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RICHARD S. PLATON  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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3 **IN THE UNITED STATES DISTRICT COURT**  
4 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

5 MARCIANO PLATA , et al., )  
6 Plaintiffs )  
7 )  
8 v. )  
9 )  
10 ARNOLD SCHWARZENEGGER, )  
11 et al., )  
12 Defendants. )

NO. C01-1351-T.E.H.

**MOTION FOR WAIVER OF STATE LAW  
RE PHYSICIAN CLINICAL COMPETENCY  
DETERMINATIONS; EXHIBITS**

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1 I.

2 INTRODUCTION

3 One of the primary causes of preventable prisoner/patient deaths reported by the Court  
4 Experts and the Court involves incompetence and indifference on the part of physicians working  
5 within the California Department of Corrections and Rehabilitation (“CDCR”). Throughout the  
6 long history of this litigation the CDCR has attempted to implement various programs, including  
7 peer review, to address this life and death problem. In every instance it has failed to effectuate  
8 adequate remedial programs. While a significant part of the blame goes to the CDCR, the  
9 State’s inability to provide an effective, professional clinical method to correct physician  
10 competency problems is also due, in large part, to the non-clinical and entirely ineffective  
11 policies of California’s State Personnel Board (“SPB”).

12 A. The Court’s Findings.

13 The Court, in its *Findings of Fact and Conclusions of Law re Appointment of Receiver*  
14 (“*Findings of Fact*”) filed October 3, 2005, provided an extensive analysis of the scope and  
15 seriousness of the problems created by California’s long standing indifference to constitutionally  
16 inadequate physician care in the CDCR. To summarize, the Court found that the CDCR sorely  
17 lacked qualified physicians; CDCR physicians were poorly trained and poorly qualified; some  
18 CDCR physicians provided poor quality of care; numerous CDCR physicians had privileges  
19 revoked prior to coming to the CDCR, many practiced with mental health problems, had settled  
20 malpractice suits, had adverse reports on the National Practitioner Data Base or were on  
21 probation with California’s physician licensing agency. The bottom line: the incompetence and  
22 indifference of some CDCR physicians “has directly resulted in an unacceptably high rate of  
23 patient deaths and morbidity” *Findings of Fact* at 8.<sup>1</sup>

24 When making these findings, the Court found that the CDCR’s efforts to implement  
25 adequate physician peer review had failed, and medical investigations were not helpful in

26 \_\_\_\_\_  
27 <sup>1</sup> See also, pages 9 to 14 of the *Findings of Fact*, describing a number of specific cases where  
28 physician malpractice/indifference led to preventable patient deaths.

1 addressing issues involving poor physician quality. *See Findings of Fact* at 16 and 25. While  
2 recognizing the responsibility of the CDCR and the State concerning this long standing problem,  
3 the Court emphasized that obstacles existed with California's governmental bureaucracy  
4 inhibiting the CDCR's efforts to address its physician quality problems, including the SPB. *See*  
5 *Findings of Fact* at 25.

6 B. The Receiver's Findings.

7 The CDCR did not institute significant improvement concerning physician quality  
8 following the filing of the *Findings of Facts* and before the Receiver's April 17, 2006  
9 appointment date. Indeed, the CDCR's efforts to implement an effective peer review process  
10 were thwarted by conflicting SPB-related provisions of California law, as explained below.

11 In his First Bi-Monthly Report, the Receiver found that problems associated with CDCR  
12 clinical accountability were, if anything, more serious than previously reported by either counsel  
13 or the Court experts. Specifically:

14 C. The prevalence of "trained incapacity" was correctly noted in the Findings;  
15 however, it may have been understated. "Trained incapacity" is a major cultural  
16 obstacle. Furthermore, it is both a vertical and horizontal issue, i.e., it involves not  
17 only CDCR but all other State Agencies and Departments whose performance  
18 significantly affects CDCR's ability to perform adequately and appropriately.  
19 Thus, the Receiver affirms that the inadequacy of medical care in California's  
20 prisons is not caused by the CDCR alone. As noted in the Findings of Fact and  
21 Conclusions of Law, the problems with CDCR medical care are a product of  
22 "[d]ecades of neglecting medical care while vastly expanding the size of the  
23 prison system [which] has led to a state of institutional paralysis." The present  
24 crisis was created by, and has been tolerated by, both the Executive and  
25 Legislative branches of the State of California. Furthermore, these problems  
26 have not been adequately addressed by the State's control agencies, including the  
27 Department of Finance ("Finance"), the Department of General Services  
28 ("DGS"), and the Department of Personnel Administration ("DPA"). For  
example, the imposition of unreasonable and unfunded bureaucratic mandate,  
concerning certain essential services (for example, the ability to obtain medical  
supplies in a timely and cost effective manner and the ability to enter into  
contracts with specialty providers in a timely and cost effective manner) has all  
but crippled the CDCR's efforts to provide adequate health care. Therefore,  
concerning these services, the corrective action required from the Receiver must,  
of necessity, involve the restructuring not only of the CDCR, but also the  
operation and oversight of State of California control agencies.

D. It should also be understood that the "trainer" of the aforementioned "trained  
incapacity" is the State of California itself including, at least, the Executive and  
Legislative branches of State government. It may, indeed, not be possible to

1 achieve the mission of the Receivership given the existence of current State laws,  
2 regulations, policies and procedures and interpretations of same. This includes  
3 existing bargaining agreements for which the State is ultimately responsible. The  
4 Receiver references here the non-economic provisions of labor contracts.<sup>2</sup> Due to  
5 labor agreements, statutes, regulations, policies and procedures related to the  
6 State personnel system, civil service requirements, and the California State  
7 Personnel Board, it is virtually impossible to effectively discipline and/or  
8 terminate State employees for poor performance, up to and including  
9 incompetence and arguably illegal behavior. The sense of hopelessness this  
creates for supervisors, managers, department heads and others with the  
responsibility and supposed authority to assure adequate and competent  
performance of subordinate employees cannot be overstated and has led, in some  
cases, to the dereliction of their own responsibilities in this regard. In addition,  
the lack of qualifications, training and, in some instances, competence of the  
above personnel has created a culture of incompetence and non-performance  
which, unfortunately, is more rewarded than not within State employment.

10 *First Bi-Monthly Report* at 4-5.

