

**B167180**

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FOUR**

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**ASSA WEINBERG, M.D.,**

*Petitioner,*

vs.

**CEDARS-SINAI MEDICAL CENTER,**

*Respondent.*

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APPEAL FROM THE SUPERIOR COURT FOR LOS ANGELES COUNTY (BS 080287)  
HON. DZINTRA JANAVS, JUDGE

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**APPLICATION TO FILE AMICUS CURIAE BRIEF;  
AMICUS CURIAE BRIEF OF THE CALIFORNIA HEALTHCARE  
ASSOCIATION IN SUPPORT OF RESPONDENT CEDARS-SINAI  
MEDICAL CENTER**

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**APPLICATION TO FILE AMICUS CURIAE BRIEF**

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Pursuant to California Rules of Court, rule 13(c), California Healthcare Association (CHA) respectfully requests permission to file the attached brief as amicus curiae in support of respondent Cedars-Sinai Medical Center (Cedars-Sinai).

CHA represents nearly 500 hospitals and healthcare systems in California. It is committed to establishing and maintaining a financial and regulatory environment within which hospitals, healthcare systems, and other healthcare providers can continue to provide high-quality patient care.

CHA is vitally interested in the discretion of a hospital's governing body to reject the recommendations of a peer review committee where

necessary to ensure the quality of patient care. The appeal in the present case directly implicates this issue and thus prompts this application and amicus curiae brief.

Counsel for CHA have reviewed the briefs on the merits filed in this case and believe this court will benefit from additional briefing on the public policy implications of preserving the discretion of hospital governing bodies to reject peer review recommendations.

Accordingly, the CHA respectfully requests this court accept and file the attached amicus curiae brief.

Dated: April 15, 2004

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## AMICUS CURIAE BRIEF

### INTRODUCTION

A peer review committee at Cedars-Sinai concluded that Dr. Assa Weinberg had committed "serious errors of judgment and action" but nonetheless expressed "hope" that he would be able to "resolve those issues that impede his taking care of patients." (AA 43.) The peer review committee therefore recommended that Dr. Weinberg be allowed to continue treating patients while under supervision and with counseling. (*Ibid.*) The hospital governing body disagreed, concluded that Dr. Weinberg could not be rehabilitated without an unacceptable risk to patients, and therefore revoked his staff privileges and hospital membership. (AA 214-216.)

Business and Professions Code section 809.05 governs the hospital governing body's decision. That section requires that a governing body give "great weight" to a peer review committee's recommendations but authorizes the body to reject those recommendations provided it does not do so arbitrarily or capriciously. (Bus. & Prof. Code, § 809.05, subd. (a).)

On appeal, Dr. Weinberg construes section 809.05 to allow a hospital governing body little or no discretion to reject a peer review committee's recommendations. Moreover, he ignores the potentially grave risks to patients should the governing body not exercise such discretion when warranted. His construction of section 809.05 would undermine public policy in two fundamental ways.

First, section 809.05 must be construed to further the hospital's role in promoting quality patient care. Any construction of the section that would deny a hospital governing body the discretion to revoke the privileges of a

physician who has committed "serious errors of judgment and action" would conflict with, and not further, this important public interest.

Second, the findings of a peer review committee are entitled to comparatively less deference on the ancillary question of whether a physician can be rehabilitated than they are on the primary question of whether the physician has acted within the standard of care. It is only the question of the standard of care that implicates the peer review committee's reason for being—its medical expertise. Consequently, the hospital governing body does not act arbitrarily or capriciously in concluding that a physician responsible for "serious errors of judgment and action" cannot be rehabilitated without unacceptable risk to the hospital's patients.

## **LEGAL ARGUMENT**

### **I**

#### **A HOSPITAL GOVERNING BODY MUST HAVE DISCRETION TO REJECT THE RECOMMENDATIONS OF A PEER REVIEW COMMITTEE WHERE NECESSARY TO ENSURE THE QUALITY OF PATIENT CARE.**

Business and Professions Code section 809.05 strikes a careful balance between the role of the peer review committee and the hospital governing body in peer review matters. Once the peer review committee makes disciplinary recommendations, the hospital governing body must give those recommendations "great weight" but may reject the recommendations so long as it does not act arbitrarily or capriciously. (Bus. & Prof. Code, § 809.05, subd. (a).)



By reserving to the hospital governing body the discretion to reject peer review recommendations, the statute fosters the important public policy of promoting quality health care. By contrast, any interpretation of the statute that denies the governing body such discretion would both (1) undermine the vital role of hospitals in ensuring the quality of patient care; and (2) risk exacerbating the decline in the financial condition of California's hospitals by denying them control over matters that may subject them to the tort claims of patients.

