.7. The separate origins of both standards were well-stablished long before S.B. 1211 was introduced to the Legislature, and it must be presumed that the Legislature was acutely aware of such a fundamental distinction in the law. See *People v. Overstreet* (1986) 42 Cal.3d 891, 897 ("[T]he Legislature is deemed to be aware of existing laws and judicial decisions in

effect at the time legislation is enacted and to have enacted and amended statutes in light of such decisions as having a direct bearing on them.") (internal quotes and citations omitted). And yet the interchangeable use of terminology during the legislative process belies the court's assertion that section 809's language should be read so narrowly so as to proscribe different levels of protection. The Appellate Court acknowledges that the temptation for bias based on pecuniary interest is not merely an academic idea; rather, as the Court stated, the real possibility of its existence requires procedural safeguards. See *Natarajan*, 42 Cal.App.5th at 390. Similarly, the rational self-interest of the selecting party to choose a favorable adjudicator is not any less acute because the proceeding is undertaken at a public hospital. The scrutiny, therefore, must be placed on the hearing officer, for it is the hearing officer who harbors the temptation, unwitting or not, to act without impartiality in light of possible financial gain and who alone is authorized to rule on the question of their own impartiality. Bus. & Prof. Code §809.2(c). Such temptation is not tempered simply because the purse strings are held by a private entity, a concept that courts in California well understood when considering the applicable standard for disqualifying bias, and which the Appellate Court failed to recognize.

3. *Haas* and *Yaqub* Provide the Governing Standards.

The California Supreme Court considered the question of disqualifying bias in the unilateral appointment and payment of an administrative law judge in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 ("*Haas*"). It framed the question in simple procedural due process terms: "When due process requires a hearing, the adjudicator must be impartial." *Id*. at 1025.

Furthermore, the Court observed, "[o]f all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving

scrutiny." *Haas*, 27 Cal.4th at 1025. *Haas* established the common law due process standard that an administrative adjudicator need not be influenced due to a pecuniary bias to be disqualified; rather disqualification is warranted by "a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." *Ibid.* (quoting *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 825). Put another way, the inquiry "is not whether a particular [administrative adjudicator] has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a 'possible temptation' to the 'average man' as judge." *Id.* at 1029.

Haas was applied to a peer review hearing officer in *Yaqub v. Salinas Valley Memorial Healthcare* (2004) 122 Cal.App.4th 474. There, the medical staff unilaterally appointed the hearing officer – a retired court judge – but the hospital paid his fees. *Id.* at 484. The hearing officer was not affiliated with the medical staff or the hospital, but he had been appointed by the hospital board to the board of the hospital's foundation for fundraising. *Ibid.* The retired judge also had presided over three peer review proceedings for the hospital in the past, and there was the potential for further appointments in the future. *Id.* at 485. On these facts, the *Yaqub* court applied *Haas* to rule that the hearing officer was disqualified due to "a 'possible temptation' to favor the hospital." *Ibid.* The court acknowledged that the hearing officer, "unlike the hearing officer in *Haas*, did not serve as factfinder, participate in the deliberations or issue a decision recommending action by the administrative board." *Ibid.* "Yet, as permitted in the bylaws, he provided key rulings on admissibility of evidence and access to information. He also ruled on the challenge to his own appointment as hearing officer, a determination upheld by the board itself." *Ibid.*

The *Yaqub* court emphasized "the necessity for careful examination of potential financial conflicts of interest in the selection of administrative hearing officers to obviate even the

possibility of bias." *Id*. at 485-86. Relying on principles applicable to judicial officers in court proceedings, the court highlighted "an objective test for the appearance of impropriety: The question is not whether the judge is actually biased, but '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*. at 486 (citations omitted).