11 In his Third Bi-Monthly Report the Receiver also reported about how the SPB returned to  
12 active employment a medical technical assistant (“MTA”) who had been terminated by CDCR  
13 for *clinical misconduct* and *dishonesty*. Finding, in a written opinion, that the MTA was merely  
14 “clueless,” the SPB returned her to work *after* the Receiver announced his decision to eliminate  
15 the MTA job classification and in direct contradiction to the Receiver’s instructions that no  
16 MTAs be returned to work as MTAs because of the pending conversion to the use of licensed  
17 vocational nurses (“LVNs”). *See Third Bi-Monthly Report* at 22-23.

18 C. CDCR Attempts to Establish a Working Peer Review Process.

19 In 2004 the Court’s Medical Experts inspected a number of the CDCR prisons and  
20 assessed progress concerning CDCR efforts to improve clinical quality of care. The experts  
21 found numerous instances where poor clinical practices aroused concerns about patient safety  
22 across the state. As a result the *Stipulated Order Re Quality of Patient Care and Staffing*  
23 (“*Order re Quality*”) was filed on September 17, 2004 requiring that the CDCR implement a  
24 peer review policy. *See Order Re Quality* at 5.

25 <sup>2</sup> The gross underpayment of State employees, especially in clinical, management and support  
26 positions which provide services in California’s prisons is well documented and, frankly, more  
27 easily correctable than non-workable and unduly burdensome State provisions relating to work rules,  
roles and responsibilities, performance assessments, disciplinary processes and employee “rights”  
(as currently defined).

1 The peer review process implemented by the CDCR includes a method for determining  
2 whether physicians' privileges must be revoked for clinical misconduct and negligence  
3 following notice of the charges and a full evidentiary hearing. It is important to note that this  
4 policy coincides with a declaration by the California Legislature which states-- in order to  
5 protect the health and welfare of the people -- it is the policy of the State of California to use  
6 peer review mechanisms to exclude those healing arts practitioners who provide substandard  
7 care or engage in professional misconduct. See California Business and Professions Code §  
8 809(a)(6). The SPB did not, however, exercise its authority to act upon this policy.

9 For example, the SPB did not establish "privileges" as a minimum qualification for  
10 classifications used to employ CDCR physicians. It has similarly failed to exercise its authority  
11 to require privileges as a condition for continued employment. As a result, the practical  
12 outcomes of the CDCR peer review process are utterly meaningless because SPB rules mandate  
13 continued State employment for CDCR physicians even after their clinical privileges are revoked  
14 for incompetence. Instead of relying upon clinical determinations concerning competency  
15 rendered by a peer review hearing panel of physicians, the SPB continues to insist that CDCR  
16 observe the same discipline process that applies to non-clinical misconduct (e.g., abuses of force,  
17 bad attendance, or insubordination).

18 In the broken peer review system that exists today, the SPB still insists that it conduct  
19 hearings before its own administrative law judges ("ALJ"), *none of whom have any clinical*  
20 *experience or clinical competence*. The hearings are often preceded by lengthy and resource  
21 intensive investigations that proceed *without the benefit of peer review proceedings and peer*  
22 *review records*. As shown by the MTA case mentioned above, SPB administrative law judges  
23 often invoke personal judgment; for example, "cluelessness" excuses clinical incompetence and,  
24 therefore, provides a basis to reinstate clinicians who provide substandard care to  
25 prisoner/patients. This hearing officer attitude defeats the very purpose of peer review.

26 As a consequence of these policies, at present there are numerous CDCR physicians who  
27 cannot, for the safety of patients, be allowed to practice medicine but who, nevertheless, remain  
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1 on the State's payroll with full pay and benefits (in some cases for several years and in other  
2 cases continuing to also receive additional perks such as low cost prison housing) thereby eating  
3 up millions of dollars of taxpayer resources.

4 The Receiver therefore brings this motion to establish an adequate peer review program  
5 which is fair, provides due process through evidentiary hearings, and has teeth to enforce peer  
6 review determinations. The peer review program proposed in this motion will both establish a  
7 constitutionally-adequate system of correcting clinical misconduct by physicians and, at the  
8 same time, it will reinforce Federal and California's peer review policies. The orders proposed  
9 below establish a simple, clinically sound requirement (common in hospitals and provider  
10 organizations in the free world) which is the requirement that physicians obtain and maintain  
11 professional "privileges" as a condition of employment to work in CDCR prisons.

12 **II.**

13 **STANDARD FOR WAIVING STATE LAW**

14 Pursuant to the *Order Appointing Receiver* filed February 14, 2006, the Receiver must  
15 make all reasonable efforts to exercise his powers in a manner consistent with California state  
16 laws, regulations and labor contracts. In the event, however:

17 that the Receiver finds that a state law, regulation, contract, or state action or  
18 inaction is clearly preventing the Receiver from developing or implementing a  
19 constitutionally adequate medical care system, or otherwise preventing the  
20 Receiver from carrying out his duties as set forth in this Order, and that other  
alternatives are inadequate, the Receiver shall request the Court to waive the state  
law or contractual requirement that is causing the impediment.

21 *Order* at 5:1-11.  
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**III.**

**FACTS IN SUPPORT OF MOTION**

A. Introduction.

A primary component of a minimally acceptable correctional health care system is the implementation of procedures to review the quality of medical care being provided. *Madrid v. Gomez*, 889 F. Supp. 1146, 1258 (1995). In finding that the lack of quality control procedures resulted in grossly inadequate care that was neither disciplined nor redressed, this Court emphasized the need for an effective peer review process. *Id.* at 1208-1210.

Both plaintiffs and the State agree with the fundamental principle; indeed, as explained above, three years ago counsel in *Plata* stipulated to the establishment of a state-wide prison oriented peer review process. *See Order re Quality* filed September 17, 2004.

B. Effective Peer Review in CDCR Institutions Is Entirely Consistent With Federal and State Peer Review Statutes.

Peer review supplements and aids customary measures aimed at preventing or responding to medical malpractice by means legislatively-constructed to encourage reporting and frank discussion by practitioners; those who are in the best position to observe and evaluate the delivery of care.

Consequently, Congress enacted the Federal Health Care Quality Improvement Act (HCQIA). The provisions of HCQIA are derived from earlier bills that addressed a “medical malpractice crisis.” Passage of the act is based on Congressional findings that the increasing occurrence of medical malpractice would be reduced and the quality of medical care improved through effective professional peer review. *See* 42 U.S.C.A § 11101. The HCQIA allows each state to opt-out from under some of its provisions.

