S196830

IN THE SUPREME COURT OF CALIFORNIA

Osamah A. El-Attar, M.D.,
Plaintiff and Appellant

VS.

Hollywood Presbyterian Medical Center,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR,
CASE NO. B209056

ANSWER BRIEF ON THE MERITS OF PLAINTIFF/APPELLANT OSAMAH A. EL-ATTAR, M.D.

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I. INTRODUCTION

A fundamental principle of fairness in any legal proceeding is that neither of the parties can unilaterally change the rules during the proceeding to obtain an advantage over the other party. Yet this fundamental principle of fairness is put on the chopping block in the Opening Brief of Defendant/Respondent Hollywood Presbyterian Medical Center ("the Hospital").

In this case, the Hospital manipulated the peer review process for Plaintiff/Appellant Osamah A. El-Attar, M.D. ("Dr. El-Attar"), by appointing the decision- making panel of physicians (called the Judicial Review Committee or "JRC") and the hearing officer to preside over Dr. El-Attar's case even though the Hospital's Medical Staff Bylaws ("the Bylaws") required that those appointments be made by the Medical Executive Committee ("MEC"), medical professionals elected by the Hospital's medical staff to handle the peer review process. The Hospital "stacked the deck" against Dr. El-Attar by appointing the JRC and its hearing officer, over his objection, and removing from the process the MEC, which was the peer review body for the Hospital.

If the Bylaws governing the peer review process do not have to be followed and can be changed by the Hospital when it wants to do so, then it becomes hard to determine what rules, if any, govern the peer review process. Indeed, the Hospital asks this Court to permit an arbitrary process that contradicts basic notions of fairness in peer review hearings. In Dr. El-Attar's case, some of the most important rules of the process – those governing the selection of the decision makers and the presiding officer for his hearing – were violated by the Hospital, leading the Court of Appeal to comment that the Hospital had "turned the peer review process on its head."

The Hospital has presented no legitimate justification for circumventing the Bylaws. The Hospital claims that the MEC delegated its authority to select the JRC and hearing officer to the Hospital's Governing Board and, in any event, the MEC was not suitable to make the selections because the MEC recommended reappointment of Dr. El-Attar.

Even if the MEC purported to delegate its authority under the Bylaws to select the JRC and hearing officer to allow the Hospital's Governing Board to make those selections, the MEC was barred by the Bylaws from delegating its authority to appoint the JRC and hearing officer. Article XVII, §B, of the Bylaws expressly prohibits the MEC and the Hospital Governing Board from unilaterally amending the Bylaws without having the amendment approved by a majority of the medical staff. This section of the Bylaws further states that, once approved, the Bylaws are "equally binding on the Governing Board and the Medical Staff." Id.

Moreover, the MEC had a duty, as the Hospital's peer review body, to participate in the peer review process by selecting the hearing panel and presiding officer for Dr. El-Attar's hearing, even though the Hospital initiated the charges against Dr. El-Attar and disagreed with the MEC's recommendation that Dr. El-Attar's staff privileges be renewed. Contrary to the Hospital's argument, the MEC did not refuse to participate in the peer review process; rather, the Hospital took the MEC's authority to make the selections of the JRC and hearing officer because it was advantageous for the Hospital to do so.

The Hospital and the MEC were required to follow the Bylaws regarding selection of the JRC and hearing officer and neither the MEC nor the Hospital could circumvent these Bylaws without formally amending them in a majority vote of the medical staff. Indeed, the MEC's purported delegation of its duties and authority was not only inconsistent with the Bylaws in effect at that time, but also violated Dr. El-Attar's

reasonable expectations about how the hearing was to be conducted pursuant to those Bylaws and the peer review law. Dr. El-Attar did not waive his right to have a hearing conducted in accordance with the Bylaws in effect at the time of his hearing and to have a JRC and hearing officer selected by the MEC and not the Hospital's Governing Board.

Contrary to the Hospital's arguments, the Hospital's violation of the Bylaws requiring the MEC to appoint the JRC and hearing officer was not an immaterial violation of the Bylaws. The power to select the decision-makers and presiding officer for a peer review hearing is significant. Moreover, the significance of this power is amplified because the Hospital seized the authority to appoint the JRC and hearing officer from the MEC because it believed that the MEC's selections would be "prejudicial" to the Governing Board. Indeed, if allowing the MEC to pick the JRC and hearing officer (as the Bylaws require) was "prejudicial to the Board", then having the Hospital Governing Board pick the JRC and hearing officer (in violation of the Bylaws) would be prejudicial to Dr. El-Attar and constitute an improper manipulation of the process.

The Hospital's manipulation of the hearing process to gain an advantage is offensive to basic notions of fair procedure, and its actions to remove the MEC, the Hospital's peer review body, from the peer review hearing undermine the foundation of the peer review process defined in the Bylaws and under California law. As this Court noted in Mileikowsky v. West Hills Hospital and Medical Center ("Mileikowsky"), 45 Cal.4th 1259, 1275 (2009), "decisions relating to clinical privileges are generally the province of a hospital's peer review bodies and not its governing bodies." Because the Hospital set up a system, in violation of the Bylaws, designed to bypass the MEC, Dr. El-Attar never received a hearing by any actual "peer review body," as that term is defined under California law. A review panel appointed by the Hopsital's Governing Board was not the MEC or a

panel created by the MEC for the purposes of Dr. El-Attar's peer review.

A JRC selected by the Hospital, instead of being selected by the MEC, cannot be a properly constituted "peer review body," not only because the selection violated the Bylaws, but because the system created by the Hospital effectively eliminated the MEC, as the Hospital's peer review body, from the peer review process. The Hospital's Governing Board cannot lawfully remove the MEC from the peer review process. Nor can the MEC delegate its duty to participate in the peer review process by selecting the JRC and hearing officer to the Hospital's Governing Board. Accordingly, the JRC created by the Hospital for Dr. El-Attar's hearing was improperly constituted.

In its Opening Brief, the Hospital argues that its violation of the Bylaws in selecting the JRC and hearing officer was trivial and did not diminish the fairness of Dr. El-Attar's hearing. Yet a glimpse into what eventually happened with the JRC at the end of the hearing destroys this "no harm, no foul" argument. In August 2005, after more than two years of hearings, JRC chairman Dr. Michael Mynatt abruptly recused himself from the panel because of a dispute involving his business relations with the Hospital. The remaining three JRC members voted to resign and disband the panel following Dr. Mynatt's departure, and the hearing officer reported to the parties that the JRC would not be making a decision.

Then, only two weeks after the JRC disbanded, Dr. Mynatt suddenly announced his return to the JRC, and the hearing officer consulted with Dr. Mynatt and the other JRC members, questioned them (outside the presence of Dr. El-Attar's attorney) and, without legal authority, reconstituted the panel long enough to render a decision against Dr. El-Attar. The composition and subsequent conduct of the JRC, especially involving the self-recusal of Dr. Mynatt for conflict of interest reasons and the panel's abrupt dissolution and later re-constitution by the hearing

officer, validated Dr. El-Attar's initial concerns about the inherent problems with a panel and hearing officer selected by the Hospital in violation of the Bylaws.

Dr. El-Attar did not receive the peer review hearing to which he was entitled under the Bylaws, the peer review law and common law principles of fair procedure. Therefore, at a minimum, Dr. El-Attar is entitled to be reinstated and given a new peer review hearing in compliance with the Bylaws in effect at the time the Hospital denied his application for renewal of staff privileges and initiated charges against him.

This Court should affirm the Court of Appeal because its decision is consistent with this Court's precedent on medical peer review cases and strikes an appropriate balance between the interests of the hospital administration, which oversees the operations and maintenance of the hospital, on the one hand, and the medical staff, which oversees and evaluates the performance of the medical practitioners in the hospital, on the other hand. Accordingly, this Court should reject the Hospital's argument that it should be allowed to deviate from its Bylaws governing the peer review process whenever the Hospital deems it advantageous to do so.

II. STATEMENT OF THE CASE

A. Statement of Facts

Dr. El-Attar is a physician licensed to practice medicine in the State of California and is board certified in internal medicine. He received his medical degree in Egypt and had advanced training in industrial health in England. He earned a Ph.D. and became a diplomate in internal medicine from Cairo University in Egypt and a diplomate in Industrial Health from the Royal College of Physicians in England. Administrative Record ("AR") at 1-5. Dr. El-Attar served as assistant professor of Medicine in Cairo University and as assistant professor of Medicine at McGill University in Montreal, Canada. He completed residency in the

United States at Aultman Hospital and Case Western University in Ohio from 1970 to 1972. He subsequently completed fellowships in both non-invasive clinical cardiology and invasive cardiology at the Cleveland Clinic, a leading institution in cardiology, from 1972 to 1975. Id. He is a member of the Los Angeles County Medical Association (LACMA), California Medical Association (CMA), American Medical Association (AMA), The American Society of Echocardiography (ASE), and Fellow of the Society for Cardiovascular Angiography and Interventions (FSCAI).

In 1975, Dr. El-Attar established a clinical practice in cardiology in Los Angeles where he became a member of the medical staff of the Hospital. AR at 1-5 (Ex. A). He has used the Hospital extensively for the care of his patients, admitting over 800 patients in the two-year period from October 1, 2000 to October 1, 2002. Ex. O (AR 249).

While Dr. El-Attar served on the Hospital's medical staff he was very active in staff affairs – serving as chair or director of the cardiology section, cardiac catheterization laboratory, emergency services committee, critical care committee, credentials committee and serving on the MEC. (AR 0002, 1820). At the same time, Dr. El-Attar was a frequent critic of the Hospital's administration. He was one of the medical staff members who circulated a petition in the fall of 2002, signed by over 200 members of the medical staff, to remove Albert Greene as CEO of the Hospital because of his improper interference with the proper functions of the medical staff. AR 2507-2520; AR 5759-60. Dr. El-Attar also made frequent criticisms in writing of the Hospital practices regarding patient care. See AR 2587-2668.[1]

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[1] These exhibits (AR 2507-2520; AR 2587-2668) were offered by Dr. El-Attar at his administrative hearing, but excluded by the hearing officer. AR 3178.

In its Opening Brief, the Hospital describes a purported link between an investigation of the Hospital by the Centers for Medicare and Medicade Services ("CMS") and the Hospital's decision to target Dr. El-Attar's practice for disciplinary action. Opening Brief at pp. 4-6. However, any such link between the CMC inquiry and the decision to target Dr. El-Attar is grossly overstated and speculative.[2] Instead, it appears that the investigation of Dr. El-Attar and several other outspoken physicians at the Hospital arose from their criticism of the Hospital's CEO, Albert Greene, who personally led the unsuccessful attack on Dr. El-Attar in the MEC in January 2003, when the MEC refused to ratify Greene's summary suspension of Dr. El-Attar from the staff. (AR 1851-1852.)

In the Fall of 2002, Dr. El-Attar submitted a routine application for renewal of his medical staff privileges.[3] His application was approved by both the medical staff credentials committee and the MEC in late 2002. Exs. 29, 30, 31, 32 (AR 1770-1779).

However, the Hospital administration inexplicably delayed what should have been a routine approval of Dr. El-Attar's application, given the recommendations of the credentials committee and MEC. The

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[2] This court should accept the Court of Appeal's more balanced Statement of Facts and reject the argumentative Statement of Facts presented by the Hospital in its Opening Brief. Rule of Court 8.500(c)(2) provides that "as a policy matter, the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." The Hospital raised the omission of facts relating to the CMS inquiry in its Petition for Rehearing, but the Court of Appeal properly excluded those assertions, which are overstated, speculative and inapplicable to Dr. El-Attar's case.

[3] Typically, medical staff privileges of all members of the staff must be renewed every two years. Bylaws, Art. III, § E, subd. (3) [AR 2320].

Hospital arranged for a secret investigation of Dr. El-Attar's charts by outside reviewers Stephen Hirsch Associates ("Hirsch") and National Medical Audit ("Mercer"). (AR 1908-2148) and (AR1843-1844). This investigation by the Hospital, undertaken without the MEC's or Dr. El-Attar's knowledge, violated the medical staff bylaws which provide that the MEC has primary responsibility for investigating allegations of unprofessional conduct by staff members and that affected members should be informed and have the opportunity to submit information to the reviewers. Bylaws, Art. VII, §C (AR 2347). Neither Dr. El-Attar nor the MEC was informed of this months-long investigation until January 29, 2003. (AR 1821, 1843, 1844).

On January 29, 2003, the Hospital's CEO, Greene, called a special meeting of the MEC wherein he informed the MEC and Dr. El-Attar *for the first time* of the Hospital's secret investigation of Dr. El-Attar's charts and requested that the MEC summarily suspend his medical staff privileges. The MEC rejected Greene's request for summary suspension of Dr. El-Attar and voted to form an ad-hoc committee (the "MEC Committee") to investigate the Hospital's charges. (AR 1851-1852).

Notwithstanding the action by the MEC to investigate the allegations against Dr. El-Attar, the Hospital summarily suspended Dr. El-Attar's medical staff privileges on January 30, 2003. (AR 1869). This was contrary to the Bylaws which provided an exception that only the MEC can issue a summary suspension, unless the MEC is "unavailable," – an exception which was not applicable here. Bylaws, Art.VII, §G, subd. (4) (AR 2349-2350).

The MEC Committee reviewed 16 patient admissions by Dr. El-Attar that had also been reviewed by the Hospital's consultants. (AR 1892-1893). The MEC Committee issued a report dated February 21, 2003,

concluding that the cases reviewed were all acceptable from a clinical management perspective, although three cases had documentation problems ("primarily the lack of enough data"). The MEC Committee's report condemned the work of the Hospital's consultants and concluded that "universally some of the recommendations or statements made by the outside reviewers were considered close to malpractice . . ." (AR 1893) [emphasis added]. The MEC concluded that disciplinary action against Dr. El-Attar was unwarranted. (AR 1870).

Nevertheless, by letter dated February 13, 2003, the Hospital informed Dr. El-Attar of the Governing Board's decision to deny his application for reappointment of medical staff privileges, thus ignoring the MEC's recommendation. (AR 1871-1872). In fact, the Hospital Governing Board denied Dr. El-Attar's reappointment without waiting for the results of the investigation of his charts by the MEC Committee, which ultimately recommended, on February 21, 2003, that no disciplinary action be taken against Dr. El-Attar.

By letter dated March 7, 2003, Dr. El-Attar (through his attorney) requested a hearing before a judicial review committee, as provided for in the Business &Professions ("B&P") Code §809.1, et seq. (AR 2685-2686). The original charges were delivered to Dr. El-Attar by letter dated March 25, 2003. (AR 1895-1907), (AR 1908-1964) and (1965-2148). The charges were later amended in the First Amended Notice of Charges ("FAC" or "Amended Charges"). (AR 2281-2292).

The FAC charged that Dr. El-Attar: (1) engaged in a pattern of dangerous and substandard conduct (Section I), (2) engaged in a pattern of overutilization of Hospital services (Section II), (3) engaged in a pattern of inadequate documentation (Section III), (4) failed to inform patients of inherent risks of procedures (Section IV), (5) engaged in a pattern of inappropriate interpersonal relations with Hospital staff, patients and

families (Section V), and (6) had a prior judicial review hearing (Section VI). Section VI was eventually dropped. The FAC consists of a 12-page letter plus 239 pages of "expert" reports by Hirsch & Mercer, attached to and incorporated by reference as part of the charges. This incorporation of these voluminous reports was contrary to the Bylaws, Art. VIII, §C, subd. (7), which provides that the charges shall be clear and "concise". (AR 2358). See (AR 1895-2148).

By letter dated March 25, 2003, the Hospital advised Dr. El-Attar that the Governing Board had appointed the Judicial Review Committee ("JRC") and attorney Jesse Miller, as the hearing officer. (AR 1895). The Bylaws provide that the MEC -- not the Hospital's Governing Board -- shall appoint the panel members and the hearing officer. (AR 2358-2359). The Hospital's letter stated that the charges would be prosecuted by an ad hoc committee appointed by the Governing Board ("Governing Board") rather than the MEC. (AR 1895).