It is certainly relevant that both *Yaqub* and *Haas* relied on general common law procedural due process principles to establish a broad impartiality standard for administrative adjudicators and hearing officers. *Yaqub* was aware of section 809.2 but did not rely on the statutory language, opting instead to rely on common law case precedents and due process principles foundational to the statutory language to discern the scope of a hearing officer impartiality standard. See *Yaqub*, 122 Cal.App.4th at 483-6. The Appellate Court suggests that because the *Yaqub* court did not explicitly cite to section 809 in its analysis of the hearing officer's bias (although it certainly did so in other sections of the opinion), that its consideration of impartiality was not faithful to the statute. See *Natarajan*, 42 Cal.App.5th at 390-91. That sentiment is unfounded. The *Yaqub* court focused on the general impartiality of the hearing officer, analysis squarely in line with the language on impartiality in subdivision (c) of the statute. Indeed, the Appellate Court contradicts its own narrow approach to interpreting section 809 by even recognizing that a hearing officer may be disqualified for bias, possible or realized. On its face, the language of the statute specifically and exclusively requires lack of bias for members of the peer review body; subdivision (b) pertaining to hearing officers contains no such requirement. *See* Bus. & Prof. Code §§809.2(a) & (b). Thus, if the Appellate Court wished to consistently apply its interpretive approach to the statute, it would have refrained from any consideration of bias of the hearing officer, and restrict its analysis specifically to the

vacuous question of whether the hearing officer gained actual financial benefit from the outcome of the hearing. Section 809.2 accordingly cannot be read in isolation based exclusively on the language contained in a single subdivision. The legislative genesis of the section and the case law applicable to hearing officer bias does not support such a narrow interpretation.

The Appellate Court went to great lengths to repudiate the holdings in *Haas* and *Yaqub*. However, the court's efforts were misguided in several respects. As discussed above, the court's rejection of *Yaqub* because it did not address the distinction between constitutional due process and fair procedure is a red herring. As the court in *Applebaum* held, common law fair procedure provides the same extent of protection as constitutional due process, despite their different legal origins. *Applebaum*, 104 Cal.App.3d. at 657. To establish otherwise in this context would create a legal chasm that belies the intent of the statute, where a licentiate facing an adverse action at a private hospital would be left unprotected against a hearing officer poised for the exact same opportunity for financial gain which would be an impermissible risk for bias at a public facility. There is no logical or functional reason for providing fewer safeguards for the privileges of physicians practicing at private hospitals than their counterparts at public hospitals. To be sure, the possible effects of an unfavorable hearing outcome on the licentiate would be no different at a public hospital compared to its private counterpart. If that physician's privileges are terminated, the physician loses their ability to practice, and a report will be made to the California Medical Board and National Practitioner Data Bank, regardless of whether the physician held those privileges at a private or public facility. *See* Bus. & Prof Code §805(a)(1)(B); 45 C.F.R. §§60.2-60.3. The potentially injurious information on the physician made public by the Medical Board is no different whether the peer review action originated at a public or private institution. From a practical and

public health perspective, the Appellate Court's divergent standards of fairness for hearings at public and private hospitals is detrimental to the practice of medicine. After all, the purpose of peer review, and the quality assurance process generally, is to ensure the delivery of quality healthcare to patients across the state. *See* Bus. & Prof. Code §805(a)(6) (an adverse privileging action requiring a report is one concerning an "aspect of a licentiate's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care"). With this guiding principle in mind, it is imperative that physicians, whether practicing at public or private facilities, are beholden to an exacting but fair peer review process.

In sum, hearing officers are subject to a broad impartiality standard that is founded upon both section 809.2 and the common law and due process principles. *Yaqub* is the governing precedent that articulates that standard: "The question is not whether the [hearing officer] is actually biased, but whether a person aware of the facts might reasonably entertain a doubt that the [hearing officer] would be able to act with integrity, impartiality, and competence." *Yaqub*, 122 Cal.App.4th at 486 (internal quotes and citations omitted). Such a broad impartiality standard is warranted to scrutinize, as noted earlier, the potential for tremendous influence hearing officers can have, intentional or not, over peer review proceedings.

C. Ensuring Hearing Officer Impartiality Requires Flexibility To Adapt To All Hospital Governance Structures And Practices.