California took advantage of the opt-out provision through the adoption of Business and Professions Code §§ 809-809.8 which set forth comprehensive standards for professional peer review. When taking this action, California’s Legislature declared that peer review, when fairly conducted, is essential to preserving the highest standards of medical practice and it aids

1 licensing boards with their responsibility to regulate and discipline errant healing arts  
2 practitioners. California's Legislature also observed that using peer review to exclude those who  
3 provide substandard care or engage in professional misconduct protects the health and welfare of  
4 the people of California. *See* California Business and Professions Code § 809(a)(3)(5) and (6).

5 In order to encourage physicians to report substandard care to peer review bodies,  
6 California law protects them from monetary liability and causes of action for communicating  
7 information to peer review committees. *See* California Civil Code § 43.8. It also generally  
8 provides that neither the proceedings nor the records of peer review bodies are subject to  
9 discovery. *See* Evidence Code § 1157. Ordinary civil service proceedings demanded by the  
10 SPB do not similarly encourage the reporting of substandard care and frank evaluation by  
11 physicians.

12 C. The Existing CDCR Peer Review System.

13 The current peer review process consists of the following steps:

- 14 1. When misconduct is reported for peer review, physicians may be summarily  
15 (temporarily) suspended if permitting them to remain at work while peer review  
16 proceeds poses a significant threat to prisoner/patient safety or well-being.
- 17 2. The CDCR peer review body, known as Professional Practices Executive  
18 Committee (PPEC), conducts an investigation and prepares a Request for Final  
19 Proposed Action by the Governing Body. PPEC includes managers in the  
20 following disciplines: physicians, dentists, psychiatrists and psychologists.
- 21 3. The Governing Body exercises its ultimate authority to determine the privileging  
22 action after considering PPEC's request. The Governing Body is comprised of  
23 non-physician managers and executives.
- 24 4. The physician may next appeal the proposed privileging action which is followed  
25 by an evidentiary hearing. An ALJ employed by the State Office of  
26 Administrative Hearings, who also conducts license hearings for the California  
27 Medical Board, presides over the hearing with a committee of three CDCR

1 physicians selected by CDCR management. The committee determines, by  
2 majority vote based on a preponderance of evidence, whether the PPEC's  
3 Proposed Final Action is reasonable and warranted, and its determinations are  
4 returned in the form of recommendations to the Governing Body.

- 5 9. The Governing Body (consisting of non-physician managers) renders a final  
6 decision regarding privileges.
- 7 6. If privileges are revoked, the physician nevertheless remains employed until:  
8 a. An administrative investigation is completed; and,  
9 b. A Notice of Adverse Action is served.
- 10 7. Pre-deprivation *Skelly* hearings are conducted.
- 11 8. Physicians may within thirty days appeal to the SPB where they receive yet  
12 another evidentiary hearing concerning the same facts. (Government Code §  
13 19575) The SPB ALJ may dismiss all charges and prepare proposed decisions for  
14 review by the five-member State Personnel Board.  
15 (Government Code § 19582).
- 16 9. Following a decision by the Board, Petitions for Rehearing may be filed by either  
17 party. (Government Code § 19586).
- 18 10. The Board has sixty days before it must act on Petitions for Rehearing.  
19 (Government Code § 19586).

20 D. Adequate Peer Review Requires Peer Determinations With Finality.

21 The basic problem with CDCR peer review, as it presently exists, is that it has no teeth.  
22 In terms of the continued employment of physicians who have engaged in the most serious of  
23 malpractice or deliberate misconduct, peer review results are entirely meaningless.

24 Even though CDCR peer review hearings are managed by an ALJ<sup>3</sup> with expertise in  
25 clinical misconduct, along with a three-physician panel which serves as the trier of fact, CDCR

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27 <sup>3</sup> The ALJ is responsible for procedural and evidentiary rulings and assisting the panel in writing  
28 an opinion which is grounded in the evidentiary record.

1 must nevertheless conduct formal “internal affairs investigations” separate and apart from peer  
2 review. In the event that CDCR wants to discipline the offending physician in any manner  
3 because of peer review findings, the SPB insists on the filing of a formal Notice of Adverse  
4 Action and thereafter, holds an entirely separate ALJ evidentiary hearing. For this hearing,  
5 however, SPB ALJs *act as the trier of fact*. The end result: an unnecessarily protracted process  
6 which, in terms of actual practice, allows for the continued employment of incompetent  
7 clinicians with full salary and benefits.

8 Three consequences follow this “two bites of the apple” system, all of them bad:

- 9 1. *Waste of Limited Resources*: SPB evidentiary hearings are duplicative, inefficient  
10 and unnecessarily consume resources. Among those resources are CDCR  
11 physicians who -- instead of providing patient care -- are assisting with  
12 investigations as a forerunner to Notices of Adverse Action, assisting counsel  
13 preparing for SPB evidentiary hearings, and testifying as witnesses at SPB  
14 hearings.
- 15 2. *Possible Inconsistent Results*: Different triers of fact and different records promote  
16 inconsistent results.
- 17 3. *Poor Exercise of Discretion by Non-Clinicians Concerning Clinical Processes*:  
18 Effective peer review requires judgement by the subject’s professional peers. SPB  
19 evidentiary hearings, however, do not enjoy the benefit of having medical  
20 professionals making highly complex clinically-based decisions which are  
21 essential to preserving appropriate standards of care. SPB ALJs are attorneys,  
22 attempting to reconcile differing medical expert opinions and preparing proposed  
23 decisions which contain findings of fact and credibility determinations concerning  
24 the quality and appropriateness of care provided to *Plata* class members. Their  
25 proposed decisions are then submitted to the members of the Board who are also  
26 non-physician political appointees of the Governor. *See* California Constitution,  
27 article VII, § 2, subd. (a). The Board may modify or revoke adverse actions and  
28

1 order physicians returned to their positions.<sup>4</sup> See Government Code § 19583. In  
2 actual practice, as concerning the case of the MTA previously cited, SPB ALJs  
3 insert their own judgement to excuse malpractice and falsehoods, citing “clueless”  
4 behavior which, under SPB standards, allows for wayward doctors and nurses to  
5 return to clinical practice in California’s prisons.

6 E. Between a Rock and Hard Place; The CDCR’s Inability to Effectuate Adequate Peer  
7 Review and Provide Constitutional Levels of Patient Care.

8 Almost everyone suffers from the consequences of the “two bites of the apple” system,  
9 including the CDCR physician managers who are attempting to improve health care in  
10 California’s prisons, the plaintiff class, and California’s taxpayers. The day-to-day reality is that  
11 the CDCR does not have enough competent physicians, nor enough attorneys, nor the funding  
12 nor the time necessary to fix an unconstitutional prison medical delivery system based on the  
13 wasteful and duplicative processes demanded by the SPB.