Dr. El-Attar objected to this deviation from the Bylaws upon learning that the Hospital's Governing Board, not the MEC, appointed the JRC members and hearing officers. (AR 7882-7884). At the outset of his hearing, Dr. El-Attar filed a petition for writ of mandamus in the superior court asking the court to stop the peer review proceedings on the ground that the MEC, rather than the Hospital, should have appointed the JRC and hearing officer. (1 Clerk's Transcript ("CT") 177). The court denied the petition without prejudice and allowed the hearing to continue, despite the Bylaw violations. (2 CT 225).

The panel members selected by the Hospital had substantial advantageous economic relations with the Hospital. In particular, Dr. Michael Mynatt, chair of the JRC, was a principal of the Arthritis Institute, a joint venture with Tenet Health System QA, Inc., then-owner of the

Hospital.[4] (AR 4158-4163). Dr. El-Attar's objections to the panel members' financial relationships with the Hospital were overruled by the hearing officer (who had also been selected by the Hospital rather than by the MEC, contrary to the Bylaws).

Preliminary sessions, including voir dire, were held on May 8, September 4 and 24, 2003. Prior to the commencement of evidentiary hearings, the hearing officer denied Dr. El-Attar's motion to clarify or restate the charges against him. (AR 2826-2836; AR4218-4222). The hearing officer also denied Dr. El-Attar's motion to include evidence that the proceedings were commenced by the Hospital in retaliation for his efforts to remove Greene as CEO of the Hospital and his criticisms of the Hospital with respect to matters involving patient care. (AR 3157-3158; 3163-3166; AR 4243-4249; AR 3178). The hearing officer further denied Dr. El-Attar's request that he be allowed to present witnesses who would testify as to his general competence as a physician and his ability to get along with other physicians and staff. (AR 3247-3249).

Evidentiary sessions started on October 13, 2003 and ended on June 15, 2005. The authors of the Hirsch and Mercer Reports testified as experts on behalf of the Governing Board's ad hoc committee, and two experts testified on behalf of Dr. El-Attar: Ray Matthews, M.D., director of cardiac catheterization at Good Samaritan Hospital, and Harold Karpman, M.D., president of the Cardiovascular Medical Group of Southern California and a Clinical Professor of Medicine at UCLA Medical School.[5]

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[4] Tenet Health System QA, Inc. ("Tenet") sold the Hospital to CHA Health Systems in 2005; however, it appears that Tenet, and its parent corporations, still have an interest in this litigation based upon the disclosures in the Certification of Interested parties filed by the Hospital with this Court on December 14, 2011.

[5] In their reports, Dr. Karpman (AR 417-441) and Dr. Matthews (AR 442-447) disagreed with the findings and conclusions of the Hirsch

Other percipient witnesses also testified, as did Dr. El-Attar.

The original hearing panel consisted of five members and several alternates. On January 24, 2005, Dr. Landis resigned, leaving only four panel members – one less than required by the Bylaws, Art. VIII, § C, subd. (8) (AR 2358-2359). Over Dr. El-Attar's objections, the hearing officer ordered the hearing to continue, notwithstanding the lack of the required number of panel members. (RT 1-24-05, pp. 4-9), (AR 6991-6996).

On July 18, 2005, the Governing Board and Dr. El-Attar submitted their closing briefs. Thereafter, on August 15, 2005, the hearing officer informed the parties in writing that the JRC's four members had met on August 10, 2005 to deliberate regarding a decision, but that the JRC's Chairman, Dr. Mynatt, had announced that, after consultation with his attorney, and due to a "recently developed conflict of interest" with Tenet, he was "compelled" to recuse himself from the panel. (AR 3490-3491). At the time of Dr. Mynatt's departure, the three remaining members, Drs. Lev, Getzen and Triantafyllos, decided that it would be unfair to render a decision as a committee of three, and likewise resigned from the JRC, disbanding the panel. The hearing officer thereafter informed the parties that no decision would be rendered. (Id.)

On August 24, 2005, the hearing officer reported that the panel members had "reexamined" their prior positions and were now ready to deliberate. The hearing officer did not explain the reasons for their

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and Mercer reviewers about the quality of medical care that Dr. El-Attar provided to the Hospital's patients. Drs. Karpman and Matthews found that Dr. El-Attar's practice was within the standard of care. Dr. Karpman found that, over all, the medical care provided by Dr. El-Attar was "excellent" (AR 417). Dr. Matthews made a similar finding, commenting in one case that Dr. El-Attar's work was a "textbook" example of proper medical procedure (AR 447; AR 6167).

change of position. (AR 3492). Dr. El-Attar, through his counsel, objected in writing to this "reconstitution" of the disbanded JRC because the hearing officer lacked authority to reconstitute the panel after its members had resigned and that, even assuming he had such authority, the panel members could not reasonably be expected to be impartial under the circumstances. Dr. El-Attar requested information from the hearing officer and panel members regarding the nature of the conflict and its purported resolution. (AR 3493-3496); and (AR 3499-3500). The hearing officer reported that he had talked to Dr. Mynatt outside the presence of the parties or their attorneys. Counsel for the parties was not allowed to examine Dr. Mynatt or the other panel members about this reversal of their positions. AR 3501-02. The hearing officer ignored Dr. El-Attar's request for detailed information about the nature of Dr. Mynatt's conflict or its purported resolution. Instead, what little information the hearing officer provided was evasive and misleading. (AR 3501-3504).

On October 25, 2005, the "reconstituted" panel issued its decision, concluding that the recommendation of the Governing Board to deny Dr. El-Attar's application for reappointment was "reasonable and warranted." (AR 3732-3755). However, even this conflicted panel, "hand-picked" by the Hospital, acknowledged that it would not have terminated Dr. El-Attar's privileges had it been the initial decision-maker. (AR 3743). The decision failed to make specific findings as to any of the more than 20 cases in which the Governing Board had alleged substandard medical conduct, any of the cases in which inadequate documentation was alleged, or any of the incidents in which Dr. El-Attar allegedly engaged in inappropriate conduct with Hospital staff. (AR 3732-3755).

Subsequently, the Hospital's Governing Board (following an appeal to an appeal board again selected by the Governing Board) "rubber stamped" the JRC's decision and terminated Dr. El-Attar's privileges

effective August 23, 2006. (AR 4109-4125). The appeal board (which issued its recommendation to the Governing Board) refused to permit Dr. El-Attar to voir dire its three members and overruled his challenge of bias to one of the physicians on the panel. (AR 4115; 4120).

On September 14, 2006, the Hospital's CEO submitted a report on Form 805 to the California Medical Board regarding the Hospital's adverse action against Dr. El-Attar. (CT 135-137). The chief of the medical staff, however, did not sign the 805 Report, as required by Business and Professions Code §805(c), demonstrating the medical staff's disapproval of the Hospital's actions against Dr. El-Attar. (Id).

B. Proceedings Below

On October 13, 2006, Dr. El-Attar filed a Petition for Writ of Administrative Mandamus, pursuant to Code Civ. Proc §1094.5 ("Petition"), seeking judicial review of the final administrative order terminating Dr. El-Attar's staff privileges. (CT 10-35). In his Petition, Dr. El-Attar asserted, among other things, that he had been denied a fair hearing because the Hospital's review proceeding was conducted in contravention of the Bylaws, the hearing was tainted by conflicts of interest amongst the JRC members and by erroneous findings by the hearing officer. (Id.)

On December 11, 2007, the Petition came on for hearing before the Hon. Mary Ann Murphy, who denied the Petition. On February 29, 2008, the court issued a Proposed Statement of Decision ("SOD") which was essentially a rehash of the Hospital's opposition brief. (CT 1590-1644). Following a hearing on Dr. El-Attar's written objections to the proposed SOD (CT 1645-1687), the court issued a revised SOD and entered judgment denying Dr. El-Attar's Petition for Writ of Mandate on May 7, 2008. (CT 1713-1772).

Dr. El-Attar timely filed his notice of appeal from this

judgment on July 1, 2008. (CT 1773-1774). Following briefing by the parties and the California Medical Association ("CMA"), as amicus curiae, and oral argument by the parties' attorneys, a unanimous panel of the Court of Appeal, Second Appellate District, Division Four, reversed the trial court's judgment and ordered that Dr. El-Attar be given a new peer review hearing because the JRC and the hearing officer had been appointed by the Hospital and not the MEC as set forth in the Bylaws. The court further held that the MEC did not have the authority to delegate its authority to select the JRC and hearing officer to the Hospital under the Bylaws.[6] See El-Attar v. Hollywood Presbyterian Medical Center ("El-Attar"), 198 Cal.App.4th 664, mod. 198 Cal.App.4th 1234c (2011) (A copy of this typed opinion is attached hereto as Appendix I pursuant to Rule of Court 8.1115, subd. (c)). On November 30, 2011, the Supreme Court granted the Hospital's Petition for Review, superseding the Court of Appeal's opinion.

III. STATEMENT OF ISSUES FOR REVIEW

This Court has specified the following two issues for review in this case: (1) could the executive committee of the hospital medical staff delegate to the hospital governing board its authority to select the hearing officer and the physician members of the peer review panel to hear a physician's challenge to the governing board's denial of his application for reappointment to the hospital medical staff; (2) if the Hospital's Bylaws did

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[6] Because the Court of appeal ruled that the Hospital's selection of the JRC and hearing officer in violation of the Bylaws deprived Dr. El-Attar of a fair hearing, the court did not reach the other claims of error made by Dr. El-Attar with regard to the conduct and fairness of the peer review hearing or that the JRC's decision was not based on substantial evidence. Dr. El-Attar does not waive or withdraw any of these claims of error as to the fairness of the hearing or that the decision of the JRC was not based on substantial evidence. In this Answer Brief, Dr. El-Attar responds to the issues for review stated by this court and the issues raised in the Hospital's Opening Brief.

not permit this procedure, was the peer review panel selected by the governing board "improperly constituted," requiring a new peer review procedure conducted by a new hearing panel selected by the executive committee.

As discussed in detail below, the answer to the first issue posed by the Court, is "No", and the answer to the second issue is "Yes". Both issues were correctly decided by the Court of Appeal in the proceedings below. This Court, therefore, should affirm the judgment of the Court of Appeal.

IV. LEGAL DISCUSSION.

A. California's Peer Review Law And The Hospital's Bylaws Provided The Required Procedural Framework for Dr. El-Attar's Hearing.

1. Summary of California's Peer Review Law

In 1989, the California legislature passed a series of laws, codified in Sections 809 through 809.9 of the Business and Professions ("B&P") Code, which sets forth the procedures that private hospitals must follow in peer review proceedings. In this legislation, which took effect on January 1, 1990, the Legislature decreed that "Peer review, fairly conducted, is essential to preserving the highest standards of medical practice." B&P Code §809(a)(3). California's peer review law, which was sponsored by the California Medical Association ("CMA"), was enacted, in large part, to "opt out" of the federal Health Care Quality Improvement Act of 1986 ("HCQIA"), to ensure that physicians' rights in the peer review process in California were not unduly limited by the federal law. See Assembly Subcommittee on the Administration of Justice Analysis of SB 1211 (July 19, 1989) ("Assembly Subcommittee Report") at pp. 1-2.[7]

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[7] The Court of Appeal granted the motion of the CMA, as amicus

(Attached as Appendix II pursuant to Rule of Court 8.520, subd.(h)).

In supporting this comprehensive California legislation, the CMA noted that:

"SB 1211 guarantees licentiates basic due process rights and will ensure fair peer review proceedings. Under case law a licentiate facing a recommendation for adverse action is entitled to 'fair procedure' as a matter of common law. A private organization which makes the decision to 'exclude or expel an individual' must 'refrain from arbitrary action.' The action to exclude or expel must be substantively rational and procedurally fair.'"[citation omitted]. Assembly Subcommittee Report, at p. 4. Moreover, the intent behind California's peer review legislation was not only to avoid the limitation of due process rights in peer review hearings for physicians in the HQIA, but to give physicians greater due process protection in the peer review process than was existing under common law. Id. ("SB1211 requires adoption of procedures which may not be required as a matter of the common law doctrine of fair procedure.").

Furthermore, the CMA supported the opt-out of the federal law because "the Act defines 'peer review body' as including the 'governing body' of a hospital." Assembly Subcommittee Report, at p. 4. The Hospital argues here – contrary to the legislative history – that the Hospital should be allowed to make itself the "peer review body" so it would thereby have had the power to appoint the JRC and hearing officer for Dr. El-Attar's hearing. Indeed, giving hospital governing boards the power to designate themselves as peer review bodies was an argument that

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curiae, for judicial notice of the Legislative History of SB 1211, the peer review law, including the Assembly Subcommittee Report. Court of Appeal order of June 9, 2009 granting judicial notice of Exhibits A (Assembly Subcommittee Report); D (Legislative Comparison of Current Law, SB 1211 and HCQIA); and E (Senate Rules Committee Digest). These Exhibits "A" and "D" are attached hereto as Appendix II.

was implicitly rejected by the Legislature when it passed SB1211 in 1989.

In addition to B&P Code Sections 809, et seq., California law requires medical facilities, such as the Hospital, to "have an organized medical staff responsible for the adequacy and quality of the medical care rendered to patients in the hospital. (Cal.Code Regs., tit. 22, § 70703, subd. (a); Arnett v. Dal Cielo, (1996) 14 Cal. 4th, 10, 56 Cal. Rptr. 2d 706, 923 P.2d 1.)", as quoted in Mileikowsky v. West Hills Hospital and Medical Center ("Mileikowsky"), 45 Cal.4th 1259, 1267 (2009). The medical staff must adopt written bylaws "which provide formal procedures for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical and governing body deem appropriate." (Citations omitted). Id. The medical staff acts chiefly through peer review committees, such as the MEC at the Hospital, to investigate complaints about physicians and to recommend whether staff privileges should be granted or renewed. Id. (citations omitted).

Also, B&P Code § 809, subd. (a)(8), requires that the medical staff bylaws of medical facilities such as the Hospital incorporate into the bylaws the peer review process defined in the legislation. Mileikowsky, 45 Cal.4th at 1267. Together the B&P Code and the medical staff bylaws constitute the procedural law governing the peer review process at every hospital covered by the comprehensive legislation. See B&P 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 Section 809.1 to 809.4, inclusive."). "It is these bylaws that govern the parties' administrative rights." Unnamed Physician v. Board of Trustees, 93 Cal.App.4th 607, 617 (2001).

2. Summary of the Hospital's Bylaws

The Bylaws in effect at the time of Dr. El-Attar's hearing (AR

2296-2413) give the Hospital's Governing Board the final say on applications for appointment or re-appointment to the medical staff (Bylaws, Art. V, § A-1) and disciplinary action against physicians. (Art. VIII, § A-(1)(a)-(b)). The MEC is elected by the medical staff and consists of medical staff officers, members and department chairs, along with certain ex-officio members, including the Hospital's CEO and a representative of the Governing Board. (Art. XII, §B.). Among its duties, the MEC functions as the Hospital's peer review body, making recommendations to the Governing Board for staff membership and reviewing "all information available ... regarding the performance and clinical competence of staff members and other practitioners with clinical privileges and as a result of such reviews to make recommendations for reappointment and renewal or changes in clinical privileges." (Id., § B(1)(b)(9)(10)) The MEC is also responsible for taking "all reasonable steps to ensure professional ethical conduct and competent clinical performance on the part of all members of the Medical Staff, including the initiation of or participation in Medical Staff corrective or review measures when warranted." (Id., §B(10(b)(12)).

In Article VII of the Bylaws, the MEC is authorized to investigate complaints against physicians and, if warranted, to recommend to the Governing Board that corrective action be taken against the physician. (Art. VII, §§ C, D). "If the [MEC] fails to investigate or take disciplinary action, contrary to the weight of the evidence, the Governing Board may direct the [MEC] to initiate investigation or disciplinary action, but only after consultation with the [MEC]." (Art. VII, § F). Article VII, § F, provides further that: "If the [MEC] fails to take action in response to the Governing Board directive, the Governing Board may initiate corrective action, but this corrective action must comply with Articles VII and VIII of these Bylaws." (emphasis added.).