First, hospitals are the keystone to our system of quality health care. "[H]ospitals do more than provide physical facilities and accommodations for the practice of medicine. They have become the focus for arranging, furnishing, and providing the community with an entire range of personal health care -- preventive and curative, outpatient as well as inpatient." (Southwick, *The Law of Hospital and Health Care Administration* (2d ed. 1988) *Liability of the Health Care Institution*, p. 555.) "[T]oday's hospital is a sophisticated and dynamic corporation charged with duties and responsibilities whose suggestion some years ago would have been likely to spur outright laughter. Of primary import . . . is direct responsibility for the quality of care provided to patients within hospital facilities." (Note, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review* (1990) 51 *U.Pitt.L.Rev.* 1025, 1025; accord, *Elam v. College Park Hospital* (1982) 132 *Cal.App.3d* 332, 344 ["The community hospital has evolved into a . . . 'comprehensive health center ultimately responsible for arranging and coordinating total health care'"].)

Accordingly, public policy requires that hospitals be allowed to "remedy any situation which threatens or jeopardizes patient care." (See *Mateo-Woodburn v. Fresno Community Hospital & Medical Center* (1990) 221 *Cal.App.3d* 1169, 1184-1185.) For this reason, courts have recognized

an "important public interest . . . in preserving a hospital's ability to make managerial and policy determinations and to retain control over the general management of the hospital's business." (*Id.* at p. 1184; accord, Dallon, *Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decisions* (2000) 73 Temp. L.Rev. 597, 616 ["The hospital also has an important interest in the credentialing process . . . [because of its] concern[] about the quality of health care services provided in its facilities"]; *Restructuring Hospital-Physician Relations, supra*, 51 U.Pitt. L.Rev. at p. 1040 ["The modern hospital's . . . important interest in fostering quality may be unduly burdened by judicial involvement"].)

Accordingly, the hospital governing body must be allowed discretion to remedy situations that threaten hospital care because it is ultimately responsible for that care. Thus, the Medicare and Medicaid programs require that the hospital governing body "[e]nsure that the medical staff is accountable to the governing body for the quality of care provided to patients." (42 C.F.R. § 482.12(a)(5).) Likewise, the California Administrative Regulations require that the hospital's governing body "[t]ake all reasonable steps to conform to all applicable federal, state and local laws and regulations" and that it "[r]equire that the medical staff establish controls that are designed to ensure the achievement and maintenance of high standards of professional ethical practices . . . ." (Cal. Code Regs., tit. 22, § 70701, subd. (a)(5) & (7).) The Joint Commission on Accreditation of Healthcare Organizations concludes that "[t]he governance of a . . . hospital sets the framework for supporting quality patient care, treatment, and services." (Joint Commission on Accreditation of Healthcare Organizations, 2005 Critical Access Hospital Standards, Leadership (Mar. 2004) p. 1.)<sup>1</sup>

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<sup>1/</sup> This document can be obtained from the website for the Joint  
(continued...)

The peer review statute must therefore be construed to allow a hospital governing body the discretion to take disciplinary action against a physician even if contrary to the recommendation of a peer review committee. Any other result would endanger the governing body's ability to ensure the quality of health care and undermine the purpose of the peer review statute "of maintaining and enhancing quality patient care." (Bus. & Prof. Code, § 809.05, subd. (d).)

Second, plaintiff's construction of Business and Professions Code section 809.05 would exacerbate the decline in the financial condition of California's hospitals by denying them control over matters of patient care that may expose them to the tort claims of patients.

A hospital can be liable for tort damages for not "screening the competency of its medical staff to insure the adequacy of medical care rendered to patients at its facility." (*Elam v. College Park Hospital, supra*, 132 Cal.App.3d at p. 346.) For example, this court has recognized that "[t]he hospital has 'a direct and independent responsibility to its patients of insuring the competency of its medical staff and the quality of medical care provided . . .'" (*Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1265 [Second Dist, Div. Four].)

Courts have found that this "spectre of liability . . . should encourage the hospital to examine its conduct more carefully in order to prevent the occurrence of unreasonable harm to patients." (See, e.g., *Elam v. College Park Hospital, supra*, 132 Cal.App.3d at p. 345.)

Nonetheless, plaintiff asks this court to interfere with the ability of a hospital governing body to promote quality care by allowing it little or no

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1/ (...continued)

Commission on Accreditation of Healthcare Organizations. (See [http://www.jcaho.org/accredited+organizations/critical+access+hospitals/standards/field+reviews/cah\\_ld\\_05stds.pdf](http://www.jcaho.org/accredited+organizations/critical+access+hospitals/standards/field+reviews/cah_ld_05stds.pdf).)

discretion to reject a peer review committee's recommendations. Plaintiff's proposed construction of Business and Professions Code section 809.05 thus conflicts with the very purpose of imposing tort liability in the first place – promoting quality patient care.