14 In its twenty months of existence, the CDCR peer review PPEC has met approximately  
15 seventy-seven times and reviewed over 300 allegations of clinical misconduct and neglect. In  
16 fiscal year 2005/06 PPEC initiated peer review investigations approximately 42% of the time. It  
17 imposed provider monitoring about 7% of the time, and it issued credentialing file alerts 7% of  
18 the time. See Exhibit 1, Declaration of Annette Lambert.

19 As of January 26, 2007, PPEC had twenty-eight physicians pending review. Given the  
20 seriousness of the charges, and following an initial review by their peers, each physician  
21 involved had their privileges summarily (temporarily) suspended pending further peer review.  
22 These suspensions were effectuated because application of the Business and Professional Code  
23 standard resulted in a determination that failure to take action may result in an imminent danger

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24 <sup>4</sup> After the five-member SPB Board renders a decision, appointing authorities may seek review  
25 through a petition for writ of administrative mandamus. Superior courts considering petitions  
26 challenging the SPB decisions, however, defer to the Board’s factual findings if they are supported  
27 by substantial evidence. See *State Personnel Board v. Department of Personnel Administration, et*  
28 *al.*, 37 Cal.4<sup>th</sup> 512, 522 (2005), citing *Skelly v. State Personnel Board*, 15 Cal.3d 194, 217, fn. 31  
(1975). Consequently, the SPB’s non-clinically based decisions – vital to real life patient care – are  
in actual practice very difficult to reverse.

1 to the health of prisoners.<sup>5</sup> Upon the conclusion of peer review proceedings for these  
2 individuals, the findings will mean nothing in terms of employment because (unlike hospitals  
3 and provider organizations in the free world) CDCR clinicians do not need privileges to work at  
4 CDCR. Therefore CDCR will be required to continue paying these physicians even if they  
5 permanently lose privileges, and must do so until after subsequent formal internal affairs  
6 investigations, engaging physician expert witnesses, marshaling the necessary litigation  
7 resources including attorneys and concluding the SPB hearing process.<sup>6</sup>

8 F. The Receiver's Proposed Peer Review System.

9 1. *Introduction.*

10 The solution is not complicated. First, CDCR physicians should be required to maintain  
11 privileges in order to practice medicine in California's prisons. Second, the termination of  
12 privileges and employment should be accompanied by the full panoply of due process.

13 2. *Summary of the Receiver's Proposed Peer Review System.*

14 The Receiver's proposed new peer review process consists of the following steps.

- 15 a. Following an initial review by PPEC, a physician may be summarily (temporarily)  
16 suspended if remaining at work while peer review proceeds may result in an  
17 imminent danger to the health of any prisoner/patient. (Business and Professions  
18 Code Section 809.5)
- 19 b. PPEC conducts an investigation and prepares a Request for Final Proposed Action  
20 to the Governing Body. Two PPEC members will be Union of American Physicians  
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24 <sup>5</sup> These initial suspension decisions involve twenty-nine deaths allegedly caused by substandard  
25 physician practices.

26 <sup>6</sup> CDCR reports that since April 2005, it has paid almost than \$3.1 million dollars in salaries for  
27 time not worked by physicians placed on paid administrative time off to avoid an imminent risk of  
28 harm to patients while awaiting final adjudication. *See* Exhibit 2, Declaration of Yulanda Mynhier.

1 and Dentists (“UAPD”) nominees approved by the CDCR Statewide Medical  
2 Director who is the PPEC chairperson. Only physician members of PPEC will be  
3 permitted to vote.

4 c. The Governing Body reviews the privileging action recommended by PPEC. The  
5 Receiver’s Chief Medical Officer will be the Governing Body chairperson and all  
6 other members shall be appointed by the Receiver.

7 d. Proposed Final Actions issued by the Governing Body will be a combined notice  
8 pertaining to privileges *and* termination of employment, serving to consolidate the  
9 matters into a single venue and hearing process. The notice will afford physicians a  
10 pre-deprivation opportunity to respond before the employment action takes effect.  
11 The employment action will take effect immediately thereafter, and remain in effect  
12 unless overturned in subsequent proceedings.

13 e. The physician may appeal the action and thereafter receive an evidentiary hearing. A  
14 State employed ALJ will preside over the hearing. The ALJ will be accompanied by  
15 a “judicial review committee” of three primary care physicians selected by the parties  
16 from a pool of independent physicians received from the California Medical  
17 Association Institute for Medical Quality<sup>7</sup> which will be asked to provide the names  
18 of physicians familiar with correctional medicine who will be subject to *voir dire*. A  
19 specialist will be on the committee whenever the matter concerns specialty care.

20 f. The ALJ will make rulings on questions of law, procedure and the admissibility of  
21 evidence. All findings of fact and substantive decisions shall be made by the  
22 physician “judicial review committee” by majority vote, based on a preponderance  
23 of evidence.

24 g. The “judicial review committee” will render a final decision regarding privileges *and*  
25 employment. The decision shall be based on the evidence introduced at the hearing,

26 <sup>7</sup> In the event that the California Medical Association is unwilling or unable to provide this pool  
27 of independent physicians, the Office of the Receiver and the UAPD will work together to establish  
28 an alternative method of selecting a physician pool for the “physician review committee.”

1 including logical and reasonable inferences from the evidence and testimony.

2 h. Either party may appeal a judicial review committee's decision to the five-member  
3 State Personnel Board. The Board will only consider the employment aspects of the  
4 committee's decision. Whether physicians have privileges to practice in CDCR adult  
5 institutions shall remain subject solely to decision by the physician "judicial review  
6 committee."

7 i. The Board shall either sustain the employment decision by the "judicial review  
8 committee" or reverse the decision in its entirety if not supported by substantial  
9 evidence. The Board may not modify an employment action determined appropriate  
10 by the "judicial review committee."

11 See Exhibit 3, *Plata* Professional Clinical Practices Peer Review and Disciplinary  
12 Hearing Policies and Procedures.

#### 13 IV.

### 14 THE RECEIVER'S EFFORTS TO DEVELOP THE 15 LEAST INTRUSIVE PROPOSED ORDER POSSIBLE

#### 16 A. Introduction.

17 The systemic, long standing acceptance of poor or non-existent standards regarding  
18 physician quality by the State of California has led to unacceptable preventable prisoner/patient  
19 deaths and contributed to other factors associated with an unconstitutional medical care delivery  
20 system in the CDCR. The solution, a workable peer review system with real-life consequences  
21 is at present impossible because of the SPB's resistance to change and its statutory overlay  
22 which essentially render peer review decisions moot. If the Receiver cannot terminate a CDCR  
23 physician who fails peer review based on a competency evaluation to the detriment of  
24 prisoner/patients, there is no hope for a timely, cost effective or long term remedial process to  
25 bring the medical care in California's prisons up from the present, unconstitutional level.