A physician facing an adverse MEC recommendation or Governing Board decision is entitled to a Judicial Review Hearing. (Art. VIII, § A). This hearing is conducted before a Judicial Review Committee ("JRC") "appointed by the [MEC] and composed of at least five (5) members of the Active Staff who gain no direct financial benefit from the outcome; who have not acted as an accuser, investigator, fact finder or initial decision maker; and who otherwise have not actively participated in the matter leading up to the recommendation or action." (Art. VIII, § C, subd. (8).) In addition, the MEC must select a hearing officer to preside over the hearing and rule on "matters of law, procedure, or the admissibility of evidence." (Art. VIII, § C, subd. (11)(c)). If requested by the JRC, the hearing officer "may participate in the deliberation of such committee and be a legal advisor to it, but the hearing officer shall not be entitled to vote." (Id.). The physician may appeal the JRC's decision to an Appeal Board selected by the Governing Board, and the appellate panel must affirm the JRC's decision if it is supported by substantial evidence, following a fair procedure. (Art. VIII, § C, subd. (11)(j) and (12)(d), (f)).

The Bylaws are binding on both the Governing Board and the MEC, and "[n]either the Governing Board nor the [MEC] can unilaterally amend the Medical Staff Bylaws and its Rules and Regulations." (Art. XVII, § B). The Bylaws can be amended only by a majority vote of a quorum at any regular or special meeting of the Active and Senior Active medical staff or by a majority vote of the Active and Senior Active medical staff to approve the amendment by written mail ballot. (Id., § B).

B. The Hospital's Violation of the Bylaws Governing Selection of the JRC and Hearing Officer Was Significant and Unlawful.

The Hospital concedes that its selection of the JRC and hearing officer for Dr. El-Attar's hearing was contrary to the Bylaws, which vest in the MEC the authority to make those selections. Opening Brief at

pp. 2, 12-13. Although Dr. El-Attar presented in his appeal numerous other Bylaw violations by the Hospital in conducting the hearing[8], the Court of Appeal reversed the trial court's judgment solely on the basis of the Hospital's selection of the JRC and hearing officer in violation of Article VIII, § C, subds (8) and (11)(c) of the Bylaws. El-Attar, 198 Cal.App.4th 644, at p. 11 (typed opinion.).

In its Opening Brief, the Hospital argues that its violation of the Bylaws was justified because the MEC failed to initiate peer review proceedings against Dr. El-Attar and the Hospital's selection of the JRC and hearing officer did not violate any peer review statute. Opening Brief at pp. 29-31. This argument is meritless. It ignores the fact that California's peer review statutes (B&P § 809, et seq.) incorporate a hospital's medical staff bylaws into the comprehensive statutory framework of California's peer review law. B&P 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 809.1-809.4, inclusive") (emphasis added).

The Hospital cannot exclude selected Bylaw provisions from the peer review process without running afoul of the comprehensive peer review law. Thus, by violating the Bylaws regarding how the JRC and hearing officer are selected, the Hospital is violating the peer review statute

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[8] Dr. El-Attar also raised other violations of the Bylaws, including violation of Article VIII, section C, subdiv. (11)(a)(5) (AR 2360) and B&P § 809.2(c) regarding restrictions on Dr. El-Attar's voir dire on Dr. Mynatt and other JRC members; violations of Article VIII, section C, subdiv.(8) (AR 2359), regarding continuing the hearing with less than the required minimum of five JRC members; and violationof Article VIII, section C, subdivs. (6)(c) and (8) and B&P § 809.2(b) in connection with the hearing officer's actions to gather the JRC members and reconstitute the panel after Dr. Mynatt and the three other panel members resigned and dissolved the JRC without rendering a decision.

(e.g., B&P Code § 809.6(a)), along with the expressed legislative intent of the peer review law, which is to permit medical staffs and hospital administrators to give additional procedural safeguards for physicians in the peer review process by adopting them in the medical staff bylaws. See, Unnamed Physician v. Board of Trustees, 93 Cal.App.4th 607, 616-617 (2001) (California's peer review system, defined in statutes and medical staff bylaws, "recognizes not only the balance between the rights of the physician to practice his or her profession and the duty of the hospital to ensure quality care, but also the importance of a fair procedure, free of arbitrary and discriminatory acts.")

Moreover, the Hospital's violation of the Bylaws is not justified because the Hospital, rather than the MEC, initiated the charges against Dr. El-Attar. In Article VII, § F, of the Bylaws, the Hospital's Governing Board is allowed to initiate disciplinary action against a physician when the MEC fails to take action in response to the Hospital's request. However, when the Hospital initiates the disciplinary action, it still must comply with Articles VII and VIII of the Bylaws. Article VIII specifically requires that the MEC select the JRC and the hearing officer, even when the Hospital's Governing Board initiates the charges.

Indeed, Article VII, § F, is consistent with B&P Code § 809.5, subd. (c), in that it allows the Hospital to initiate and prosecute charges against a physician, when the peer review body (in this case, the MEC) declines to do so, but the statute requires that such action by the Hospital must "fully comply with the procedures and rules applicable to peer review proceedings established by sections 809.1 to 809.6, inclusive." As stated above, B&P § 809.6(a) incorporates the medical staff bylaws into the peer review law, so the Hospital violated the peer review statute when it selected the JRC and hearing officer in violation of Article VIII, § C, of the Bylaws.

The Hospital's actions also run afoul of B&P Code § 809.05, subd. (a), which states that: "In all peer review matters, the governing body shall give great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner." In Dr. El-Attar's case, the Hospital's Governing Board completely disregarded the recommendations of its peer review body -- the MEC – and acted arbitrarily and capriciously when it ignored the Bylaws requiring the MEC to select the JRC and hearing officer.

The Hospital's arbitrary and capricious disregard of the Bylaws and its refusal to give any weight to the MEC's expertise or findings with regard to Dr. El-Attar distinguishes Dr. El-Attar's case from Weinberg v. Cedar-Sinai Medical Center, 119 Cal.App.4th 1098 (2004). In Weinberg, the hospital suspended Dr. Weinberg's staff privileges because he allegedly provided patients sub-standard care. Dr. Weinberg requested and received a hearing on the hospital's charges, and, thereafter, a majority of a divided peer review committee of the MEC recommended that Dr. Weinberg's staff privileges not be terminated. The MEC agreed with the majority of its peer review committee and recommended against termination of staff privileges. Id., at 1104.

The hospital's governing board extensively reviewed the findings of the MEC, including the findings of both the review panel's majority and dissenters. Based on its review, the hospital asked the MEC to reconsider its recommendation and address six specific issues. The MEC reconsidered its recommendation and polled its members on the six specific issues raised by the hospital's governing board. Thereafter, a majority of the MEC reaffirmed its recommendation not to terminate Dr. Weinberg's staff privileges; however, a substantial minority of the MEC expressed the view that termination was appropriate. Id., at 1105. Following this process, the hospital's governing board declined to follow the MEC

recommendation and terminated Dr. Weinberg's staff privileges. Id., at 1105-1106. The hospital noted in its decision that it had carefully considered the MEC recommendation and given "great weight" to the findings of a majority of the MEC's hearing committee. Id.

From these facts, it is clear that what happened in Weinberg is far different from what happened with Dr. El-Attar, where the Hospital bypassed the MEC as the peer review body and gave no weight or deference to the MEC and/or any review committee formed by the MEC. Thus, the Hospital's reliance on Weinberg to support its position is not appropriate. See Weinberg, 119 Cal.App. 4th at 1110-1111 ("We therefore conclude that the Board properly accorded 'great weight' to the actions of the hearing committee and MEC under section 809.05, subdivision (a).")

Moreover, the hospital in Weinberg followed the medical staff bylaws with regard to the peer review hearing and appeal process and did not violate those bylaws by appointing the hearing panel in place of the MEC. Indeed, unlike the Hospital here, the hospital in Weinberg went to great lengths to include the MEC in the peer review process, even though it disagreed with the MEC recommendations.

Similarly, Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center, 62 Cal.App.4th 1123 (1998), is not applicable here either. In fact, the hospital in Hongsathaij had its MEC conduct the peer review hearing and select the JRC in compliance with the bylaws. Id., at 1130. When the MEC declined to prosecute charges against the physician, the hospital prosecuted the disciplinary charges in accordance with the bylaws. Id.

The issue in Hongsathavij had to with the hospital appealing the JRC's decision to an appeal board, which overturned the JRC's decision because it was not supported by substantial evidence. Hongsathavij, 62 Cal.App.4th at 1134-1135. Even though the bylaws did not specifically give

the hospital the right to appeal the JRC decision, the bylaws did give the hospital the authority to make the final decision on the charges against Dr. Hongsathavij. Thus, the court found that the hospital's appeal right could be implied from the fact that the hospital was the final decision-maker on the charges. Indeed, unlike Dr. El-Attar, Dr. Hongsathavij received a fair peer review hearing before a JRC appointed by the MEC. Hongsathavij proves that the Hospital did not have to usurp the MEC's authority in selecting the JRC because, regardless of the JRC's decision, the Hospital's appeal board had the power to review the JRC's findings for substantial evidence in making its final decision.

C. Because The MEC Was Required To Follow The Bylaws, And Could Not Change Them Unilaterally, The MEC Could Not Delegate Its Authority In The Bylaws To Select The JRC And Hearing Officer For Dr. El-Attar's Peer Review Hearing.

One of the issues that this Court designated for review was whether the MEC could delegate to the Hospital's Governing Board its authority under the Bylaws to select the JRC and hearing officer.[9] Article XVII, § B, of the Bylaws states that: "These Bylaws, and the Rules and

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[9] The Court of Appeal found that substantial evidence supported the notion that the MEC tried to delegate its authority to select the JRC and hearing officer to the Governing Board. Dr. El-Attar disputed this finding, arguing that the evidence was insufficient to prove that the MEC actually delegated its authority to make those selections. The minutes from the March 12, 2003 MEC meeting (AR 1890-1891) do not show that the MEC voted to delegate its authority under the Bylaws to select the JRC and hearing officer. Nowhere in the minutes -- either in the discussion, motion or action taken sections – is there a reference to the MEC voting to delegate its authority to pick the JRC and hearing officer to the Governing Board. In fact, the "Discussion" section expressly states that: "The MEC was informed that the hearing process outlined in the Medical Staff Bylaws *would be followed* with the Governing Board taking the place of the MEC in establishing and arranging the hearing." AR 1891 (emphasis added).

Regulations, when adopted and approved shall be equally binding on the Governing Board and the Medical Staff. Neither the Governing Board nor the Medical Staff can unilaterally amend the Medical Staff Bylaws and its Rules and Regulations." (AR 2414) (emphasis added).

The process for amending the Bylaws is set forth in Article XVII, § A, and requires: (1) a majority vote of a quorum of the Active and Senior Active Staff, at any regular or special meeting of the medical staff; or (2) approval of the amendment by a vote of a majority of the Active and Senior Active medical Staff in a written mail ballot. Accordingly, the MEC could not unilaterally change the Bylaws to delegate its obligation to select the JRC and hearing officer for Dr. El-Attar's hearing without first obtaining a majority vote of the entire medical staff pursuant to Article, XVII, § A, of the Bylaws. (AR 2414). Moreover, the MEC and the Hospital's Governing Board could not agree among themselves to disregard the Bylaws so that the Hospital, instead of the MEC, could select the JRC and hearing officer, without first amending the Bylaws pursuant to Article XVII of the Bylaws.

Finally, even if the MEC and the Hospital's Governing Board agreed to deviate from the Bylaws in selecting the JRC and hearing officer (which they could not lawfully do), such an agreement would not bind Dr. El-Attar to the altered procedure because he did not consent to it. B&P Code § 809.2, subd.(a), provides an option in which the licentiate and the peer review body can agree on one or more arbitrators to act as trier of fact in the hearing. However, this option was not pursued by the MEC or the Hospital in Dr. El-Attar's case. Thus, the MEC's purported delegation of its authority was not only inconsistent with the Bylaws in effect at the time, but also violated Dr. El-Attar's reasonable expectations of how the hearing was to be conducted pursuant to those Bylaws and the peer review law.

D. The Power To Select The Decision-Making Panel And The Hearing Officer Is Not Immaterial And The Hospital's Use Of That Power, In Violation Of The Bylaws, Gave It An Unfair Advantage Over Dr. El-Attar In The Hearing.

The Hospital argues that its violation of the Bylaws in selecting the decision-making JRC and the hearing officer, who makes key decisions on procedure, evidence and conflicts of interest, was immaterial and should not constitute a per se reversible error. Opening Brief at pp. 31-34. However, this violation of the Bylaws by the Hospital's Governing Board, in the words of the Court of Appeal, "undermines the purpose of the peer review mechanism" (El-Attar, at p. 15 (Typed Opinion)) and "jeopardizes the integrity of the hearing from the beginning". (Id., p. 17).

Indeed, it is hard to come to any other conclusion because the power to handpick the decision-makers, not to mention the presiding officer, may be the most significant power exercised by any participant in the proceeding. Far from trivial or immaterial, the requirement in the Bylaws that the MEC select the JRC and hearing officer is at the core of the peer review process and implicates the balance of power between the Hospital administration, on the one hand, and the medical staff, on the other hand.

Moreover, the evidence suggests that the Hospital's reason for taking the selection power away from the MEC was because the Hospital believed that the MEC, which had recommended Dr. El-Attar's reappointment to staff and refused to ratify the Hospital's summary suspension of Dr. El-Attar, would favor Dr. El-Attar in its selection of the JRC and hearing officer.[10] The Hospital also argued in the Court of

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[10] The March 12, 2003 minutes of the MEC note that: "it was felt

Appeal that the Governing Board essentially had the right to usurp the MEC's authority to pick the JRC and hearing officer because "any other means of handling the hearing under these circumstances would lead to absurd results, be prejudicial to the Board, and be a waste of everyone's time." Respondent's Brief at p. 15. Indeed, if allowing the MEC to pick the JRC and hearing officer (as required in the Bylaws) was "prejudicial to the [Governing] Board", then having the Hospital Governing Board pick the JRC and hearing officer (in violation of the Bylaws) would be prejudicial to Dr. El-Attar and an improper manipulation of the peer review process.

Ironically, the Hospital seized the MEC's power to appoint the JRC and hearing officer for Dr. El-Attar's peer review hearing because the power to make those appointments was significant and gave it an advantage in the hearing over Dr. El-Attar. The Hospital did not want the MEC, which had made recommendations favorable to Dr. El-Attar, to make these crucial appointments, even thought the Bylaws required the MEC to make those appointments.

The significance of the Hospital administrators having the power to select the decision-making panel and hearing officer for the hearing is obvious. "It should come as no surprise that hospital authorities appoint panel members and hearing officers who are sympathetic to the hospital's position."[11] Merkel, Physicians Policing Physicians: The

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that since the MEC did not summarily suspend [Dr. El-Attar]'s privileges, did not recommend any adverse action relating to [Dr. El-Attar] and has not filed any Section 805 report relating to [Dr. El-Attar]; and since the requested hearing would be to review actions by the Governing Board, it should be the Governing Board and not the MEC which arranges and prosecutes the requested hearing." (AR 1890-1891). Interestingly, in the April 9, 2003, minutes, the March 12 minutes were amended to delete the foregoing entry. (AR 1894).

[11] Professor Merkel criticizes a system where the prosecutor can

Development of Medical Staff Peer Review Law at California Hospitals (2003) 38 U.S.F. L.Rev. 301, 331.

Accordingly, the Hospital's violation of the Bylaws with regard to the selection of the JRC and hearing officer was not trivial or immaterial; rather, the Hospital made a strategic decision to seize the MEC's authority to make these selections to gain an advantage over Dr. El-Attar in the peer review hearing. These actions of the Hospital are anathema to the basic concept of a fair hearing.

Indeed, one of the earliest cases to discuss the scope of fair procedure in an administrative hearing under common law declared that the expulsion of members of a fraternal organization was invalid because the rules for how the hearing was to be conducted were arbitrarily suspended. Taboada v. Sociedad Espanola, etc., 191 Cal. 187, 191 (1923) (quoted in Hackethal v. California Medical Association, 138 Cal.App.3d 435, 442, 444-445 (1982)) (holding that the common law fair hearing right was violated by hearing council disregarding its own bylaws regarding burden of proof.). Fair procedure in peer review hearings is determined by whether "the procedures contained in the Bylaws were followed." Smith v. Selma Community Hospital, 164 Cal.App.4th 1478, 1519-1520 (2008). Because the violation of the Bylaws was significant and gave the Hospital an advantage over Dr. El-Attar in the hearing that it did not have under the Bylaws, Dr. El Attar was deprived of the fair hearing to which he was

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select the decision makers and hearing officer. While the MEC is frequently the prosecutor of charges, it was not the prosecutor in Dr. El-Attar's case. The Bylaws in place for Dr. El-Attar's hearing gave the authority to the MEC to select the JRC and hearing officer even when (as here) the Hospital became the prosecutor in the hearing instead of the MEC. The Professor's criticism of unfairness is amplified when the Hospital, as prosecutor of charges, seizes the power to appoint the decision-makers and hearing officer from the MEC, even though the Bylaws specifically require the MEC to make those appointments.

entitled under the peer review law, not to mention his common law right to have a fair hearing.