Plaintiff's proposed construction of section 809.05 would also exacerbate the financial difficulties that many of California's hospitals are currently facing. According to a March 2004 report from the Economic Alliance of the San Fernando Valley, "[t]he foundational core upon which the entire healthcare system operates – the hospital – is being threatened." (Economic Alliance of the San Fernando Valley, San Fernando Valley Hospital Report (Mar. 18, 2004) p. 4.)<sup>2</sup> The report highlights the disturbing fact that "[m]ore than 50% of hospitals in California are currently operating in the red." (*Ibid.*)

The plight of hospitals in the San Fernando Valley provides an eye-opening example. "In the past 15 years, approximately 40% of hospitals in the San Fernando Valley have closed, leaving 21 hospitals to care for a population that was previously cared for by 33 hospitals." (Economic Alliance of the San Fernando Valley, *supra*, at p. 5.) Moreover, while the number of hospitals in the San Fernando Valley has been shrinking, the Valley's population has been growing and is expected to increase by more than 250,000 people over the next six years. (Haynes, *Possible Threat to Valley's Healthcare Cited; Rising Population and a Diminishing Number of Hospitals Offer a Serious Challenge, Report Says*, L.A. Times, Valley Edition (Mar. 19, 2004) p. B.3.) As one article succinctly put it: "The health care system in the San Fernando Valley is on the edge of collapse . . . ."

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<sup>2/</sup> The report can be obtained from the website for the Economic Alliance of the San Fernando Valley. (See <http://www.economicalliance.org/news/San-FernandoValleyHospitalReport2004.pdf>.)

(Bartholomew & Pondel, *Valley Hospitals in Crisis*, L.A. Daily News (Mar. 17, 2004) p. 1.)

This court would only exacerbate the financial difficulty of California's hospitals if it deprived them of the tools necessary to control the quality of patient care while leaving them exposed to civil liability for failing to exercise that control. The end result would be unmanageable tort liability that could undermine the healthcare system for all Californians.

## II.

### A. PEER REVIEW COMMITTEE'S RECOMMENDATIONS ARE ENTITLED TO LESS DEFERENCE WHERE THEY DO NOT INVOLVE THE STANDARD OF CARE.

"Medical peer review is a process by which physicians evaluate the quality of work performed by their colleagues for the purpose of determining compliance with appropriate standards of health care." (Commentary, *Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection* (2001) 52 Ala. L.Rev. 723, 723.)

The fundamental rationale behind this process is that "practicing physicians are in the best position to determine the competence of other practicing physicians as they regularly observe one another's work and have the *expertise* to effectively evaluate that work." (*Maintaining the Balance, supra*, 52 Ala. L.Rev. at p. 723, emphasis added.) Thus, peer review is founded on "the logical premise that only a physician's colleague or peer would have the *expertise* required to appropriately evaluate that physician's work." (*Id.* at pp. 724-725, emphasis added; accord, Note, *The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More*

*Inviting?* (1988) 74 Va. L.Rev. 1115, 1115 [“The proponents of peer review emphasize that medicine is such a specialized field that physicians and others within the medical community are the only individuals with the knowledge required to evaluate meaningfully the qualifications and performance of other medical practitioners”].) Indeed, plaintiff argues that “only other physicians have the expertise necessary to judge the quality of care and the ability to provide it.” (ARB 15.)


Here, the peer review hearing committee’s factual findings that Dr. Weinberg engaged in substandard care were entitled to deference because the committee has expertise regarding that issue. Moreover, the hospital governing body deferred to those factual findings. (AA 214-216.) By contrast, the committee’s “hope” that Dr. Weinberg would benefit from rehabilitation (AA 43) is entitled to comparatively less deference because it does not involve Dr. Weinberg’s adherence to the standard of care and is therefore beyond the presumed expertise of the peer review committee. Accordingly, the hospital governing body did not act arbitrarily or capriciously by rejecting that recommendation and instead revoking Dr. Weinberg’s staff privileges.

## CONCLUSION

A hospital governing body must have discretion under Business and Professions Code section 809.05 to reject the recommendations of a peer review committee where necessary to ensure the quality of patient care. This is particularly important where, as here, a peer review committee has concluded that the physician committed "serious errors of judgment and action" but the committee nonetheless recommended against revoking that physician's staff privileges. The judgment should thus be affirmed.

Dated: April 15, 2004

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**CERTIFICATE OF WORD COUNT**  
**(Cal. Rules of Court, rule 14(c)(1).)**

The text of this brief consists of 2,067 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

DATED: April 15, 2004



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Robert H. Wright



**PROOF OF SERVICE [C.C.P. § 1013a]**

**I, Jill Gonzales, declare as follows:**

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On April 15, 2004, I served the within document entitled:

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AMICUS CURIAE BRIEF OF THE CALIFORNIA HEALTHCARE ASSOCIATION IN  
SUPPORT OF RESPONDENT CEDARS-SINAI MEDICAL CENTER**

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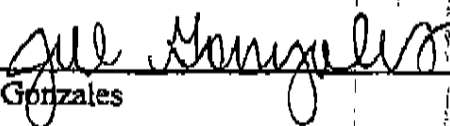
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and, following ordinary business practices of Horvitz & Levy LLP, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 15760 Ventura Boulevard, Encino, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 15, 2004, at Encino, California.

  
\_\_\_\_\_  
Jill Gonzales