1 The SPB's insistence on business as usual and reliance on its statutes to countermand  
2 California policy regarding peer review also correspondingly prevents the Receiver from  
3 developing and implementing a constitutionally adequate medical care system. Adequate,  
4 enforceable peer reviews combined with adequate, enforceable discipline is desperately needed,  
5 and needed now.

6 Prior to seeking this motion the Office of the Receiver engaged in a lengthy, time  
7 consuming series of studies, meetings, and conferences to determine whether there is some other  
8 method of solving the physician quality problem, and to verify that in the event that a waiver of  
9 State law was requested, that the waiver is as narrow as possible consistent with the Receiver's  
10 objectives. Those meetings are summarized below.

11 B. Meetings With SPB.

12 In Winter 2006 John Hagar, the Receiver's Chief of Staff and Linda Buzzini, Staff  
13 Attorney for the Receiver, began meeting with and exchanging letters with SPB officials  
14 concerning this issue. On January 23, 2007, the Receiver met with the SPB Board in public  
15 session and presented his views concerning this issue. Subsequently Mr. Hagar and Ms. Buzzini  
16 held numerous and extensive discussions with SPB's Executive Officer concerning the  
17 Receiver's proposed peer review process. The Office of the Receiver also provided SPB with a  
18 draft copy of the motion. SPB did not (1) provide any substantive comments, (2) take issue with  
19 any facts set forth in this motion, or (3) provide any legal authority in opposition to this motion.

20 C. Consultation With Governor's Office

21 The Governor's Office was provided with a draft copy of this motion and provided its  
22 questions and recommendations.

23 D. Meetings With UAPD.

24 At the same time, Ms. Buzzini began (over a period of several months) a series of  
25 meetings with representatives of the UAPD to discuss how to modify the existing CDCR peer  
26 review process to make it more effective while, at the same time, preserving the due process  
27 protections deemed essential to UAPD membership. During this detail oriented and lengthy  
28

1 process, agreement was reached between UAPD and the Office of the Receiver concerning the  
2 appropriate steps and due process protections required of a peer review process which would  
3 have real life job consequences – including in some cases the loss of privileges. UAPD was also  
4 provided a draft copy of this motion. It provided 13 suggestions, all of which have been  
5 incorporated into this motion.

6 As a result, physicians employed by the CDCR will gain, under the Receiver’s proposed  
7 plan, more timely, fair and additional protection that is not provided in the current CDCR peer  
8 review process and SPB overlay system. Examples of differences between the existing peer  
9 review/SPB/investigation model and the Receiver’s proposed program include the following:

- 10 1. The existing process is management controlled (e.g., PPEC members are appointed  
11 exclusively by management). The new process proposed by the Receiver (set forth  
12 above) permits the UAPD to nominate PPEC members, subject to the approval of the  
13 CDCR Statewide Medical Director.
- 14 2. The existing process permits non-physician members of PPEC to vote regarding  
15 physician privileging actions. The Receiver’s proposed process limits voting to  
16 physician members.
- 17 3. The existing Governing Body is composed of non-physician CDCR managers  
18 whereas the Receiver’s Chief Medical Officer presides over the new Governing  
19 Body.
- 20 4. The existing process provides little ability for the subject-physician to provide  
21 information during the investigation or to the Governing Body. The proposed  
22 process corrects this problem.
- 23 5. Current peer review evidentiary hearings only result in a recommendation that is  
24 returned to the Governing Body which makes the final determination regarding the  
25 privileges. The new process provides for a final and binding decision by the  
26 physician “judicial review committee” at the conclusion of the evidentiary hearing.
- 27 6. The existing physician evidentiary hearing panel only consists of CDCR physicians.

1 The new process requires physicians be selected through such independent and  
2 qualified sources as the California Medical Association Institute for Medical Quality.

3 7. The existing process requires two evidentiary hearings – one concerning privileges  
4 and one concerning continued employment. The new process consolidates these  
5 matters into a single hearing.

6 8. The existing process relies on SPB ALJs who sit alone and make substantive clinical  
7 determinations. The new process affords the Receiver and UAPD the option of using  
8 Office of Administrative Hearings' ALJs who are experienced in presiding over  
9 Medical Board licensing hearings for physicians.

10 E. Alternative Models Re Physician Discipline.

11 As a result of these meetings, and other meetings and discussions with the state officials  
12 including SPB, and the Office of Internal Affairs, three alternative methods to improve the  
13 quality and clinical viability have been proposed by State officials.

14 1. *Improve the Existing "Two Bites of the Apple" SPB System.*

15 The SPB's initial proposal was in reality no proposal at all. Essentially SPB staff  
16 recommended that the State throw more resources at the existing, failed dual track program,  
17 hoping that untested enhancements such as "improved case presentation" before the SPB by  
18 retaining more "physician consultants" to support the internal affairs investigators assigned to  
19 physician malpractice cases would improve the abysmal timeliness and quality of a system  
20 whereby clinical misconduct is investigated, tried, and decided by non-clinicians. *See* Exhibit 4,  
21 letter from Elise Rose to Robert Sillen.

22 This proposal was rejected by almost all parties involved in the discussions (the Receiver,  
23 clinicians, and the Office of Internal Affairs). Given the realities and the long, failed record of  
24 the existing SPB system for disciplining clinical misconduct, no one seriously believes that its  
25 major flaws can be remedied by what amount to band aids (e.g., employing more competent  
26 physician consultants to work with internal affairs agents during the course of medical quality  
27 "investigations"). Furthermore, proposals to improve the existing system do nothing to correct  
28

1 the impotency of the current CDCR peer review process.

2 *2. Establishing the Requirement of Privileges for Continued CDCR Employment.*

3 Interestingly, the order the Receiver now requests - making privileges a condition of  
4 employment - was initially brought forth by SPB and the State.