Since passage of the Affordable Care Act, the hospital industry across the nation has undergone a wave of mergers and acquisitions, creating large hospital systems. Two years ago, Dignity Health, California's largest hospital system, completed a merger that created a hospital system with 139 hospitals spanning 28 states. Consolidation of hospitals is meant to

generate scale to achieve costs savings, better coordinate patient care, and realize financial, administrative, and clinical efficiencies. Inevitably, global hospital governance structures are being established to manage these mega-systems. These changes continue to have an impact on how hospitals conduct peer review and highlight the disparity in leverage and resources between large national health systems and individual physicians within the peer review context. A broad and clear impartiality standard for hearing officers becomes vital to ensure continued fairness in peer review in such a fast-changing hospital industry.

California has seen a long-term trend toward expansion of hospital health systems. In 1995, 39 percent of the state's hospitals (134 out of 345) were part of a system, while that figure increased to 59 percent in 2018 (165 out of 282) and is undoubtedly higher today. *See* Glenn Melnick and Katya Fonkych, "Is Bigger Better? Exploring the Impact of System Membership on Rural Hospitals," CAL. HEALTHCARE FOUND. at 5 (May 2018). The eight largest hospital systems in California account for 40 percent of hospital beds. Lisa Maiuro and Bret Corzine, "California Hospitals: An Evolving Environment," CAL. HEALTHCARE FOUND. (Aug. 2015) at 10. Nearly one hundred mergers per year occurred between 2011 and 2018, with the number of hospitals involved in these consolidation deals consistently topping 200 per year. *See* American Hosp. Ass'n, "Chart 2.9: Announced Hospital Mergers and Acquisitions, 2005-2017," TRENDWATCH CHARTBOOK 2018 (2018).

Dignity Health's merger with Catholic Health Initiatives ("CHI") in 2018 falls in line with these industry trends. The 139-hospital, multistate health system, renamed CommonSpirit Health, is owned and operated by a master parent corporation based in Chicago. *See* JD Healthcare, "Effect of the Ministry Alignment Agreement between Dignity Health and Catholic Health Initiatives" Rept. Prepared for the Office of the Cal. Attorney General at 13 (Aug. 31, 2018). The master parent

corporation, governed by a board of trustees, controls all hospitals in the system, including all Dignity Health hospitals, through a system whereby it is the sole corporate member of subsidiary holding corporations. *Id*. at 13- 17.

A study commissioned by the American Hospital Association highlights the efficiencies that drive hospital consolidations. Hospital leaders "universally indicated that some of the most significant savings that they have achieved through merger result from the standardization of clinical processes." Monica Noether and Sean May, "Hospital Merger Benefits: Views from Hospital Leaders and Econometric Analysis," Charles River Assocs. (Jan. 2017) at 6. Hospital consultants emphasize that hospital systems can become efficient and realize the benefits of scale only if they "revamp their operating models to bring more accountability and control at the system level – rather than at the level of individual facilities." Anil Kaul et al., "Size Should Matter: Five ways to help healthcare systems realize the benefit of scale," STRATEGY& at 12 (PricewaterhouseCoopers 2016).

Under California law, each separately licensed hospital must have an independent and self-governing medical staff organization that is responsible for peer review. *See* Bus. & Prof. Code §2282; 22 C.C.R. §70701(a)(1)(D) & (F) and §70703. There is nothing in the law, however, that requires each medical staff to discharge its functions separately and exclusively in peer review; rather, medical staffs may knowingly and voluntarily delegate their duties and responsibilities to hospitals or others. See *El-Attar*, 56 Cal. 4th at 990. Likewise, there is nothing in the law that dictates how hearing officers are to be paid. It is common, if not almost universal, that hearing officer services are paid with hospital funds.

Given the prevalence of large hospital systems such as Dignity Health and the complex governance structures that come with such systems, there are many ways that a hearing officer could be tempted to favor one side over the other to the extent of

having a disqualifying bias. Hospital systems are increasingly becoming more centralized. Although each facility within the system may retain some local control (including having local advisory boards), hospital systems use a large degree of central control. This reality cannot be ignored in evaluating hearing officer impartiality. Hearing officers could, for instance, have relationships with system corporate offices that have control over local facility decision-making. The decisions made in particular peer review cases at a particular local facility could be colored by the hearing officers desire to cultivate such relationships with corporate headquarters.

The Appellate Court tacitly acknowledged the distinction between a hearing officer's relationship with an individual hospital and their enduring involvement with the broader hospital system. See *Natarajan*, 42 Cal.App.5th at 387. Indeed, the Appellate Court's annotation of the hearing officer's income from *defendant-affiliated entities* supports the sentiment that a hearing officer's pecuniary relationship with a hospital system can be an important consideration for bias. *Id*. at 387, fn. 7 (emphasis added). However, the Appellate Court came to the opposite conclusion. Dignity currently operates 24 hospitals in California. *See* Dignity Health Website, Page: Dignity Health Locations at <https://locations.dignityhealth.org/california> (as of Nov. 29, 2020). Under the Appellate Court's analysis, no actual pecuniary interest would exist if the hearing officer had been retained for future hearings at every one of Dignity's other hospitals across the state, so long as he was not contracted for another peer review matter at the hospital in the present matter for some indefinite period. *Id*. at 392 ("[W]e do not need to address […] plaintiff's immaterial assertion that we should consider potential employment with defendant's hospitals as a whole as opposed to only St. Joseph"). Such an assertion is unmoored from the functional reality that, in a time where corporate control of medicine is facing increased regulatory

scrutiny, the role of the corporate entity and the hearing officer's relationship with a hospital system as a whole cannot be so summarily dismissed. *See* Chang et. al., "Examining the Authority of California's Attorney General in Health Care Mergers," CAL. HEALTHCARE FOUND. (Apr. 24, 2020) at 3. An approach that focuses only on the hearing officer's relationship with an individual medical staff at an individual hospital in the larger system would fail to take account of the realities of how large hospital systems function.

The common law and the broad impartiality standard of section 809.2 do not require such a rigid approach. Indeed, the *Yaqub* court eschewed a hyper-technical analysis when it found a disqualifying bias by a hearing officer who was appointed by the medical staff but separately paid by the hospital. See *Yaqub*, 122 Cal.App.4th at 484. It did not matter that the hearing officer had been appointed by the medical staff. The court focused on the hearing officer's relationship and history with the hospital to uncover any "economic realities" arising from the "design of the fee system" that could raise "a 'possible temptation'." *Id.* at 485.

D. There Are Guiding Principles For Ensuring Hearing Officer Impartiality In All Peer Review Proceedings.

Any application of an impartiality standard for hearing officers will depend on the particular facts of the case. Although there could be a myriad of arrangements that could raise disqualifying temptations for hearing officers, there are certain principles to follow in evaluating the existence of bias temptations, especially in the context of large multi-hospital systems.

First, careful attention should be paid to a hearing officer's prior work with the hospital system and any one or more local hospitals within the system to uncover potential patterns of bias. There also should be a focus on formal and informal relationships hearing officers may have with parties to the peer review that

could give rise to some tangible temptation.

Second, courts should not rely too heavily on corporate formalities and subsidiary relationships that may not reflect the true influence that corporate headquarters exercise over local facilities. The temptations that could bias hearing officers are not limited to such legal distinctions.

Finally, although temptations for hearing officers could arise from a hearing officer's relationship with a medical staff or its physician leaders, it is more likely that hearing officer bias will be rooted in temptations to please hospitals and hospital systems. Hospitals (not medical staffs) are the ones paying hearing officers. And most importantly, hospitals (not medical staffs) exercise final authority over the peer review matter. See *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr.* (1998) 62 Cal.App.4th 1123, 1143. In other words, there would be greater pay off for hearing officers to appease hospitals since they are the ones with the purse and exercise an authoritative role in peer review proceedings.

While the risk of hearing officer bias is real, it is important also to observe that bias cannot be presumed out of structural arrangements alone. The peer review laws do not contemplate a strict separation between the medical staff and the hospital governing body as a prerequisite for fairness. "Where an administrative body [i.e., a medical staff or a hospital governing body] has a duty to act, and is the only entity capable of acting, the fact that the body may have an interest in the result does not disqualify it from acting. The rule of necessity precludes a claim of bias from the structure of the process." *Hongsathavij*, 62 Cal.App.4th at 1142–43. Furthermore, in the administrative law context, an adjudicator's impartiality in reviewing the propriety of an adverse action taken by an agency may be presumed even if the adjudicator is chosen by, and is a member of, the agency prosecuting the matter. See *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737.

"By itself, the combination of investigative, prosecutorial, and adjudicatory functions within a single administrative agency does not create an unacceptable risk of bias." *Ibid.*; see also *El-Attar*, 56 Cal.4th at 1157 ("We see nothing in the mere fact of having been appointed by a hospital's governing body instead of by the medical staff that would inherently cast doubt on the impartiality of a review hearing participant").

Other common aspects about hearing officers should not be taken as indicia of bias. The Supreme Court has rejected the argument that the nature of an administrative officer's law practice can automatically establish bias. See *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 789–790. The Court explained, "Even if the nature of a lawyer's practice could be taken as evidence of his political or social outlook, such evidence, as will appear, is irrelevant to prove bias." *Id.* at 790. "The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him." *Ibid.*

Just as judges commonly rule upon their own disqualifications, it is possible for hearing officers to entertain and rule upon challenges to their impartiality. Such a system of self-policing can work only if the parties to the peer review proceeding have a meaningful way to gather relevant information without needless personal intrusion. The CSHA could aid this process by including relevant profile information about each hearing officer in its rosters. In any event, for purposes of this case, the peer review system and all its participants can benefit greatly from a robust and clear hearing officer impartiality standard.

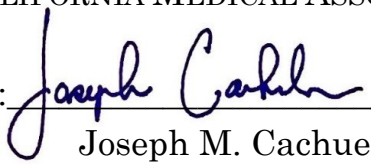
IV
CONCLUSION

Establishing the correct standard for hearing officer impartiality is critical to ensuring a fair and effective peer review system. CMA respectfully urges the Court, in deciding this appeal, to pay careful attention to the empirical evidence showing the great influence that hearing officers can have over peer review proceedings. CMA also asks the Court to fashion a hearing officer impartiality standard that is robust and reflective of the reality of the current healthcare landscape that is dominated by large hospital systems. Crafting such a standard will require the Court to take a contextualized approach to the question of disqualifying hearing officers for bias, one broader and more functional than the narrow standard crafted by the Appellate Court. The objective is to reveal bias and temptations in a complex healthcare ecosystem that could affect a hearing officer's ability to serve in a neutral and fair manner. Physicians' livelihoods and the protection of the public depend on it.

DATED: November 30, 2020

Respectfully,

Center for Legal Affairs
CALIFORNIA MEDICAL ASSOCIATION

By: 
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), the undersigned hereby certifies this brief consists of 10,925 words, exclusive of the cover page, tables, signature block, and this certification, as counted by the Microsoft Word-processing program used to generate it.

DATED: November 30, 2020.

By: 
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PROOF OF SERVICE

Natarajan v. Dignity Health, no. S259364

I, Joseph M. Cachuela, hereby declare:

I am employed in Sacramento, California. I am over the age of eighteen years and am not a party to the above-entitled action. My business address is 1201 K Street Suite 800, Sacramento, California 95814.

On November 30, 2020, I caused the document(s) to be served as indicated below:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF NO PARTIES

BY ELECTRONIC SERVICE VIA TRUEFILING. Based on a court order, I caused the above-entitled document(s) to be served through TrueFiling at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the TrueFiling Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 30, 2020, at Sacramento, California.

Joseph Cachuela

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VIA U.S. MAIL Clerk of the Court	Appeal no. C085906

Court of Appeal Third Appellate District 914 Capitol Mall Sacramento, CA 95814	
VIA U.S. MAIL Clerk of the Court Superior Court of San Joaquin County Civil Division 180 E. Weber Ave, Ste. 200 Stockton, CA 95202	Case no. STK-CV-UWM-20164821

STATE OF CALIFORNIA
Supreme Court of California

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Case Name: **NATARAJAN v. DIGNITY HEALTH**
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Lower Court Case Number: **C085906**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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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.

12/1/2020

Date

/s/Joseph Cachuela

Signature

Cachuela, Joseph (285081)

Last Name, First Name (PNum)

California Medical Association

Law Firm