Contrary to the Hospital's argument, giving Dr. El-Attar the ability to question the Hospital's hand-picked JRC members and hearing officer does not cure the inherent unfairness in the Hospital's manipulation of the Bylaws to obtain an advantage. This is especially true when it is the Hospital's handpicked hearing officer who rules on whether he or she or the JRC members are qualified to conduct the hearing and make decisions. Dr. El-Attar is at a distinct disadvantage because he must "risk the wrath of those sitting in judgment by challenging their representation of impartiality." Rosenblit v. Superior Court, 231 Cal.App.3d 1434, 1448 (1991).

As the Court of Appeal in this case aptly noted, "A procedure that enables the Governing Board to tip the scales in its favor, leaving the physician to uncover and cure any potential inequality on his or her own, does not comport with the fair procedure envisioned in the statute or Bylaws." El-Attar, at p. 18 (Typed Opinion). This Court should reject the Hospital's arguments that its violation of the Bylaws was immaterial and did not deprive Dr. El-Attar of a fair peer review hearing.

E. Because A Peer Review Panel Selected By The Hospital (Instead of MEC) In Violation of the Bylaws Is Not "Properly Constituted", Dr. El-Attar Is Entitled To A New Peer Review Hearing With A Properly Selected Panel And Hearing Officer.

Because the Hospital, as opposed to the MEC, appointed the peer review panel in violation of the Bylaws, it logically follows that this decision-making panel was "improperly constituted" at the outset of Dr. El-Attar's hearing and resulted in a hearing that did not meet the requirements of fair procedure. Dr. El-Attar's subsequent hearing before an Appeal

Board, also consisting of members selected by the Hospital's Governing Board, did not cure the unfairness. Indeed, Dr. El-Attar never received a hearing by any actual "peer review body", as that term is defined in B&P Code §805, subd. (a)(1), subparts (A)-(D) [12]. A review panel appointed by the Hospital's Governing Board was not the MEC, or a committee of the MEC, created for peer review at the Hospital.[13]

All levels of the review of Dr. El-Attar's case, from denial of staff reappointment to the final decision by the Governing Board, involved panels either handpicked by the Hospital or consisting of members of the Hospital's Governing Board. Thus, the Hospital's manipulation of the Bylaws created a system designed to remove the MEC – the actual peer review body – from the peer review process. Such a system was not legitimate and stacked the deck in favor of the Hospital, which wanted to exclude the MEC because it disagreed with the MEC's findings that were favorable to Dr. El-Attar. However, "decisions relating to clinical privileges are generally the province of a hospital's peer review bodies and

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[12] This statutory definition of "peer review body" includes the medical staff of a health care facility (B&P Code §805, subd.(a)(1)(A)) or any "committee" set up by an entity "for the purpose of reviewing the quality of professional care" by members or employees of the entity. (B&P Code §805, subd.(a)(1)(D)). At the Hospital, the MEC, or the committees it creates, clearly functioned as the statutory "peer review body." The Governing Board, or committees of that Board, was not the peer review body at the Hospital.

[13] California opted out of the federal HCQIA, in part, because the federal law permitted the peer review hearing to be determined by the health care entity rather than the "peer review body". Significantly, California's legislation required that the peer review hearing be determined by the peer review body. See Legislative Comparison of SB1211, Current Law, and HCQIA, at p. 1 (Appendix II B). Given the legislative intent behind California's peer review law, the Hospital could not have lawfully bypassed the MEC, which was the designated peer review body, to create its own pseudo "peer review body" to review Dr. El-Attar's case.

not its governing board" (Mileikowsky, 45 Cal.4th at 1275), so it was improper for the MEC not to participate in the process, even when the Hospital initiated and prosecuted the charges.

The Hospital had the right under the Bylaws, and pursuant to B&P Code § 809.05, to prosecute charges against its physicians in the peer review process. The Hospital, however, was not allowed to hijack the peer review process and skew it against the physician by removing the medical staff's executive committee from the process. Both the Bylaws (Art. VII, § F) and B&P Code § 809.05 (b), require the Governing Board first to consult with the MEC before initiating corrective action against the physician, and when the Board initiates such corrective action, it "must comply with Articles VII and VIII of these Bylaws." (Art. VII, § F). Article VIII, § C, requires the MEC to appoint the JRC and hearing officer, even when the Hospital initiates the corrective action.

As this Court recognized in Mileikowsky, "although a hospital's administrative governing body makes the ultimate decision about whether to grant or deny staff privileges, it does so based on the recommendation of its medical staff committee [citation omitted], giving 'great weight to the actions of peer review bodies ...' [citation omitted] Here the board gave no weight to the actions of any peer review body." Mileikowsky, 45 Cal.4th at 1273 (emphasis in original). The situation in Dr. El-Attar's case is similar. By removing the MEC from Dr. El-Attar's peer review hearing, the Hospital gave no weight to the MEC's recommendations.

A JRC selected by the Hospital, instead of being selected by the MEC, cannot be a properly constituted "peer review body", not only because the selection violated the Bylaws, but the system created by the Hospital eliminated the Hospital's peer review body from the peer review process. The Hospital's Governing Board cannot lawfully remove the

MEC from the peer review process. Nor can the MEC purport to delegate its authority to participate in the peer review process to the Hospital's Governing Board. Thus, the panel created by the Hospital for Dr. El-Attar's hearing was improperly constituted.

Moreover, the evidence showed that the Hospital's handpicked panel gave no consideration to the MEC's recommendation that Dr. El-Attar not face disciplinary charges and that his staff privileges be renewed. The JRC improperly deferred to the Hospital Governing Board's decision to terminate Dr. El-Attar's staff privileges rather than giving "great weight" to the recommendations of the MEC as "the peer review body." Mileikowsky, 45 Cal.4th at 1272.

In its written decision, the JRC found that the Governing Board's non-renewal of Dr. El-Attar's staff privileges "was reasonable and warranted", but the panel noted that "it would have pursued an intermediate resolution had it been the initial decision maker." (AR 3736, 3743). The JRC's deferral to the Governing Board, without giving any weight to the recommendations of the MEC as the actual peer review body, is problematic and suggests that the JRC did not make a truly independent review of the evidence. The JRC's deference to the Governing Board, rather than the MEC, is undoubtedly derived from the fact that the Hospital's Governing Board selected the members of that panel. Given how the JRC was selected, it was clear that the panel could not, and did not, give Dr. El-Attar the kind of peer review hearing he was entitled to under the Bylaws and the peer review law. Indeed, in refusing to renew Dr. El-Attar's staff privileges and bringing charges against him, the Hospital disregarded the MEC and gave its recommendations no weight. "This procedure violated both the letter and the underlying principles of the statutory peer review process." Mileikowsky, 45 Cal.4th at 1272.

The Hospital argues here that without Dr. El-Attar making a

showing of bias or a direct financial interest in the outcome of the hearing by one or more of the JRC members, the panel was properly constituted (despite the Bylaw violations) and Dr. El-Attar is not entitled to a new hearing. The Hospital further argues that because bias cannot be presumed and the hearing officer made some rulings in favor of Dr. El-Attar, there is no proof that the hearing was unfair and any errors in the selection of the panel and hearing officer were "harmless." Dr. El-Attar, the Hospital argues, was represented by counsel, who was able to voir dire the panel for bias and present witnesses and evidence on his behalf in a lengthy hearing. In essence, the Hospital argues that the hearing is presumed to be fair, despite the Bylaw violations in the selection of the JRC and hearing officer.

These arguments ignore the magnitude of what the Hospital did in manipulating the peer review process to gain an advantage over Dr. El-Attar in the hearing. The Hospital has not justified its manipulation of the system other than to argue that the MEC – the established peer review body – was somehow unfit to select the JRC and hearing officer because it had made recommendations favorable to Dr. El-Attar. But other than the fact that the Hospital disagreed with the recommendations of the MEC, the Hospital presented no evidence that the MEC was unfit, corrupt or unwilling[14] to discharge its duty to select the review panel and hearing officer and otherwise participate in the peer review process as was its duty under the Bylaws. (Art. XII, § B, subd. (1)(b)(12)). The Hospital's violation of the Bylaws in selecting the JRC was not out of "necessity", but

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[14] The MEC was far from unwilling to participate in the peer review process. For example, the MEC formed a committee which reviewed Dr. El-Attar's patient files that were the subject of the Hospital's investigation (AR 1851-1852), made recommendations on Dr. El-Attar's renewal application and recommended not pursuing charges against Dr. El-Attar based on its investigation (AR 1770-1779) and the analysis of the report on Dr. El-Attar by the Hospital's reviewers (AR 1870, 1892-1893).

was strategic to ensure that the panel would be more aligned with the Hospital's views, as opposed to the perceived views of the MEC, about Dr. El-Attar.

Under these circumstances, the composition of the panel cannot be presumed to be proper, and Dr. El-Attar's hearing with such a panel cannot be presumed to be fair. At a minimum, the Hospital, not Dr. El-Attar, had the burden of showing that its violation of the Bylaws and manipulation of the hearing process were clearly justified for reasons other than the Hospital administration's disagreement with the MEC over the renewal of Dr. El-Attar's staff privileges.

If the Hospital can change the rules of the peer review process when it is advantageous for it to do so, then it is hard to determine what rules really apply and what rights the physician has in the hearing process. B&P Code §809.05, subd. (a), states that: "In all peer review matters, the governing body shall give great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner." (emphasis added). Section 809.05, subd.(b), further provides that when a peer review body's failure to investigate or to initiate disciplinary action is contrary to the weight of the evidence, "the governing body shall have the authority to direct the peer review body to initiate an investigation or a disciplinary action, but only after consultation with the peer review body. No such action shall be taken in an unreasonable manner." (emphasis added).

Clearly, the Hospital's selection of the JRC and hearing officer in violation of the Bylaws and its removal of the MEC from Dr. El-Attar's hearing process was unreasonable and arbitrary. The Hospital's actions at the outset of Dr. El-Attar's hearing were contrary to California law, the Bylaws and basic notions of fair procedure.

Accordingly, Dr. El-Attar did not receive the peer review hearing to which he was entitled under the Bylaws, the peer review law,

and common law principles of fair procedure. He is entitled to a new peer review hearing in compliance with the Bylaws in effect at the time the Hospital denied his application for renewal of staff privileges and initiated charges against him.

The Hospital argues that the medical staff formally amended the Bylaws near the end of Dr. El-Attar's hearing and the California Hospital Association ("CHA") enacted model bylaws in 2011, both of which may permit hospital governing boards, under certain circumstances, to appoint decision-making panels. These ever-changing developments are not relevant to Dr. El-Attar's situation. The point in Dr. El-Attar's case is that if a physician faces the risk of losing his right to practice medicine at a private hospital, the physician is entitled to expect – and fundamental fairness requires -- that the hospital and/or the MEC will comply with the bylaws in effect at the time the adverse action was taken against the physician

Moreover, the purported 2004 Bylaws referred to by the Hospital at pp. 44-45 of its Opening Brief appear to be an unsigned draft, rather than actual approved bylaws. (AR3934). For example, the section cited by the Hospital (AR3877) is internally contradictory in stating that: "A hearing occasioned by a Medical Executive Committee recommendation or a Governing Board recommendation shall be conducted by a Judicial Review Committee appointed by the Medical Executive Committee. A hearing occasioned by a Governing Board recommendation shall be conducted by a Judicial Review Committee appointed by the Governing Board Chair or his designee." (AR 3877). Which bylaw provision is applicable?

In addition, the required number of JRC members is stated to be both "five members" and "three members" in the purported bylaws. (AR 3877). This provision is also contradictory and suggests that the

purported 2004 revised bylaws are merely a draft or not what they purport to be. In any event, the Hospital's reference to the purported 2004 revised bylaws is a red-herring with no applicability to Dr. El-Attar's situation.

Furthermore, this Court need not make any sweeping decisions beyond the scope of Dr. El-Attar's case. To the extent that medical staffs and hospital governing boards can approve changes to their bylaws to alter the peer review process (consistent with the peer review law and fair procedure), the decision in this case will not endanger the validity of such bylaws, including those model bylaws of the CHA or similar organizations, as they apply to physicians other than Dr. El-Attar.

At a minimum, Dr. El-Attar should be reinstated to the Hospital's staff and given a new peer review hearing pursuant to the Bylaws in effect at the time that the Hospital denied his renewal application and brought charges against him. Hackethal v. California Medical Association, 138 Cal.App.3d 435, 448-449 (1982); Rosenblit v. Superior Court, 231 Cal.App.3d 1434, 1449 (1991).

F. Contrary to the Hospital's Arguments, The JRC Selected By The Hospital Was Not Unbiased And Dr. El-Attar Proved that Dr. Mynatt, the JRC's Chair, Had Conflicting Financial Interests With the Hospital That Should Have Disqualified Him.

Although the Court of Appeal found that the Hospital's improper selection of the JRC and hearing officer compromised the fairness of Dr. El-Attar's hearing without the need for Dr. El-Attar to prove that the panel was actually biased, Dr. El-Attar presented proof that certain JRC members had financial ties to the Hospital that compromised their objectivity. In its Opening Brief, the Hospital argues that Dr. El-Attar fails to prove that any JRC members were biased or had financial conflicts of interest that raised a reasonable potential for bias. Opening Brief at pp. 15-19, 46.

This is not correct. Dr. El-Attar proved in the trial court and argued on appeal that certain JRC members, primarily JRC Chairman Dr. Michael Mynatt, had financial conflicts of interest with the Hospital and Dr. El-Attar that raised serious questions about their suitability to serve as decision makers. The Court of Appeal found it unnecessary to look beyond the improper composition of the JRC at the start of the hearing. This Court's statement of issues appears to limit the review of this case to whether the Hospital's selection of the JRC and hearing officer in violation of the Bylaws resulted in Dr El-Attar being deprived of a fair hearing.

Nonetheless, the Hospital has raised the lack of evidence of bias or financial interest in Dr. El-Attar's hearing panel, and Dr. El-Attar is compelled to respond to those arguments. The following is a brief summary of the evidence presented by Dr. El-Attar in the proceedings below.

1. At the beginning of the hearing, the hearing officer improperly limited counsel's voir dire of the JRC members, especially with regard to Dr. Mynatt and his financial connections to the Hospital.

The hearing officer improperly prevented Dr. El-Attar's attorney from following-up on questions relating to Dr. Mynatt's economic relationship with the Hospital in connection with the Arthritis Institute he jointly operated with the Hospital.

Dr. Mynatt is an orthopedic surgeon and principal in the Arthritis Institute, a "joint program" with the Hospital, which at the time of the hearing was owned by Tenet Healthsystems ("Tenet"). Dr. Mynatt's office was based at the Hospital and he practiced under the umbrella of the Arthritis Institute. (AR 4159). When asked to explain the nature of the relationship between Tenet and the Arthritis Institute, Dr. Mynatt was evasive, argumentative, and provided answers such as "I'm not qualified to

do that" and "Asked and answered" when the question was clarified by counsel. (AR4160). Significantly, the hearing officer did not order Dr. Mynatt to provide any more meaningful information. (AR 4159-4161).

When questioned as to whether Tenet was paying for the office space of the Arthritis Institute at the Hospital (including Dr. Mynatt's office space), Dr. Mynatt was evasive. (AR 4162). Dr. Mynatt further stated that 80 percent of his practice was at the Hospital, demonstrating his significant financial link to the Hospital. (AR 4163).

Later in the proceedings, the hearing officer excluded evidence of Dr. El-Attar's eviction from a nearby medical office building controlled by the Hospital. (AR 3156-3157). See Excluded Exhibits Q, R, S, T, U (AR 2521-2585). Dr. El-Attar was in litigation with the Hospital to evict him from his office to make room for Dr. Mynatt's Arthritis Institute at the same time that Dr. Mynatt was presiding over the JRC. In the litigation, Tenet sued Dr. El-Attar for Intentional Interference with Prospective Business Advantage because, as a result of Dr. El-Attar's refusal to leave Suite 902 at 1300 N. Vermont Avenue, "Tenet has not been able to build out the suites on the Ninth floor and utilize them for Tenet's intended Arthritis Institute. [E]ach day that El-Attar continues in possession of Suite 902 causes Tenet an additional day's delay, resulting in continued lost profits from the operation of the Arthritis Institute as well as rental for unused Suites 901, 903, 904, 905 and 906." Supplemental Clerk's Transcript ("SCT") at 8 (Tenet Complaint, p. 7, ¶ 25).

Thus, one month after Dr. Mynatt was seated as the chair of the JRC in Petitioner's peer review hearing, Tenet sued Dr. El-Attar to recover as damages lost profits suffered by the Arthritis Institute – a business venture that Tenet had with Dr. Mynatt. Dr. Mynatt, as Tenet's joint venturer in the Arthritis Institute, was a potential beneficiary of Tenet's lawsuit against Dr. El-Attar. Miller, therefore, should have required

Dr. Mynatt to provide a full and fair disclosure of his business relationship with Tenet in the Arthritis Institute. Indeed, the mere existence of Tenet's lawsuit to recover from Dr. El-Attar profits lost by Dr. Mynatt's Arthritis Institute means that Dr. Mynatt could not be an "unbiased individual" qualified to sit on the JRC. The trial court erroneously applied the narrow standard of "actual bias" rather than the broader standard for disqualification when there is a financial interest – that is, where the "probability of actual bias is too high to be constitutionally tolerable." Hackethal, 138 Cal. App.3d at 443.

Throughout the hearing, the hearing officer shielded Dr. Mynatt and his entangled business relationship with the Hospital from appropriate scrutiny by Dr. El-Attar. Not surprisingly, it was Dr. Mynatt's economic relationship with the Hospital that led to his self-recusal from the JRC two years later. Dr. El-Attar only learned some of these facts in the mandate proceedings in the trial court as a result of his partially successful motions to augment the record. See statement by Jesse Miller in response to May 23, 2007 court order ("Miller Statement") (6 CT. 1118-1123). Dr. El-Attar had to make this motion because, during the JRC proceedings, the hearing officer failed to disclose the complete facts and circumstances surrounding Dr. Mynatt's conflict, recusal and return to the JRC.

The hearing officer should have allowed the parties to question Dr. Mynatt, pursuant to the Bylaws and B&P Code § 809.2(c), to ascertain the facts of Dr. Mynatt's conflict and determine whether or to what extent Dr. Mynatt's ability to decide the case was compromised by his financial connection with the Hospital and his embroilment in El-Attar's litigation with Tenet over Dr. Mynatt's Arthritis Institute. As a result of this error by the hearing officer, Dr. El-Attar did not receive a fair hearing.

2. Dr. Mynatt's Return to the JRC After His Self-Recusal For Conflicts of Interest Deprived Dr. El-Attar of a Fair Hearing.

Dr. Mynatt should not have been permitted to return to the JRC after his self-recusal, let alone sit on the panel in the first place because of his business venture with Tenet in the Arthritis Institute at the Hospital and connection to the litigation between Tenet and Dr. El-Attar over the Institute's office space. The hearing officer erred in allowing Dr. Mynatt to return to the JRC after Dr. Mynatt had recused himself for conflicts of interest involving his business dealings with the Hospital which he said prevented him from deciding the case.

In examining whether a hearing officer or JRC panel member is biased in medical peer review hearings, the "[p]rinciples applicable to judicial officers in court proceedings provide comparable guidance." Yaqub v. Salinas Valley Memorial Healthcare System, 122 Cal. App.4th 474, 486. In Yaqub, the court examined Code of Civ. Proc. §170.1(a)(3), pertaining to the disqualification of judges who have a financial interest in the subject matter in a proceeding or in a party to the proceeding. Id. The court also found canon 2 of the California Code of Judicial Ethics helpful in analyzing a physician's right to an impartial adjudicator in peer review proceedings. Canon 2 states that a judge "shall avoid impropriety and the appearance of impropriety in all of the judge's activities." Id. (emphasis in original). The court noted that the commentary to canon 2 provides the following 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.

Moreover, when Dr. Mynatt's economic relationship with Tenet turned sour later in the proceedings and he contemplated litigation against Tenet, Dr. Mynatt abruptly recused himself from further

deliberations and left the JRC in August 2005 just before it was to render a decision. The remaining three panel members immediately left the panel without rendering a decision because they did not want to make a decision with only three members. Dr. Mynatt announced his return to the JRC two weeks after his recusal. The hearing officer rounded up the other JRC members to join Dr. Mynatt and declared the panel reconstituted. The dispute between Tenet and Dr. Mynatt was apparently "settled" on undisclosed terms. CT 1456, 1458. This unusual scenario raises serious legal questions about whether Dr Mynatt could return to the JRC after he recused himself or whether the hearing officer even had the authority to reconstitute the panel after the JRC disbanded without a decision. See Gelderman v. Bruner, 229 Cal. App.3d. 662, 666 (1991) (holding that once a trial judge had voluntarily recused himself from a matter, he was precluded by Code Civ. Proc. § 170.4 from later participating in any portion of the case).[15]

The court never permitted Dr. El-Attar to obtain detailed information from Dr. Mynatt about his dispute with Tenet or the nature of his settlement. *The appearance of impropriety* associated with Dr.

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[15] In People v. Freeman, 47 Cal.4th 993 (2010), this Court noted that a judge's decision to accept reassignment of a defendant's case that she had previously recused herself from "may have violated the judicial disqualification statutes that limit the actions that may be taken by a disqualified judge," but, without more, the judge's acceptance of reassignment did not justify a finding that defendant's due process rights were violated. Id., at 1006. The narrow holding in Freeman is not applicable here because the defendant in Freeman did not seek to disqualify the judge pursuant to the judicial disqualification statutes (Code Civ. Proc §§ 170 – 170.8). In the present case, Dr. El-Attar sought to disqualify Dr. Mynatt pursuant to the Bylaws and California's peer review law – the equivalent of the judicial disqualification statutes – and did not waive his objection to Dr. Mynatt's conflict and return to the panel after his recusal. Gelderman, 229 Cal.App.3d at 665.

Mynatt's recusal and return, the reconstitution of the JRC, as well as the shroud of secrecy surrounding his self-recusal and return, taints the JRC's decision.

Questions linger about Dr. Mynatt's motivation in walking out of the hearing during the deliberations. Was Dr. Mynatt using his power to decide Dr. El-Attar's case as a bargaining chip in order to get a financial concession from the Hospital in his dispute with it? Was there a quid pro quo between Dr. Mynatt and the Hospital that prompted Dr. Mynatt's return to the JRC? This probability of impropriety rendered the hearing unfair and the JRC's decision suspect.

3. The Hearing Officer's Unauthorized Reconstitution Of The JRC After It Disbanded Deprived Dr. El-Attar Of A Fair Hearing.

The hearing officer did not have authority to reconstitute the JRC panel in August 2005 after it disbanded following Dr. Mynatt's self-recusal. Neither the Bylaws nor any other applicable law authorize the hearing officer to reconstitute the JRC once it disbands.

A hearing officer does not have implied authority, beyond what is specifically given to him or her in the Bylaws, to terminate a peer review hearing as a sanction against the physician for non-compliance with discovery orders. Mileikowsky, 45 Cal.4th at 1275. Similarly, the hearing officer in Dr. El-Attar's hearing should not have the implied authority to "reconstitute" the hearing once the JRC has decided to disband without rendering a decision.

The Bylaws do not authorize the hearing officer to overrule or modify the JRC's decision to disband following Dr. Mynatt's recusal. Indeed, the Bylaws prohibit the hearing officer from voting on or influencing the JRC's decision. Bylaws, Article VIII: C(6)(c) (AR 2361). See also B&P Code § 809.2(b) (Hearing officer "shall not be entitled to

vote.").

Also, the hearing officer's efforts to round up the panel members and reconvene the JRC were improper because a hearing officer is prohibited from being an advocate in the proceeding. B&P § 809.2(b); (AR 2361). By doing this, the hearing officer took actions favorable to the Hospital and adverse to Dr. El-Attar because the decision of the JRC to disband and not render a decision would have resulted in Dr. El-Attar retaining his staff privileges, pending a new hearing. The hearing officer's action in rounding up the JRC members to reconstitute the panel would be similar to a judge rounding up the members of a "hung jury" two weeks after they had been discharged and have them return to court, reconvene and render a verdict against the defendant. Clearly, such an action would be improper and prejudicial to the defendant.

4. Dr. El-Attar Was Denied A Fair Hearing Because The Hearing Officer Conducted His Own Secret Voir Dire Of The Re-Empanelled JRC Without Allowing The Parties To Question The Returning Panel Members.

The hearing officer's secret questioning of the re-empanelled JRC outside the presence of the parties' counsel and without allowing counsel to question the panel was improper and compromised Dr. El-Attar's right to a fair hearing. This situation was similar to that in Rosenblit, where the court found a secret voir dire of the hearing panel by the hearing officer compromised Dr. Rosenblit's ability to obtain a fair hearing and denied him an opportunity to expose potential bias of the panel members. Rosenblit, 231 Cal. App. 3d. at 1447-1448.

The conduct of Dr. El-Attar's hearing by the Hospital's handpicked JRC and hearing officer proved that the Hospital's attempt to skew the peer review process in its favor was wrong from the start and never should have been allowed to occur. California's comprehensive peer

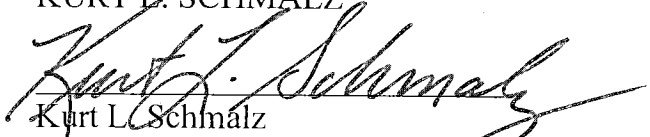
review law and the Bylaws of the Hospital were devised to provide an appropriate balance between hospital administration, the medical staff and the physician, who faces the loss of his staff privileges and irreparable harm to his professional livelihood. The Hospital's reconfiguration of the peer review process by selecting the decision-making panel and hearing officer in violation of the Bylaws was far more than a technical mistake. It undetermined the integrity and fairness of the peer review process and deprived Dr. El-Attar of the hearing to which he was entitled.

V. CONCLUSION

The Hospital's Governing Board violated the Bylaws, California's peer review law and common law principles of fair procedure by selecting the decision-making JRC and the hearing officer for Dr. El-Attar's peer review hearing instead of allowing the MEC, the Hospital's peer review body, to make those selections. Under the Bylaws, the MEC did not have the authority to delegate its duty and authority to select the JRC. Nor could the MEC unilaterally change these Bylaws to permit the Governing Board to make those selections and to remove the MEC from participation in the peer review process. The JRC created by the Hospital's Governing Board was contrary to the law and the Bylaws with no justification other than to obtain a strategic advantage over Dr. El-Attar in the hearing. As a result, the hearing panel selected by the Hospital was not properly constituted and Dr. El-Attar is entitled to a new peer review hearing with a properly constituted panel. Accordingly, this Court should affirm the judgment of the Court of Appeal.

Dated: May 25, 2012

LURIE, ZEPEDA, SCHMALZ & HOGAN
KURT L. SCHMALZ

By: 
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CERTIFICATE OF COMPLIANCE
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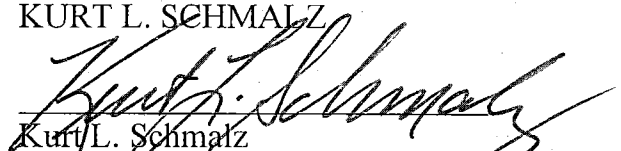
By: 
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Filed 8/19/11

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

OSAMAH A. EL-ATTAR, Petitioner and Appellant, v. HOLLYWOOD PRESBYTERIAN MEDICAL CENTER, Defendant and Respondent.	B209056 (Los Angeles County Super. Ct. No. BS105623)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Reversed and remanded.

Lurie, Zepeda, Schmalz & Hogan, Kurt L. Schmalz, and Neeru Jindal for Petitioner and Appellant.

Christensen & Auer, Jay D. Christensen, and Anna M. Suda for Defendant and Respondent.

Francisco J. Silver and Astrid G. Meghrigian for California Medical Association as Amicus Curiae on behalf of Defendant and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II of the Discussion.

This case concerns a hospital's peer review procedure in the case of a physician who is denied reappointment to the medical staff. The hospital bylaws governing peer review hearings in such cases call for a hearing panel made up of physicians selected by an elected executive committee of the medical staff. We hold that in the absence of a bylaw provision to the contrary, the elected committee must appoint the hearing panel, and cannot delegate this task to the governing board of the hospital.

Appellant Osamah El-Attar, M.D., was a medical staff member at respondent Hollywood Presbyterian Medical Center (Hospital). In fall 2002, he applied for reappointment to the medical staff. His application was reviewed by the medical staff's Medical Executive Committee (MEC), which recommended that his application be approved. The Governing Board of Hospital denied the application, and appellant requested a peer review hearing to challenge the Governing Board's discussion.

The Queen of Angels-Hollywood Presbyterian Medical Center Medical Staff Bylaws (Bylaws), adopted by the medical staff and approved by the Governing Board of Hospital, provided that in a case such as this, the peer-elected MEC appoints the members of the hearing panel to hear the case. Nevertheless, in this instance, the MEC acted to delegate that authority to the Governing Board. That body appointed a hearing panel which ultimately ruled against appellant.

Following the hearing, the appellant's medical staff membership and privileges were terminated. Appellant petitioned for a writ of admin0istrative mandate, pursuant to Code of Civil Procedure section 1094.5. His petition was denied. On appeal, he makes several claims of error with respect to the selection of the hearing panel and the procedures it followed in hearing the case. We decide only one: whether the panel was properly constituted. We hold that it was not because selection of the hearing panel by

the Governing Board violated the Bylaws, depriving appellant of the hearing to which he was entitled. We therefore reverse the trial court's ruling denying relief.[1]

FACTUAL AND PROCEDURAL SUMMARY

Pursuant to Business and Professions Code section 809,[2] Hospital employs a peer review process to evaluate a physician's performance and conduct for various purposes, including applications for appointment and reappointment to the medical staff and disciplinary action against a physician. The Bylaws prescribe the structure of the peer review process. The Bylaws outline the respective roles of Hospital's Governing Board and the medical staff in that process. The Governing Board has final say on appointment applications (Bylaws, art. V, § A-1) and corrective actions against physicians. (art. VIII, § A-(1)(a)-(b).) The medical staff is represented by the MEC, which is comprised of medical staff officers, members, and department chairperson, all elected by the medical staff. (art. XII, § B.) Among other duties, the MEC makes recommendations to the Governing Board for medical staff appointment and reappointment, and takes "all reasonable steps to ensure professional ethical conduct and competent clinical performance on the part of all members of the Medical Staff. . . ." (*Ibid.*)

The Bylaws authorize the MEC to investigate complaints against a physician (art. VII, § C), and, when appropriate, to recommend to the Governing Board that corrective action be taken against the physician. (art. VII, § D.) Article VII, section F provides that in the event the MEC "fails to investigate or take disciplinary action, contrary to the

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[1] We do not reach appellant's substantial evidence argument or other issues concerning the conduct of the Judicial Review Hearing. For the guidance of counsel, the unpublished portion of our opinion addresses appellant's argument that he did not receive an adequate notice of charges.

[2] All statutory references are to the Business & Professions Code, unless otherwise indicated.

weight of evidence, the Governing Board may direct the [MEC] to initiate . . . disciplinary action, but only after consultation with the [MEC]. If the [MEC] fails to take action in response to the Governing Board's directive, the Governing Board may initiate corrective action, but this corrective action must comply with Articles VII and VIII of these Bylaws."

A physician facing an adverse MEC recommendation or Governing Board decision is entitled to a "Judicial Review Hearing" (art. VIII, § A) before a Judicial Review Committee (JRC) "appointed by the [MEC] and composed of at least five (5) members of the Active [medical] Staff who shall gain no direct financial benefit from the outcome; who have not acted as an accuser, investigator, fact finder or initial decision maker; and who otherwise have not actively participated in the matter leading up to the recommendation or action." (art. VIII, § C, subd. (8).) The JRC panel must include at least one member who has the same specialty as the physician challenging the action. In the event that it is not feasible to appoint a JRC completely composed of active medical staff members, the MEC may appoint members from other staff categories or practitioners who are not members of the medical staff. (art. VIII, § C, subd. (8).) The hearing is overseen by a hearing officer selected by the MEC, who rules on "questions which pertain to matters of law, procedure, or the admissibility of evidence." (art. VIII, § C, subd. (11)(c).)

If the JRC's decision is adverse to the physician, he or she is entitled to appellate review by the Governing Board before a final decision is rendered. (art. VIII, § A, subd. (1)(a)-(b).) The Governing Board must affirm the JRC's decision if it is supported by substantial evidence. If the Governing Board finds that the decision is not supported by substantial evidence, it "may modify or reverse the decision . . . and may instead, or shall, where a fair procedure has not been afforded, remand the matter to the [JRC] for reconsideration. . . ." (art. VIII, § C, subd. (12)(f).)

Appellant is a physician licensed to practice medicine in the State of California and is board certified in internal medicine and cardiology. In 1975, he established a clinical practice in cardiology in Los Angeles, where he became a member of Hospital's medical staff. Appellant used Hospital extensively for the care of his patients, admitting over 800 patients in the two-year period from October 1, 2000 to October 1, 2002. During that time he became a frequent critic of Hospital's practices regarding patient care, and was one of the medical staff members who signed a petition in 2002 to remove Albert Greene as Hospital's chief executive officer.

In 2002, the Governing Board formed an ad hoc committee (AHC) to review and make recommendations relating to the quality of care by certain medical staff members. The AHC identified appellant as one of several practitioners on staff who appeared to be involved in a pattern of clinically unnecessary, inappropriate, and opportunistic consultations involving patients who had been admitted to Hospital through the Emergency Department.

Hospital contracted with two independent medical review groups, National Medical Audit (Mercer) and Steven Hirsch and Associates (Hirsch) to review appellant's practice. Mercer reviewed 13 randomly selected patient file records and classified the problems into four categories: unacceptable care, overuse of services, substandard documentation and inadequate initial evaluation, and patient relationship issues. Hirsch reviewed 30 randomly selected records and concluded that appellant performed numerous high risk procedures, engaged in a pattern of disruptive conduct with screaming episodes and profane language, and refused to reasonably participate as a member of the patient treatment team. Hirsch also concluded that appellant's clinical management, professional conduct, and medical recordkeeping were below professional standards.

In fall 2002, appellant submitted a periodic application for reappointment, as his existing appointment was due to expire on January 31, 2003. In December 2002, the MEC recommended that appellant be reappointed. However, on January 28, 2003, the

Governing Board recommended that the application be denied and directed Greene to summarily suspend appellant's privileges. On January 29, Greene attended a MEC meeting to present the AHC's findings and to request that MEC ratify the Governing Board's decision to suspend appellant. The MEC refused to do so.

On January 30, Greene notified appellant by letter that, at the direction of the Governing Board, he was summarily suspending appellant's clinical privileges. The MEC again refused to ratify the suspension and the suspension was automatically terminated, pursuant to Article VII, section G, subdivision (4) of the Bylaws. The MEC notified appellant of its decision on January 31.

The following month, the Governing Board voted to deny appellant's application for reappointment. On March 7, 2003, appellant filed a timely request for a judicial review hearing to contest the Governing Board's decision.

The MEC met on March 12, 2003. The minutes of the meeting state that a "motion was made, seconded and carried that [appellant] should be granted a Judicial Review Hearing; and that the [MEC] leaves the actions relating to the Judicial Review Hearing procedures to the Governing Board." Subsequently, the Governing Board's AHC issued a notice of charges on March 25, 2003, listing six charges of misconduct and substandard practice. The notice stated that the Governing Board selected Jesse D. Miller as the hearing officer and appointed six members of the medical staff to serve as the JRC. The chosen members were Drs. Harry Mynatt as JRC Chairman, Myunghae Choi, Thomas Goodwin, Bradley Landis, Stephanie Hall, and Dr. Cecilia Lev as the alternate.

On April 18, 2003, appellant filed a petition for writ of mandate and a temporary stay with the Los Angeles Superior Court, challenging the Governing Board's authority under the Bylaws to select the hearing officer and the JRC. In light of this, Miller announced on April 23 that he would postpone the start of the hearing "until the litigated matters have been clarified." On April 24, 2003, the trial court denied the writ on the grounds that a final administrative decision had not been rendered, and therefore, a writ

was not proper under Code of Civil Procedure section 1094.5.[3] The court also denied the writ on the merits, ruling that "[o]n the face of the pleading and documents thus far, the court does not find that the procedure implemented to appoint the judicial review committee or the hearing officer is in error. . . ."[4]

The judicial review hearing commenced on May 8, 2003, with appellant's voir dire of Miller and the panel members. One member was excused and two other members resigned prior to the commencement of the evidentiary hearings. Subsequently, in July 2003, Drs. James Getzen and John Triantafyllos were appointed by the Governing Board to serve on the JRC as replacements, bringing the number of panel members to five. Evidentiary hearings began in September 2003. In January 2005, after approximately 20 hearing sessions, one of the JRC members resigned for personal reasons, leaving the JRC with only four members: Drs. Mynatt, Lev, Getzen, and Triantafyllos. Appellant objected to proceeding with only four members in violation of the Bylaws, but was overruled. After approximately 30 sessions, evidentiary proceedings closed on July 18, 2005. The four remaining panel members attended all 30 evidentiary sessions.

The JRC issued its decision on October 25, 2005. The JRC made specific findings on all six of the charges, finding that three charges were substantiated by a preponderance

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[3] Code of Civil Procedure section 1094.5 specifies the procedures applicable to a petition brought for the "purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer . . . ." (Code Civ. Proc., § 1094.5, subd. (a).)

[4] Appellant makes several procedural error arguments which we do not reach. Those include allegations that Miller improperly limited appellant's voir dire of the JRC panel members, Dr. Mynatt had a disqualifying conflict of interest, Miller erred in allowing Dr. Mynatt to return to the panel after recusing himself, and that Miller improperly reconstituted the JRC after it had momentarily disbanded in response to Dr. Mynatt's recusal.

of evidence.[5] It concluded that "under all the circumstances of this case . . . the . . . decision of the Governing Board to deny [appellant's] application for reappointment to the Medical Staff of this Hospital was reasonable and warranted, but the Committee notes that if it had been the initial decision maker, it would have pursued an intermediate resolution."

Appellant appealed the JRC decision on procedural and substantive grounds. He argued there was "substantial non-compliance with the procedures required by the [B]ylaws and/or California and/or Federal law which caused demonstrable prejudice" and the decision was "not supported by substantial evidence based upon the hearing record." The Governing Board affirmed the JRC's decision and ordered that appellant's medical staff membership and privileges be terminated as of September 8, 2006.

Appellant filed an administrative mandate petition, seeking to have the JRC decision vacated on the grounds stated in his administrative appeal.[6] Following a lengthy hearing on the merits, the trial court denied appellant's petition. At appellant's request, the court prepared a proposed statement of decision. Following a hearing on appellant's objections to the proposed statement of decision, the court issued a revised statement rejecting all of appellant's procedural claims. The court held that Hospital's decision to

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[5] Article VIII, section C-11(g) provides that the standard of proof in the judicial review hearing is proof by a preponderance of evidence.

[6] Appellant filed a motion to conduct discovery to augment the administrative record, under Code of Civil Procedure section 1094.5, subdivision (e). He sought to depose two physicians, Drs. Al-Jazarly and Latif, who were members of the MEC at the time of its March 12, 2003 meeting. Appellant alleged the two physicians would testify that the MEC did not vote to delegate its authority to select the hearing officer and the JRC to the Governing Board. The motion included sworn declarations by both physicians and Dr. El-Attar's sworn declaration stating what they told him about the March 12 meeting. The trial court denied the motion, finding: "The declarations of Drs. Al-Jazarly and Latif do not state that a vote was not taken. [Appellant's] declaration filed on 2/26/07 . . . that states what [they] told [him] . . . is hearsay and is not considered."

terminate his membership was supported by substantial evidence. The court entered judgment denying appellant's petition and this timely appeal followed.

DISCUSSION

I

Under common law, a private organization with an important public role may not deprive an individual of fundamental interests without affording the individual a fair proceeding on the merits of the issue. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 549-552 (*Pinsker*).) "A physician's access to a hospital, whether public or private, is such a fundamental interest." (*Tiholiz v. Northridge Hospital Foundation* (1984) 151 Cal.App.3d 1197, 1202, citing *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802; see also *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1155 [right to retain medical staff privileges is a vested right meriting greater protection than that afforded to an initial applicant].) What constitutes a fair procedure is not fixed or judicially prescribed and "the associations themselves should retain the initial and primary responsibility for devising a method which provides an applicant adequate notice of the 'charges' against him and a reasonable opportunity to respond. In drafting such a procedure . . . the organization should consider the nature of the tendered issue and should fashion its procedure to insure a *fair* opportunity for an applicant to present his position. Although the association retains discretion in formalizing such procedures, the courts remain available to afford relief in the event of the abuse of such discretion." (*Pinsker*, *supra*, 12 Cal.3d at pp. 555-556.)

In 1989, the Legislature codified the common law requirement by enacting Business and Professions Code section 809, et seq. Section 809 provides that "[p]eer review, fairly conducted, is essential to preserving the highest standards of medical practice," and "[p]eer review that is not conducted fairly results in harm to both patients and healing arts practitioners by limiting access to care." (§ 809, subd. (a)(3)-(4).) "The

statute thus recognizes not only the balance between the rights of the physician to practice his or her profession and the duty of the hospital to ensure quality care, but also the importance of a fair procedure, free of arbitrary and discriminatory acts." (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 616-617.)

The statutory scheme provides a legal baseline for what constitutes fair procedure, but ultimately recognizes the responsibility of the private sector to provide a fair peer review procedure. (*Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th at pp. 616-617.) Accordingly, each hospital must have an organized medical staff responsible to the governing body for the adequacy and quality of the care rendered to patients. (Cal. Code Regs., tit. 22, § 70703, subd.(a).) The medical staff must adopt written bylaws setting the procedures and criteria for evaluating applicants for staff appointments, credentials, privileges, reappointments, and other matters that the medical staff and governing body deem appropriate. (Cal. Code Regs., tit. 22, § 70703, subd. (b); see also *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1482.) The bylaws must incorporate sections 809 through 809.8. (§ 809, subd. (a)(8).) "It is these bylaws that govern the parties' administrative rights." (*Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th at p. 617.)

A hospital's decision resulting from a peer review proceeding is subject to judicial review by administrative mandate under Code of Civil Procedure section 1094.5. (Bus. & Prof. Code, § 809.8; see also *Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1054.) Code of Civil Procedure section 1094.5, subdivision (b), provides that the inquiry to be made by the administrative mandamus proceeding is "whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

Thus, "[w]here, as here, the issue is whether a fair administrative hearing was conducted, the petitioner is entitled to an independent judicial determination of the issue. [Citation.] This independent review is not a 'trial de novo.' [Citations.] Instead, the [trial] court renders an independent judgment on the basis of the administrative record, plus such additional evidence as may be admitted under [Code of Civil Procedure] section 1094.5, subdivision (e). [Citations.]" (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.)

When reviewing a trial court's ruling on an administrative writ petition, we are "'ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence.'" (*Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th 607 at p. 618.) However, if the facts are undisputed, the fair hearing finding is a conclusion of law that requires a de novo review of the administrative record. (*Id.* at pp. 618-619; see also *Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1496 ["When the issue presented is whether the hospital's determination was made according to a fair procedure, the court will treat the issue as one of law, subject to independent review based on the administrative record."].)

Appellant argues that the Governing Board's selection of the hearing officer and JRC panel members deprived him of the peer review hearing to which he was entitled. We agree.[7]

Section 809.2, subdivision (a) generally provides that "[t]he hearing shall be held, as determined by the peer review body, before a trier of fact, which shall be an arbitrator or arbitrators selected by a process mutually acceptable to the licentiate and the peer review body, or before a panel of unbiased individuals . . . ." While the statute does not

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[7] Although appellant did not explicitly object during the administrative proceedings, he challenged the Governing Board's appointment power from the beginning, as evidenced by his attempt to seek judicial intervention. Hospital does not contend that appellant has forfeited this argument, and we treat it as being properly preserved.

articulate who shall appoint the hearing panel, Article VIII, section C, subdivision (8) of the Bylaws does. It states: "A hearing occasioned by a Medical Executive Committee recommendation or a Governing Board recommendation shall be conducted by a Judicial Review Committee appointed by the Medical Executive Committee . . . ." As to the hearing officer, Article VIII, section C, subdivision (11)(c) states that "[t]he Medical Executive Committee shall appoint a hearing officer to preside at the hearing."

Hospital asserts that, notwithstanding these provisions, the Governing Board has inherent power to select the JRC and the hearing officer. It cites no Bylaw provision giving it this authority. Instead, it argues that the MEC and the Governing Board disagreed over whether to extend or terminate appellant's staff privileges, and therefore, the Governing Board was authorized by section 809.05, subdivision (c) to take action against appellant. That section of the Business and Professions Code provides that "[i]n the event the peer review body fails to take action in response to a direction from the governing body, the governing body shall have the authority to take action against a licentiate. Such action shall . . . fully comply with the procedures and rules applicable to peer review proceedings established by [s]ections 809.1 to 809.6, inclusive." (§ 809.5, subd. (c).) Article VII, section F of the Bylaws similarly authorizes the Governing Board to initiate disciplinary action when the MEC fails to take action in response to the Governing Board's directive. However, any such action must still be in compliance with Articles VII and VIII of the Bylaws. (art. VII, § F.) Neither the statute nor the Bylaws support Hospital's position. That the Governing Board is authorized to initiate a corrective action against appellant says nothing about its authority to appoint the hearing officer and JRC once appellant requests a hearing to challenge that action. Rather, Article VIII, section C, subdivision (11) of the Bylaws contemplates the situation that occurred here and requires the *MEC* to appoint the JRC even when the corrective action is initiated by the Governing Board.

Alternatively, Hospital argues that the MEC properly delegated its appointment authority to the Governing Board during its March 12, 2003 meeting. As a preliminary matter, appellant challenges the trial court's finding that the MEC delegated its authority to the Governing Board. We disagree with appellant, concluding that the MEC did purport to delegate this authority to the Governing Board.

The minutes of the March 12 MEC meeting state that a "motion was made, seconded and carried that [appellant] should be granted a Judicial Review Committee Hearing; and that the [MEC] leaves the actions relating to the Judicial Review Hearing procedures to the Governing Board." The minutes further state: "It was felt that since the MEC did not summarily suspend [appellant's] privileges, did not recommend any adverse action relating to [appellant] . . . and since the requested hearing would be to review actions by the Governing Board; it should be the Governing Board and not the MEC which arranges and prosecutes the requested hearing. The MEC was informed that the hearing process outlined in [the Bylaws] would be followed with the Governing Board taking the place of the MEC in establishing and arranging the hearing."

Although the directive to establish and arrange the hearing does not specifically mention the appointment of the JRC and the hearing officer, nothing in the record suggests that the MEC objected to the Governing Board's selection. The record suggests that it did not. The AHC issued the notice of charges on March 25, which announced the selection of the hearing officer and the JRC panel. On April 9, 2003, the MEC approved its minutes from the March 12 meeting and restated that it "leaves the actions relating to the Judicial Review Hearing procedures to the Governing Board." Thus, the trial court's finding is supported by substantial evidence found in the administrative record.

The question remains whether the MEC was authorized to delegate its authority in this fashion. We conclude that it was not.

Article VIII, section C, subdivisions (8) and (11), specifically vest the authority to appoint the JRC and the hearing officer in the MEC. Nothing in the Bylaws allows the

MEC to delegate this authority to another body, let alone the Governing Board. In fact, the Bylaws require that even when the Governing Board is authorized to initiate an action against a physician due to the MEC's unwillingness to do so, the power to appoint the JRC panel remains in the hands of the MEC. Comparing the Bylaws to the California Medical Association Model Bylaws also illustrates the intent behind provisions such as Article VIII, section C, subdivisions (8) and (11). The California Medical Association Model Bylaws grants the MEC the broad power to select and recommend panel members and hearing officer to the governing board which selects the fact finders and hearing officer. The recommendation will be deemed to have been accepted by the governing board if the board does not reject it within five days. (See Merkel, *Physicians Policing Physicians: The Development of Medical Staff Peer Review Law at California Hospitals* (2004) 38 U.S.F. L.Rev. 301, 326-327.) Here, the medical staff had the opportunity to leave the final say over appointments to the Governing Board through a provision to that effect in its Bylaws, but did not do so. This suggests an intent to empower the MEC, and no other, with appointment powers.

Hospital cites section 809, subdivision (b), which generally expands "'peer review body'" to include "any designee of the peer review body." Hospital seems to advance this definitional paragraph as a general mandate to a peer review body to delegate its authority to a nonpeer designated entity. Section 809 et seq. is silent on the MEC's authority to appoint the JRC and the hearing officer or its authority to delegate that responsibility to another entity. It does not stand to reason that this general definitional paragraph may be applied to Article VIII, section C, subdivision (8) so as to grant the MEC the power to delegate its appointment powers to the Governing Board where the Bylaws make no such provision.[8] Rather, Article VIII, section C, subdivision (8) should

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[8] In a similar vein, Hospital argues that while the MEC delegated its authority to the Governing Board, it was the Governing Board's AHC that actually selected the JRC and the hearing officer, as evidenced by the notice of charges. Hospital contends that the

be read in contrast to portions of the Bylaws that *do* empower the MEC to delegate a specific function. In respect to the MEC's authority to initiate an investigation of a physician, Article VII, section C provides: "The [MEC] may conduct the investigation itself, or may assign the task to an appropriate Medical Staff Officer, Medical Staff Department, or Standing or [AHC] of the Medical Staff." Even this provision does not list the Governing Board as a potential designee. Thus, while no single provision in the Bylaws explicitly forbids the MEC from delegating its appointment authority to the Governing Board, Hospital's interpretation is inconsistent with a complete reading of the Bylaws.

Allowing the Governing Board to select the hearing officer and JRC panel is not an inconsequential violation of the Bylaws. Rather, it undermines the purpose of the peer review mechanism. The Supreme Court in *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267 (*Mileikowsky*), articulated the fundamental principles behind peer review. While noting that the primary purpose of the process is to protect the health and welfare of the public, the court held that "[a]nother purpose also, if not equally important, is to protect competent practitioners from being barred from practice for arbitrary or discriminatory reasons. . . . Peer review that is not conducted fairly and results in the unwarranted loss of a qualified physician's right or privilege to use a hospital's facilities deprives the physician of a property interest directly connected to the physician's livelihood." (*Ibid.*)

AHC falls into the definition of "'peer review body'" set out in section 805, subdivision (a)(1)(B), which defines "peer review body" to include "[a] committee organized by any entity consisting of or employing more than 25 licentiates of the same class that functions for the purpose of reviewing the quality of professional care provided by members or employees of that entity." Thus, Hospital argues that the AHC had the authority to select the JRC and the hearing officer on behalf of the Governing Board. The Bylaws make no mention of an AHC's ability to appoint the JRC or the hearing officer. Nor does a committee formed directly by the Governing Board constitute a designee of the MEC.

The critical importance of the peer review process is highlighted by the grave impact an adverse decision has on a physician's career. The *Mileikowsky* court continued: "As one author stated: 'It is almost impossible for a physician to practice medicine today unless she is a medical staff member at one or more hospitals. This is because a doctor cannot regularly admit or treat patients unless she is a member of the medical staff. Privileges are especially important for specialists, like surgeons, who perform the majority of their services in a hospital setting. For this reason, a hospital's decision to deny membership or clinical privileges, or to discipline a physician, can have an immediate and devastating effect on a practitioner's career.'" (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1268, quoting Merkel, *Physicians Policing Physicians: The Development of Medical Staff Peer Review Law at California Hospitals* (2004) 38 U.S.F. L.Rev. 301, 302-303.) The court further noted that Business and Professions Code section 805, subdivision (b) requires hospitals to report certain disciplinary action to the state medical board, which maintains a historical record of such information. Thus, "[a] hospital's decision to deny staff privileges therefore may have the effect of ending the physician's career." (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1268.)

An uncompromised peer review system protects physicians from undeservedly suffering these consequences. The *Mileikowsky* court continued: "Hospitals have a dual structure. The administrative governing body, which might not include health care professionals, takes ultimate responsibility for the quality and performance of the hospital. . . . It is not inconceivable a governing body would wish to remove a physician from a hospital staff for reasons having no bearing on quality of care. . . . Accordingly, although a hospital's administrative governing body makes the ultimate decision about whether to grant or deny staff privileges, it does so based on the recommendations of its medical staff committee [citation], giving 'great weight to the actions of peer review bodies. . . .'" (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1272.) A working peer review system as established in the Bylaws, not only requires establishment of a dual structure, but also

requires preserving the separateness of those dual components. That structure promotes the goal of shielding physicians from arbitrary and discriminatory disciplinary action by effectively insulating a governing body bent on removing the physician from the hospital medical staff. Allowing the Governing Board to handpick the JRC members jeopardizes the integrity of the hearing from the beginning and it undercuts the medical staff's right and obligation to perform this self-governing function.

Hospital argues that the right to a fair hearing does not compel adherence to "'formal proceedings with all the embellishments of a court trial,'" and may be satisfied by a variety of procedures. (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278.) We agree that "the concept of 'fair procedure' does not require rigid adherence to any particular procedure, to bylaws or timetables" (*Tiholiz v. Northridge Hospital Foundation*, *supra*, 151 Cal.App.3d at p. 1203), and that "the question is whether the violation resulted in unfairness, in some way depriving the physician of adequate notice or an opportunity to be heard before impartial judges." (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 497.) But it does not allow the Governing Board to turn the peer review process on its head, which would be the result if the MEC were permitted to abrogate its right and duty with respect to the peer review procedure.[9] Hospital argues that any potential prejudice that could result from allowing the Governing Board to select the JRC members and the hearing officer was mitigated by appellant's ability to conduct

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[9] We contrast this with another violation claimed by the appellant: that Hospital denied him a fair hearing because it allowed the hearing to proceed with a JRC panel of only four members, when the Bylaws call for a five-member panel. As noted above, courts have rejected the notion that any violation of a hospital bylaws referring to the peer review process is a per se denial of a physician's right to a fair hearing. As we reverse the trial court's decision based on the Governing Board's selection of the JRC and hearing officer, we do not decide whether, or at what point, a number of panel members smaller than called for in the Bylaws fundamentally undermines the fairness of a hearing, so that an actual showing of prejudice is not needed.

voir dire. Hospital offers no support for this assertion and we find none. A procedure that enables the Governing Board to tip the scales in its favor, leaving the physician to uncover and cure any potential inequality on his or her own, does not comport with the fair procedure envisioned in the statute and Bylaws.[10]

II

For the guidance of the parties we also discuss appellant's next claims that the amended charges did not give him adequate notice of the misconduct with which he was charged. We do not agree. Notice of the charges sufficient to provide a reasonable opportunity to respond is basic to the common law right to a fair procedure. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445.) Section 809.1, subdivision (c)(1) requires that prior to a peer review hearing, the peer review body shall give the licentiate written notice stating "[t]he reasons for the final proposed action taken or recommended, including the acts or omissions with which the licentiate is charged." Similarly, Article VIII, section C, subdivision (7) of the Bylaws requires that the MEC state "clearly and concisely in writing the reasons for the adverse action taken or recommended, including the acts or omissions with which the member is charged and a list of the charts in question, where applicable."

Here, the six charges against appellant were divided into different sections. Each section stated the charge, listed specific patient medical records that illustrated the charged conduct, and referenced the Hirsh and Mercer reports for further information.

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[10] No issue is raised as to whether the Governing Board would be entitled to appoint the JRC and the hearing officer if the MEC refused to do so. The March 12 meeting minutes stated that the MEC "felt that since" it did not initiate the adverse action against appellant "it should be the Governing Board and not the MEC which arranges and prosecutes the requested hearing." The language used does not demonstrate an active refusal on the part of the MEC to fulfill its duties under the Bylaws. Absent any evidence to the contrary, we presume that the MEC would faithfully carry out its obligations under the Bylaws.

Section I charged appellant with demonstrating "a pattern of dangerous, unacceptable, substandard practice evidenced by your: failure to recognize serious medical conditions, failure to intervene as the attending physician in order to postpone a non-emergent procedure on a high risk patient, improper or inadequate diagnoses, improper clinical management of patients and/or by performing cardiac catheterizations without adequate clinical findings to justify the necessity of the procedure." The notice then listed 25 medical records, with a description of appellant's alleged misconduct or substandard practice in connection with each record.

Unlike section I, sections II through IV of the charges listed medical records without specific details about the record. Section II charged appellant with engaging "in a pattern of requesting unnecessary and inappropriate consultations without proper clinical findings to substantiate the need for such consultations," and listed five medical records. Section III charged appellant with demonstrating a "pattern of inadequate, substandard medical record documentation." The notice alleged that the records contained discrepancies, were "grossly inadequate and incomplete," "scantily described" patient symptoms, and omitted crucial data. As with section II, the notice referenced the Hirsch and Mercer reports and listed 20 medical records without further detail on how each record was inadequate or incomplete. Section IV alleged that appellant failed to "properly inform patients of the inherent risks involved in the particular procedures . . . . [Appellant] failed to take steps to seek a legal representative of patients unable to give informed consent as required by hospital policy and/or [appellant] failed to seek a translator for patients who had significant language barriers." Three medical records were listed. Section V charged appellant with a "pattern of inappropriate, interpersonal relations with staff members, patients and their families." The notice chronicled in detail, 25 individual events on specified dates in which appellant engaged in inappropriate behavior. And finally, Section VI stated that appellant had a long history of

abusive treatment of hospital staff, had been previously warned that future misconduct would result in corrective action, but continued to act abusively and inappropriately.

Appellant contends that the notice of charges, specifically sections I, II, III, and V, did not clearly and concisely set forth the specific acts or omissions with which he was charged. He cites *Rosenblit v. Superior Court, supra,* 231 Cal.App.3d 1434, in support of his position. In that case, Dr. Rosenblit's staff privileges were revoked after an adverse finding by a hearing panel. Dr. Rosenblit petitioned for a writ of administrative mandate but was denied. (*Id.* at p. 1444.) The appellate court reversed, finding several procedural errors in the peer review process, including improper notice of charges. The court held the notice inadequate because it simply charged that there were problems with Dr. Rosenblit's "'fluid management, diabetic management, or clinical judgment'" in 30 different cases. (*Id.* at p. 1445.) The notice then listed the 30 charts numerically without any indication as to which purported deficiency applied to which case. The court held "[i]t is impossible to speculate how [Rosenblit] might have defended [himself] had he been informed of the specific problems with each patient." (*Id.* at p. 1446.)

The facts here are distinguishable from those in *Rosenblit v. Superior Court, supra* 231 Cal.App.3d 1434. Unlike the blanket notice in *Rosenblit*, here, section I not only included a general statement of charge, but also detailed the specific mistake appellant committed with each patient and the consequences of his errors. Thus, while Dr. Rosenblit was left to mine through the records to uncover the charged conduct in respect to each patient, here, appellant was directly and adequately informed about the "specific problems with each patient." (*Id.* p. 1446; see also *Unnamed Physician v. Board of Trustees, supra,* 93 Cal.App.4th at pp. 623-624 [notice adequate when it ties each act or omission stated to specific patient chart].) Similarly, Section V of the charges described in detail 25 incidents in which appellant displayed inappropriate behavior with staff members, patients, and their families. It also cited to specific portions of the Hirsch report for further information on the incident in question. And while Sections II and III

did not provide detailed analysis of each medical record referenced therein, the sections pertained to a specific charge of substandard conduct. Section II charged appellant with "requesting unnecessary and inappropriate consultations without proper clinical findings" and Section III alleged that appellant engaged in a pattern of substandard documentation. Thus, unlike in *Rosenblit*, the notice in respect to sections II and III "clearly and concisely" informed appellant of what he was being charged with in relation to each referenced medical record.

Appellant, again relying on *Rosenblit v. Superior Court*, *supra*, 231 Cal.App.3d 1434, makes several references to the volume of attached documents when arguing that the notice of charges was inadequately clear and concise. However, the court's ruling in that case did not rest on the volume of charts and records alone, but rather, on the fact that the hospital did not provide adequate direction and focus to assist Dr. Rosenblit in navigating through the voluminous documents. Appellant cites no authority for the argument that the size of the attachments alone weighs against the adequacy of the notice. To the contrary, more information, in the form of medical charts and external review reports, such as the Hirsch and Mercer reports here, better ensures adequate notice. (See *Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th at p. 624.)

DISPOSITION

We reverse the judgment and remand to the trial court with instructions to issue a writ directing Hospital to vacate its decision against appellant and grant him a new judicial review hearing. Appellant to have his costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

OSAMAH A. EL-ATTAR,

Petitioner and Appellant,

v.

HOLLYWOOD PRESBYTERIAN MEDICAL CENTER,

Defendant and Respondent.

B209056

(Los Angeles County
Super. Ct. No. BS105623)

ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

THE COURT:*

It is ordered that the published opinion filed on August 19, 2011, and reported in the Official Reports (198 Cal.App.4th 664) be modified as follows:

On page 1, the appearance of counsel is modified to reflect that the California Medical Association Amicus Curiae brief was filed by: "Francisco J. Silva and Astrid G. Meghrigian for California Medical Association as Amicus Curiae on behalf of Petitioner and Appellant."

There is no change in the judgment.

*EPSTEIN, P. J. WILLHITE, J. MANELLA, J.

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Case Number B209056
Division 4

OSAMAH EL-ATTAR M.D.,
Plaintiff and Appellant,
v.
HOLLYWOOD PRESBYTERIAN MEDICAL CENTER,
Defendant and Respondent.

Date of Hearing: July 19, 1989

ASSEMBLY SUBCOMMITTEE ON THE ADMINISTRATION OF JUSTICE
LLOYD G. CONNELLY, Chairperson

SB 1211 (Keene) - As Amended: July 17, 1989

SUBJECT: This bill (1) makes specified legislative findings regarding the need for California to "opt-out" of the federal Health Care Quality Improvement Act of 1986 (Act) and (2) establishes basic due process rights to which specified health care providers shall be entitled during peer review proceedings that propose action adverse to the practitioner.

DIGEST

Existing law, as found in the federal Act, provides immunities, including an immunity from federal anti-trust liability, to specified participants in peer review proceedings. The Act also permits States to "opt-out" of the federal law if such an election is made by October 1989.

Existing law, as found in the Civil Code, Evidence Code, and Business and Professions Code, provides various immunities to persons and organizations that participate in peer review activity.

This bill, with regard to the "opt-out" issue provides the following:

1) California shall opt-out of the federal Act because the laws of this state "provide a more careful articulation of the protections for both those undertaking peer review activity and those subject to review" and "better integrates public and private systems of peer review."

2) If the federal Act is amended to specify that (a) it is "supplemental to, and is not preemptive of" state law immunities and (b) in the event of conflicts with federal law, state law shall prevail, California's decision to opt-out shall be "null and void."

3) States that it is not the intent of the Legislature to opt-out of the national reporting requirements.

4) In order to meet the October 1989 deadline, contains an urgency clause, for this Section of the bill only.

This bill, with regard to due process rights afforded practitioners who are the subject of peer review proceedings, provides the following:

1) Defines licentiate to include a physician, surgeon, podiatrist, or dentist and defines "peer review body" as that expression is defined under Business and Professions Code Section 805.

- continued -

2) Licentiates who are the subject of a proposed adverse action which is required to be reported to the appropriate licensing board under Business and Professions Code Section 805 are provided certain "due process" rights.

(Section 805 requires reports to be submitted when a licentiate's request for privileges is denied for medical disciplinary reasons, privileges are revoked for a medical disciplinary reason, privileges are restricted for at least 30 days for medical disciplinary reasons, or privileges are suspended for at least 14 days.)

3) The "due process" rights granted to licentiates include the following:

a) Written notice of the proposed adverse action.

b) The right to a hearing before either an arbitrator (selected by a process agreeable to both the licentiate and the peer review body) or a panel of unbiased individuals who shall gain no direct economic benefit from the outcome.

c) The right to voir dire the panel members and challenge the impartiality of the hearing officer, if any.

d) The right to inspect and copy documentary information possessed by the peer review body, except confidential information relating solely to other licentiates may only be inspected if the hearing officer so permits.

e) An exchange of lists of witnesses.

f) The hearing shall be commenced within 60 days and completed within a reasonable time.

g) The right to call, examine, and cross-examine witnesses.

4) The peer review body shall have the burden of proving by a preponderance of the evidence that the proposed adverse action is "reasonable and warranted."

5) Guidelines regarding whether a licentiate may be represented by an attorney shall be adopted by the peer review body. The peer review body may not be represented by an attorney if the licentiate is not.

6) The peer review body must adopt written findings of fact and conclusions articulating the connection between the findings and the evidence.

7) Appellate procedures, if any, need not include a de novo review, but must include the right to appear, be represented by an attorney, and receive a written decision.

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8) These procedures need not proceed an immediate suspension, but may be invoked by the suspended licentiate thereafter.

9) Provides that the governing body may directly summarily suspend the privileges of a licentiate who presents an imminent danger to an individual's health. Such action may be only taken if the peer review body, or its designee, is unavailable and any such action must be ratified by the peer review body within two working days or the suspension is dissolved.

10) Bylaws and contracts or agreements, other than bylaws, may provide for additional procedures insofar as they are not inconsistent with the provisions of this bill. However, the provisions of this bill may not be waived.

11) These peer review procedures do not apply to peer review proceedings in public hospitals, including the University of California, or teaching hospitals.

12) Judicial review remains available under Code of Civil Procedure Section 1094.5.

13) The urgency clause of the bill does not apply to these provisions of the bill.

FISCAL EFFECT

None

COMMENTS

1) This bill is sponsored by the California Medical Association (CMA) and opposed by the California Association of Hospitals and Health Systems.

CMA is committed to the process of peer review to ensure the quality of care. However, the decision in Patrick v. Burget (1988) 108 S.Ct. 1658, in which the Supreme Court ruled that the state-action doctrine did not protect physicians participating in peer review activity from liability under the federal anti-trust laws, has made many licentiates unwilling or reluctant to participate in peer review.

According to the CMA, the "primary goal of SB 1211 is to increase the peer reviewer's willingness to participate in peer review by increasing the protections from liability. This will be done by increasing the likelihood California will obtain an exemption for peer reviewers from the federal antitrust laws ..." Additionally, the "clear procedural standards" contained in SB 1211 will "reduce the risk of erroneous peer review decisions."

CMA's primary reason for "opting-out" of the federal Act is that California's immunities for peer review activity are more comprehensive

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than those contained in the federal Act. CMA fears that it may be argued by others that the Act pre-empts California's statutory scheme of peer review immunities. Also, opting out will permit continued review of the body of peer review law by California's courts.

CMA also notes that the Act defines "peer review body" as including the "governing body" of a hospital. This definition of "peer review body" is different than that contained in SB 1211 and acknowledges the role of a hospital governing body in peer review -- an acknowledgment that CMA is currently unwilling to make in SB 1211.

Lastly, CMA notes that SB 1211 guarantees licentiates basic due process rights and will ensure fair peer review proceedings. Under case law, a licentiate facing a recommendation for adverse action is entitled to "fair procedure" as a matter of common law. A private organization which makes the decision to "exclude or expel an individual" must "refrain from arbitrary action." The "action to exclude or expel must be substantively rational and procedurally fair." (See Hackethal v. California Medical Assoc. (1982) 138 Cal.App.3d 435.)

However, "the common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial." (See Anton v. San Antonio Community Hosp. (1977) 19 Cal.3d 802.) In this case, the Supreme Court refused to find peer review bylaws, which required the accused licentiate to demonstrate that the proposed adverse action should not be adopted absent a clear and convincing showing by the licentiate that the action should be overturned, as violative of the common law requirement of "fair procedure."

CMA argues strongly that these procedures will prevent abuse of the peer review process, such as that witnessed in the Patrick case when the peer review process was wielded as an economic club against a competitor and not on the basis of patient care. For example, CMA argues that licentiates who admit "too many" Medi-Cal patients or refuse to quickly discharge elderly patients will, under SB 1211, be safe from the abusive use of the peer review process.

SB 1211 requires adoption of procedures which may not be required as a matter of the common law doctrine of fair procedure.

2) CAHHS opposes SB 1211 for the following reasons:

a) The federal Act does not preempt state peer review immunity law, as indicated, by among others, the author of the Act, Congressman Waxman. Opting-out may discourage the free flow of information about unsatisfactory licentiates among hospitals, thereby frustrating one of the major purposes of the federal Act -- the creation of a national data bank containing information pertaining to licentiates who are the subject of adverse peer review decisions.

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(CAHHS would support an amendment to SB 1211 that would reverse the presumption in the bill to provide that SB 1211 becomes effective when the federal Act is declared preemptive of state peer review immunities.)

b) SB 1211 "will make it more difficult to discipline" licentiates. The procedures contained in SB 1211 may threaten patient care by making it more difficult to dismiss "marginal" physicians.

c) Case law "provides ample guidance to hospitals, physicians, and others" involved in peer review. It is unwise to overturn the common law of "fair procedure" and enact rigid statutory prescriptions.

d) Licentiates will be less willing to serve on peer review bodies if SB 1211 is enacted because the proceedings will be more laborious and time-consuming.

e) SB 1211 does not contain any explicit statutory recognition of the legitimate role that governing boards of hospitals have in the peer review process. Since a hospital remains liable for its "failure to insure the competence of its medical staff through careful selection and review" it is only fair to expressly acknowledge a hospital's legitimate function in statute. (See Elam v. College Park Hospital (1982) 132 Cal.App.3d 332.)

This issue of "governance" is particularly important in those instances in which the peer review process fails and the hospital is required to initiate action.

f) Any benefit of the doubt with regard to the notion of "due process" must be given to the patient. Patients suffer when licentiates who should be "disciplined" are not and continue to practice while litigating the issue of their competency.

g) CAHHS prefers that the peer review process remain a matter of hospital bylaws. SB 1211 acknowledges the use of bylaws to develop additional procedures, but any such procedures may not be "inconsistent with the provisions of SB 1211.

3) At least four issues remain unresolved:

a) Should the bill contain a bilateral attorney fee clause, which compels the payment of the other party's attorney fees if the peer review proceeding was either brought or defended in bad faith or frivolously?

b) Should the bill confer a qualified immunity on hospitals for their peer review activities? (The federal act currently

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confers a similar, qualified immunity, which will be lost if California opts-out of the federal Act.)

c) Should the discovery provisions of the bill be modified?

d) Should a policy statement proposed by Assembly Member Isenberg, relating to the issue of governance, be amended into the bill?

SUPPORT

California Medical Association
Physicians Insurance Management
NORCAL Mutual Insurance Company
Osteopathic Physicians and Surgeons of California

OPPOSITION

California Association of Hospitals and Health Systems
Various Hospitals

G. ERBIN
324-7593
7/11/89:asadj

PROPOSED LEGISLATION	HCQIA	CURRENT CALIFORNIA LAW
Notice of Hearing	Notice of Hearing	Notice of Hearing
1. Written notice of proposed action.	1. No requirement that notice be "written."	1. Physician has right to adequate notice of charges Pinsker II, 12 Cal 3d 541 (1974).
2. That action has been proposed to be taken against the physician.	2. That action has been proposed to be taken against the physician.	2. Procedural unfairness may be based on notice causing prejudice to plaintiff due to lack of opportunity to respond. Anton v. San Antonio Community Hospital, 19 Cal 3d 802 (1977).
3. Reasons for the adverse action taken or recommended.	3. Reasons for proposed action.	
4. Place, time and date of hearing, not less than 30 days.	4. Any time limit (of not less than 30 days) within which to request such hearing.	
5. Summary of rights of licentiate in the hearing.	5. Summary of rights in the hearing.	
6. Copy of evidence upon which the proposed action is based.	6. No similar provision.	
Conduct of Hearing	Conduct of Hearing	Conduct of Hearing
1. The hearing shall be held (as determined by the peer review body) before an arbitrator mutually acceptable to the licentiate and the peer review body or before a panel of impartial individuals who have no direct pecuniary interest in the outcome.	1. Hearing shall be held (as determined by the health care entity): (1) before a mutually acceptable arbitrator, (2) before a hearing officer who is not in direct economic competition with the physician involved, or (3) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved.	1. Right to unbiased hearing officer. Applebaum v. Board of Directors of Barton Memorial Hospital, 104 Cal App. 3d 648 (1980)
2. Right to exchange witness lists.	2. List of witnesses.	2. Physician subjected to corrective action must have a "fair opportunity to present his position" Anton v. San Antonio Community Hospital (1977) 19 Cal. 3d 802, 829.

PROPOSED LEGISLATION	HCQIA	CURRENT CALIFORNIA LAW
3. Right to copies of all documents expected to be introduced at the hearing.	3. No similar provision.	
Rights in the Hearing	**Rights in the Hearing**	**Rights in the Hearing**
1. Prohibits ex parte communications with the trier of fact.	1. No similar provision.	1. Physician has right to a reasonable opportunity to respond. Pinsker II, 12 Cal 3d 541 (1974).
2. Right to have a record made of the proceedings.	2. Right to have a record made of the proceedings.	2. Representation by counsel is within the discretion of the trier of fact. Anton v. San Antonio Community Hospital, 19 Cal 3d 802 (1977).
3. Right to be represented by an attorney.	3. Right to be represented by an attorney.	3. Physician subjected to corrective action must have a "fair opportunity to present his position." Anton v. San Antonio Community Hospital, 19 Cal 3d 802 (1977).
4. Right to call, examine and cross-examine witnesses.	4. Right to call, examine, and cross-examine witnesses.	4. Individual has right to "an opportunity to confront and cross-examine the accusers and to examine and refute the evidence." Hackethal v. CMA, 138 Cal App. 3d 443 (1982).
5. Right to present and rebut evidence.	5. Right to present evidence.	
6. Right to submit a written statement at the close of the hearing.	6. Right to submit a written statement at the close of the hearing.	
Burden of Proof	**Burden of Proof**	**Burden of Proof**
1. The peer review body has the initial burden of proof and the burden of persuading the trier of fact by a preponderance of the evidence that the proposed action is reasonable and warranted. Initial applicants bear the burden documenting their competence.	1. No similar provision.	1. Judicial review committee may decide against an applicant who fails to provide clear and convincing proof that the denial was arbitrary, unreasonable or not sustained by evidence. Smith v. Vallejo, 216 C. R. 189 (1985).

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PROPOSED LEGISLATION	HCQIA	CURRENT CALIFORNIA LAW
Decision 1. Right to written conclusions of the trier of fact, including findings of fact demonstrating that the evidence was considered and a reasonable conclusion articulating the connection between the evidence produced at the time of the hearing and the decision reached. 2. Written explanation of the appeals procedure.	**Decision** 1. Right to written recommendation of the trier of fact including a statement of basis for the recommendation. 2. No similar provision.	**Decision** 1. Fair procedure is violated by notice merely that action "may be appealed" as sole notice of hearing rights. Haller v. Burbank Community, 149 Cal App. 3d 660 (1983).
Appeal 1. Grounds for appeal: a. Substantial non-compliance with procedures required above which has created demonstrable prejudice; b. Decision was not supported by substantial evidence; and c. Decision was arbitrary and capricious. 2. The right to a written decision by the appellate body.	**Appeal** 1. No similar provision. 2. Written decision of the health care entity including a statement of the basis for the decision.	**Appeal** 1. No similar provision.
Additional Rights 1. The licentiate is entitled to any additional rights contained in the medical staff bylaws or any other contracts between the licentiate and peer review body.	**Additional Rights** 1. No similar provision.	**Additional Rights** 1. California case law has found that physicians are entitled to rights contained in medical staff bylaws and any other contracts between the licentiate and peer review body.

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PROPOSED LEGISLATION	HCQIA	CURRENT CALIFORNIA LAW
	Compliance Petition 1. No similar provision.	
Payment of Attorney Fees and Costs 1. No similar provision.	Payment of Attorney Fees and Costs 1. In any suit brought against a defendant health care entity in which the defendant substantially prevails, the claimant shall pay attorney fees and costs of the claim if the claimant's conduct was frivolous, unreasonable, without foundation, or in bad faith.	Payment of Attorney Fees and Costs 1. No similar provision.
Peer Review Immunity 1. Proposed legislation does not affect current California law in this respect. However, the proposed legislation does provide that unless a hospital or other organization complies with the above procedural due process protections, immunity under Civil Code Section 43.97 would not be available.	Peer Review Immunity - The HCQIA states that nothing in the Act, except as specifically provided in the Act, shall be construed as changing the liabilities or immunities under law. 1. Would provide immunity if the action was taken: A) In the reasonable belief that the action was in the furtherance of quality health care. B) After a reasonable effort to obtain the facts of the matter. C) After adequate notice and hearing procedures are afforded to the physician under the circumstances and in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts.	Peer Review Immunity 1. Civil Code 43.7 - provides for immunity if the action was taken: A) without malice; B) after a reasonable effort to obtain the facts of the matter; and C) acts in reasonable belief that the action taken is warranted by the facts.

PROPOSED LEGISLATION	HCQIA	CURRENT CALIFORNIA LAW
2. Would condition immunity under Section 43.97 on compliance with due process standards as set forth in the proposed legislation.	2. No similar provision.	2. Civil Code Section 43.97 - grants conditional immunity from liability to hospitals and organizations for actions taken or restrictions imposed which requires a report on the action to be sent to BMQA. This immunity does not apply to an action knowingly and intentionally taken for the purpose of injuring a person affected by the action or infringing upon a person's rights. A physician who successfully challenges a medical staff disciplinary action can recover only "economic or pecuniary damages", principally lost income.
3. Proposed legislation does not affect California law in this respect.	3. No liability in any civil action with respect to any report made under the Act without knowledge of the falsity of the information contained in the report.	3A. Civil Code 43.8 - provides near-absolute immunity for persons who communicate information to any hospital staff when such communication is intended to aid in the evaluation of the qualifications, fitness, character or insurability of a practitioner. This immunity applies so long as the individuals presenting the information as true, reasonably believe it to be true.

PROPOSED LEGISLATION	HCQIA	CURRENT CALIFORNIA LAW
		38. Civil Code 47 - grants absolute immunity from liability for communications made "in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 ... of the Code of Civil Procedure." This provision applies broadly to protect communications to medical staff committees and regulatory bodies such as BMQA in connection with the initiation or conduct of credentialing and disciplinary proceedings. However, it does not apply to communications made to individuals not properly concerned with credentialing or disciplinary functions. In addition, the Section 47 immunity attaches only to covered communications. The actions taken by medical staff committee members are protected by the conditional immunity of Civil Code Section 43.7, discussed above.
Confidentiality Not included or affected by the bill.	Confidentiality Not included or affected by the HCQIA.	Confidentiality Evidence Code 1157 - provides an exemption from discovery for the proceedings and records of organized medical staff committees have responsibility of evaluation and improvement of the quality of care rendered in the hospital. In addition, the court in West Covina held that Section 1157 does not preclude voluntary disclosure of committee proceedings by members of the peer review committees.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is: 9107 Wilshire Boulevard, Suite 800, Beverly Hills, California 90210-5533.

On **May 25, 2012**, I served ☐ the original ☒ a true copy of the within document(s) described as **ANSWER BRIEF ON THE MERITS OF PLAINTIFF/APPELLANT OSAMAH A. EL-ATTAR, M.D.** on all interested parties in this action:

☒ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California addressed as set forth on the attached service list. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at 9107 Wilshire Boulevard, Suite 800, Beverly Hills, California in the ordinary course of business. I am aware on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

SEE ATTACHED SERVICE LIST

☒ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ **(Federal)** I declare that I am employed in the office of a member of the State Bar of this Court at whose direction the service was made.

Executed on **May 25, 2012**, at Beverly Hills, California.

Claudia Stroe
Type or Print Name

Claudia Stroe
Signature

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