5 On August 17, 2006, the SPB Chief Counsel informed the Receiver he could address  
6 substandard care by SPB adopting a requirement that makes privileges a condition of  
7 employment. *See Exhibit 4.* On August 19, 2006, counsel for the CDCR also suggested  
8 privileges be made a condition of employment. *See Exhibit 5, letter from Bruce Slavin to Robert*  
9 *Sillen.*

10 In essence, the Office of the Receiver has adopted Ms. Rose's and Mr. Slavin's proposals  
11 and also has developed (after countless hours of work and significant discussions with SPB staff  
12 and with UAPD) a single hearing process pertaining to both privileges and the termination of  
13 employment, the outcome of which is determined by an independent three-physician peer review  
14 panel subject to review upon appeal by the five-member Board based on the record developed by  
15 the peer review panel itself.

16 *3. Utilizing a Single Privileges and Employment Hearing Process But With SPB*

17 *ALJs Retaining the Authority to Overrule the Peer Review Panel Factual Findings.*

18 This final proposal has been suggested by a member of the five-member Board. In  
19 essence, the proposal calls for the same single hearing process proposed by the Receiver;  
20 however, instead of factual questions related to clinical care being determined by the physicians  
21 "judicial review committee" (an independent panel of carefully selected and qualified  
22 physicians), a non-clinical SPB ALJ will have the final say concerning the sufficiency of  
23 evidence pertaining to all factual peer review determinations. This proposal flies in the face of  
24 Federal and State peer review standards and brings the Receiver's efforts of several months back  
25 a full circle, with the same group of clinically unqualified attorneys from SPB rendering clinical  
26  
27  
28

1 determinations for which they are entirely unqualified.<sup>8</sup>

2       The proposal is unacceptable because it will not protect the life and death clinical  
3 concerns of 170,000 prisoner patients. In rejecting this proposal, however, the Receiver  
4 emphasizes the narrow scope of the waiver he proposes. The Receiver does not seek a waiver to  
5 foreclose upon review of employment actions by the five-member Board. Instead, under the  
6 program proposed by the Receiver, the five-member Board will conduct its review regarding the  
7 *employment* aspects of CDCR physician peer review cases by sitting in an appellate-type  
8 capacity where it makes its decision based on the peer review hearing record below – without  
9 any SPB administrative hearing de novo.<sup>9</sup>

10       Given the Board’s record of not holding State employees accountable, and the difficulties  
11 encountered with the Board during the long process described above, the Receiver’s decision not  
12 also to seek a waiver of review by the *five-member* SPB Board has been made with significant  
13 reservations. In order to effectuate the least intrusive order possible, however, the Receiver  
14 believes it best to monitor the SPB’s appellate review of peer review decisions, and if future SPB  
15 decisions warrant additional Federal Court oversight, the Receiver will move for additional  
16 waivers at that time.

17       As stated above, after the Receiver’s staff met and conferred with UAPD, which supports  
18 the proposed plan and the objectives it seeks to achieve. Thus, the Receiver is convinced that the  
19 proposed waiver does not eliminate or degrade physicians’ rights pertaining to privileges or  
20 continued employment. Rather, the physicians will receive speedier adjudication of their rights  
21 using the full panoply of Government Code due process protections ordinarily applied by the  
22 SPB. Indeed, practitioners will receive greater due process protections than they enjoy under the

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23  
24 <sup>8</sup> The Receiver is not adverse to opening lines of communication with SPB to allow, after the  
25 necessary training, a program whereby SPB ALJs function as peer review hearing officers with the  
26 authority to assist the judicial review panel, but without making any substantive clinical  
27 determinations.

28 <sup>9</sup> SPB’s legal authority does *not* extend to questions of privilege; therefore, concerning this issue,  
the peer review panel finding will be final.

1 current system, as set forth at page 15 of this motion.

2 The Receiver also emphasizes that the waivers requested apply only to California's  
3 prisons -- not to other agencies --and that it has been carefully and specifically formulated to  
4 protect the constitutional rights of the plaintiff class in *Plata*, the violation of which have already  
5 been proven. For example, the Receiver does not seek to set aside his authority or any  
6 appointing authority's power to take adverse action as set forth in the Government Code (*see*  
7 Government Code §§ 19590 and 19570 et seq.) nor does he intend the waiver to alter the Board's  
8 current process for reviewing non-peer review actions. Rather, the Receiver motions for a  
9 waiver of statutes only insofar as they concern actions investigated and decided through peer  
10 review.

11 **V.**

12 **ORDERS REQUESTED**

13 **A. Introduction.**

14 The orders requested below are in no way tangential to the objectives of the  
15 Receivership. To the contrary, they go to the heart of one of the Receiver's highest priorities, to  
16 stop an "unacceptably high rate of patient deaths and morbidity" *Findings of Fact* at 8. Without  
17 the waivers sought below, the Receiver will be unable to correct the serious shortfalls of  
18 physician quality which plague California's prisons. Without question, the current SPB process,  
19 a process that SPB itself could have and should have modified years earlier, is clearly preventing  
20 the Receiver from dealing effectively, in a time sensitive manner, with physician competency  
21 problems. If the requested waivers are not granted, the Receiver will be unable to implement an  
22 effective process for clinically determining competency, he will be unable to implement a peer  
23 review process that is enforceable, and he will be unable to begin to establish the professional  
24 clinical environment within California's prisons necessary to attract the number and quality of  
25 physicians that will be necessary to achieve constitutional standards of medical care.

1           B. Orders Requested.

2           Based on all of the above, the Receiver requests that the Court:

3           1. Order the Receiver to commence the implementation of a single hearing privileges  
4 and employment physician peer review program set forth in Exhibit 3 no later than  
5 May 15, 2007.

6           2. Issue an Order establishing staff privileges as defined by California Business and  
7 Professions Code § 805(a)(4) as a condition of employment for physicians providing clinical  
8 care in the CDCR.

9           3. Issue an Order waiving, but only insofar as they foreclose on consolidated evidentiary  
10 hearings regarding privileges and employment through peer review proceedings<sup>10</sup> as outlined in  
11 Exhibit 3, the following sections of California's Government Code:

12           a. Government Code § 19574.2 (designates the SPB Hearing Office as the location to  
13 file petitions to compel discovery and states it shall be an SPB ALJ who makes a  
14 decision).

15           b. Government Code §§ 19574.5 and 19592.2 (limits leaves during investigations  
16 regarding misconduct to 15 days).<sup>11</sup>

17           c. Government Code § 19575 (renders adverse actions final if not appealed to SPB  
18 within thirty calendar days of their effective date).

19           d. Government Code § 19576 (authorizes SPB to conduct investigation and hold  
20 evidentiary hearings).

21           e. Government Code § 19578 (authorizes the Board or its representative to hold  
22 evidentiary hearings).

23 \_\_\_\_\_  
24 <sup>10</sup> Notwithstanding a waiver of these statutes an ALJ shall administer pre-hearing and hearing  
25 processes under due process terms and conditions ordinarily applicable to SPB disciplinary action  
26 hearings to ensure constitutionally adequate due process.

26 <sup>11</sup> The Receiver seeks waiver of this section because it conflicts with Business and Professions  
27 Code § 809.5 requiring summary suspensions pending peer review when failure to act may result  
28 in an imminent danger to the health of any individuals.

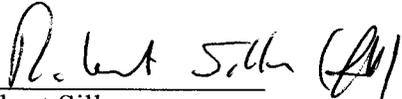
- 1 f. Government Code § 19581 (limits the issuance of subpoenas to the board or its  
2 authorized representative).
- 3 g. Government Code § 19582 (authorizes the board or its authorized representative to  
4 conduct evidentiary hearings, dismiss charges, prepare proposed decisions; adopt  
5 proposed decisions and take alternative action).
- 6 h. Government Code § 19583 (provides that disciplinary action as taken shall stand  
7 unless modified or revoked by the Board).
- 8 i. Government Code § 19585 (authorizes an appeal to SPB after service of a notice of  
9 non-cause termination).
- 10 j. Government Code § 19587 (authorizes SPB to set matters for rehearing before its  
11 representative in response to petitions for rehearing).
- 12 k. Government Code § 19590 (authorizes SPB to investigate disciplinary actions and  
13 conduct evidentiary hearings).
- 14 l. California Code of Regulations, Title 2, § 51.4 (stating every appeal hearing,  
15 including adverse actions hearings, shall be open to the public).<sup>12</sup>
- 16

17 Dated: April 25, 2007

18

19 Respectfully submitted:

20

21   
22 \_\_\_\_\_  
23 Robert Sillen  
24 Receiver

25

26

27 <sup>12</sup> The Receiver seeks waiver of this section because Evidence Code § 1154 protects proceedings  
28 and records of peer review bodies from discovery.



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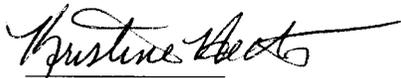
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18 Sacramento, California 95814

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Rosen, Bien & Galvan  
20 155 Montgomery Street, 8<sup>th</sup> Floor  
San Francisco, CA 94104  
21

22 I declare under penalty of perjury under the laws of the State of California that the foregoing  
23 is true and correct. Executed on April 25, 2007 at San Francisco, California.

24   
25 Kristina Hector

# **EXHIBIT 1**

1  
2  
3 **IN THE UNITED STATES DISTRICT COURT**  
4 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

5 MARCIANO PLATA , et al., )

6 Plaintiffs )

7 )  
8 v. )

9 )  
10 ARNOLD SCHWARZENEGGER, )  
11 et al., )

12 Defendants. )  
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NO. C01-1351-T.E.H.

**DECLARATION OF ANNETTE LAMBERT  
IN SUPPORT OF WAIVER OF STATE LAW  
RE PHYSICIAN CLINICAL COMPETENCY  
DETERMINATIONS**

1 I, ANNETTE LAMBERT, declare that if called I could and would competently testify as  
2 follows:

3 1. I am a Health Program Specialist I, Division of Correctional Health Care Services,  
4 California Department of Corrections and Rehabilitation ("CDCR"). Since June 2005 I have been  
5 responsible for coordinating the Professional Practices Executive Committee ("PPEC") and  
6 Governing Body activities at the Division of Correctional Health Care Services.

7 2. In its twenty months of existence, CDCR's peer review body, known as PPEC, has met  
8 approximately seventy-seven times and reviewed over 300 allegations of clinical misconduct and  
9 neglect. In fiscal year 2005/06 PPEC initiated peer review investigations approximately 42% of the  
10 time. It imposed provider monitoring about 7% of the time, and it issued credentialing file alerts 7%  
11 of the time. As of January 26, 2007, PPEC had twenty-eight physicians pending review.

12 I declare under penalty of perjury that the foregoing is true and correct to the best of my  
13 knowledge. Executed this day of April 2007, in Sacramento, California.

14  
15   
16 Annette Lambert, PPEC Coordinator  
17 CDCR Division of Correctional Health Care Services  
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# EXHIBIT 2

1  
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3 **IN THE UNITED STATES DISTRICT COURT**  
4 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

5 MARCIANO PLATA , et al., )

6 Plaintiffs )

7 )  
8 v. )

9 )  
10 ARNOLD SCHWARZENEGGER, )  
11 et al., )

12 Defendants. )  
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NO. C01-1351-T.E.H.

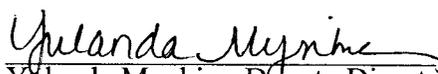
**DECLARATION OF YULANDA  
MYNHIER IN SUPPORT OF WAIVER  
OF STATE LAW RE PHYSICIAN CLINICAL  
COMPETENCY DETERMINATIONS**

1 I, YULANDA MYNHIER, declare that if called I could and would competently testify as  
2 follows:

3 1. I am a Correctional Administrator, acting in the capacity of Deputy Director, Health Care  
4 Administrative Operations Branch, California Department of Corrections and Rehabilitation  
5 (“CDCR”). Since July 2006, I have been responsible for providing fiscal oversight for Health Care  
6 Services in the field and served as the Division’s liaison with the Department’s Budget Management  
7 Branch.

8 2. Since April 2005, CDCR has paid almost \$3.1 million in salaries for time not worked by  
9 physicians placed on paid administrative time off to avoid an imminent risk of harm to patients while  
10 awaiting final adjudication of cases necessary before terminations could take effect.

11 I declare under penalty of perjury that the foregoing is true and correct to the best of my  
12 knowledge. Executed this 12<sup>th</sup> day of April 2007, in Sacramento, California.

13  
14   
15 Yulanda Mynhier, Deputy Director (A)  
16 Health Care Administrative Operations Branch  
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# EXHIBIT 3

<b>CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION</b> Plata Personnel Services and Staff Development	TOPIC: <b>PLATA PROFESSIONAL CLINICAL PRACTICES PEER REVIEW and DISCIPLINARY HEARING POLICIES AND PROCEDURES OVERVIEW</b>
	CONTROL NUMBER:
	ADOPTION DATE:

**Application**

These policies and procedures only apply to physicians in the California Department of Corrections and Rehabilitation (CDCR) adult institutions, and the regional and headquarters offices of the Division of Correctional Health Care Services (hereafter collectively referred to as "DCHCS"). For purposes of this policy, the term "physician" does not include psychiatrists.

**Overview**

These policies and procedures shall be utilized to ensure a standardized mechanism to determine (1) when clinical privileges should be suspended, revoked or restricted; and (2) when remedial measures in lieu of or in addition to those impacting privileges are appropriate.

This process only applies to instances where clinical practices must be assessed to determine if they fall below appropriate standards of medical care, and where clinical misconduct may have occurred. It does not pertain to routine peer reviews.

This process does not substitute for supervisors' ordinary duty to monitor, train, evaluate and respond to all performance issues. Rather, it provides a forum that all clinical competency concerns must immediately be referred to for evaluation.

Performance issues that do not pertain to clinical competency will not be reviewed through this process. Any reasonable doubt should be resolved in favor of referring matters for an intake evaluation through this process.

**Purpose**

The purpose of this procedure is to provide appropriate, objective, and systematic due process for practitioners consistent with Article VII of the California Constitution, Title 22 of the California Code of Regulations (CCR 22), the California Business and Professions Code (BPC), the Federal Health Care Quality Improvement Act of 1986 (42 USCA § 11101), collective bargaining agreements, applicable law governing suspension or restriction of privileges, reporting to the medical board, and the continuation of employment.

This process also provides for a single evidentiary hearing, the outcome of which simultaneously and correspondingly impacts both privileges and State employment.

The outcome of the evidentiary hearing shall be determined by a judicial review committee composed of independent and impartial physicians. Their decision is final and binding, though either party may appeal the *employment* aspect of the committee's decision to the five (5) member State Personnel Board for review.

## Objectives

This procedure will ensure that inmate-patients receive health care services from competent and qualified practitioners. It is also for purposes of:

1. Improving the quality of health care.
2. Reducing morbidity and mortality.
3. Providing a mechanism by which practitioners are systematically evaluated for professional competency and clinical privileges.
4. Preserving standards of medical practice and ensuring appropriate actions are taken to address practitioner competency through peer review, including remedial measures to rectify clinical practice deficiencies that PPEC determines do not rise to the level of substandard care requiring action pertaining to privileges.
5. Maintaining the confidentiality of peer review proceedings and records.

## Confidentiality

It is essential that the proceedings and the records of the peer review body be maintained as confidential and not be available to unauthorized persons or organizations.

**All persons participating in the peer review processes discussed in this policy shall adhere to these provisions regarding confidentiality.**

## Discovery and Testimony

California Code of Evidence Section 1157(a) generally provides that neither the proceedings nor the records of the peer review body shall be subject to discovery. Section 1157(b) further provides that no person in attendance at peer review body meetings shall be required to testify as to what transpired at the meeting. These prohibitions do not apply to statements made by the party to the action or proceedings, or to any person requesting hospital staff privileges. (Evid. Code § 1157(c).)

The records of the medical staff and its committees responsible for the evaluation and improvement of the quality of inmate-patient care shall be maintained as confidential where required by Evidence Code section 1157.

Access to such records shall be limited to duly appointed officers and committees of the medical staff for the sole purpose of discharging medical staff responsibilities and subject to the requirement of confidentiality where required by Evidence Code section 1157.

Information that is required to be disclosed as part of the Professional Clinical Practice Peer Review and Disciplinary Hearing Process (so that the Professional Practice Executive Committee, the Governing Body and their representatives, and the judicial review committee may discharge their duties) shall be maintained as confidential, except that it may be disclosed to the CDCR Statewide Medical Director, the federal court *Plata* Receiver (and his designees) for use in discharging the Receiver's duties and obligations, and as determined necessary during investigative processes prior to adverse action, rejections during probation and any applicable processes set forth by this policy, law or court order.

**Scope and Extent  
of SPB Review**

The parties may appeal peer review judicial review committee decisions to the five-member State Personnel Board but only insofar as it pertains to employment. Whether privileges to practice in CDCR adult institutions are revoked or restricted remains separately subject to the outcome of the Professional Clinical Practice Peer Review and Disciplinary Hearing Process, as ultimately determined by the judicial review committee.

**Public Record  
Upon Appeal to  
SPB**

Matters appealed to the State Personnel Board are typically a matter of public record. The record on appeal includes all materials introduced at the peer review hearing, a transcript of the hearing, and the written decision by triers of fact.

Motions to seal the record or otherwise protect the record from public disclosure shall be determined by the Board for reasons which include protecting them against discovery as set forth in Evidence Code section 1157. Note, however that section 1157(c) the prohibitions relating to discovery and testimony do not, however, apply to statements made by persons in attendance who are party to the action.

<b>CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION</b> Plata Personnel Services and Staff Development	TOPIC: <p style="text-align: center;"><b>REFERRAL AND INTAKE</b></p>
	CONTROL NUMBER:
	ADOPTION DATE:

**PPEC and  
Governing Body**

Professional Practice Executive Committee (PPEC) and Governing Body shall act exclusively in the interest of maintaining and enhancing quality patient care. (Business and Professions Code section 809.05(d).)

**Matters That Must  
Be Referred**

Suspected substandard clinical practices and clinical misconduct shall be immediately referred to the PPEC Coordinator for peer review investigation.

This includes acts, demeanor or conduct reasonably likely to be detrimental to patient safety or the delivery of medical care. Examples include but are not limited to:

- **Disruptive Conduct:** Failure to work in harmony with others or evidence of disruptive behavior or conduct of such serious nature as to be detrimental to inmate-patient care.
- **Unethical Conduct:** Unethical behavior that is detrimental to inmate-patient care.
- **Failure to Practice Within Known Competencies:** Electing to engage in care practices requiring skills or knowledge beyond those possessed by the practitioner in willful disregard of the limits of the practitioner's competencies.
- **Failure to Notify:** Failing to notify appropriate authorities (e.g., management and PPEC) that substandard care is being provided by an individual, or that circumstances exist in particular instances that may result in preventing access to care or the delivery of appropriate levels of care by any individual.

**Referral Sources**

- **Failure to Perform Required Standards of Care:** Failure to deliver care that is consistent with the degree of care, skill and learning expected of a reasonable and prudent practitioner acting in the same or similar circumstances (e.g. accuracy of diagnosis, appropriateness of therapy, timely and appropriate consultation, resource management and length of stay, timely transfer as needed for severity and acuity of illness, or medical decision making.)

Any person may provide information to PPEC about the conduct, performance or competence of physicians, but concerns pertaining to substandard clinical practices and clinical misconduct should ordinarily be submitted to PPEC through the following avenues.

- **Management:** Health Care Managers, Regional Medical Directors, the Statewide Medical Director, