



## **3.8 Million Reasons Why Proper Process in Physician Discipline Matters**

Insights

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Any avid watcher of medical dramas would tell you that a hospital always has the ability to cut ties with any doctor who is not up to snuff. (For podcast fans we highly recommend [Dr. Death](#).) They would tell you this is particularly true if the Department of Health points out that doctor's errors.

However, as you know, real life is not that simple. In a case published last week, the California Court of Appeal reminded us that procedure matters by affirming a doctor's \$3.8 million award against a hospital that suspended his privileges despite its finding that his performance was deficient.

### **Background**

Dr. Kenneth Economy was an anesthesiologist who practiced at Sutter East Bay Hospitals and Alta Bates Summit Medical Center for 20 years, through his employment with East Bay Anesthesiology Medical Group who had an exclusive contract with the hospital. In other words, only an East Bay anesthesiologist could provide those services at the hospital.

In 2011, the California Department of Public Health conducted a survey at the hospital and found that Dr. Economy had "placed patients at risk for undue adverse medical consequences" through deficient use of the drug droperidol (a sedative, among other things). This finding placed the hospital in "immediate jeopardy," which is a rare determination that requires an immediate response from a hospital's administrator.

### **The Discipline**

The immediate jeopardy determination set off a series of events regarding Dr. Economy's work at the hospital, and the cessation thereof. First, he was referred to peer review at the hospital and suspended from active practice by his group. The peer review recommended continuing education and conditioned his return to clinical practice on the completion of that program. Dr. Economy was denied the opportunity to present before the peer review committee but nevertheless completed the required education program in order to return to work.

After Dr. Economy returned to his practice, the hospital noticed other errors it found unacceptable for an anesthesiologist with his level of experience and training. The hospital notified the group that it was not comfortable with the quality of care provided by Dr. Economy and asked the group to take him off his schedule pursuant to the contract term allowing the hospital to remove any physician

that “performs an act or omission that jeopardizes the quality of care provided to hospital patients.” The group asked Dr. Economy to resign; when he refused, he was terminated by the group.

### **What Went Wrong**

California law—as an alternative to the federal Health Care Quality Improvement Act—guarantees physicians certain due process rights. Among these, a physician is entitled to notice and a hearing before hospital privileges are revoked. The question that arose during this case: may a hospital avoid its obligation to provide notice and a hearing before terminating a doctor’s ability to practice in the hospital for jeopardizing patient quality of care, by directing the medical group employing the doctor to refuse to assign the doctor to the hospital? The Court of Appeal found it may not. The court also concluded that the hospital should be liable for damages by failing to comply with the mandated procedures of Business and Professions Code section 809 *et seq.*

The court found the hospital violated Dr. Economy’s rights by essentially suspending his hospital privileges without providing the required notice and hearing. According to the court, it did not matter that the doctor maintained his privileges on paper during his suspension. By denying him the ability to practice at the hospital, the hospital had effectively revoked his privileges as defined by statute.

The court further found it did not matter that the contract between the hospital and the group required the group to develop and maintain an independent peer review process for its physicians. Quoting the trial court, the appellate court reasoned, “the language in the agreement does not clearly state that the East Bay Group peer committee ‘is responsible for protecting the full panoply or rights guaranteed physicians under [California law].’” Further, it noted that this responsibility is committed to the hospital’s medical staff in accordance with its bylaws.

Moreover, the appellate court affirmed the award of damages for lost earnings and the award of an additional sum to address the tax penalty affiliated with a lump-sum payment. In doing so, it held that the damages were proper because they resulted from the loss of his due process rights. It did not matter if the ultimate result—his termination—would have been the same even if there had been a hearing.

### **Best Practices**

This decision raises many important issues that hospitals and physician groups must navigate. Among them are these three main conclusions:

- When is peer review triggered? If a hospital requests a medical group to remove a doctor from the hospital schedule because of a medical competency reason, then peer review is required. It does not matter that the medical group is the one terminating the physician’s employment from the group. The important thing to focus on in these situations is the reason motivating the termination decision and whether that reason triggers peer review.
- Medical group peer review will not be sufficient to revoke hospital privileges. As seen from this decision, not only must the peer review process protect the full panoply of rights guaranteed by

the Business and Professions Code sections 805 through 809, but the review of physician performance is committed to a hospital's medical staff in accordance with its bylaws. A hospital cannot avoid medical staff peer review by directing a provider medical group to no longer assign one of its physicians to work at the hospital.

- Can a physician waive the right to peer review? Business and Professions Code section 809.6 prohibits a contractual waiver of peer review proceedings in cases where a physician's medical competency is at issue. On the other hand, peer review is not required when the termination of privileges is for an administrative decision (for example, if the hospital is restructuring the department).

It remains to be seen whether Sutter East Bay Hospitals will seek review of this decision from the California Supreme Court. For now, it remains an important reminder to both hospitals and physician groups to revisit their contracts and ensure they are properly navigating the peer review process.

### ***Related People***



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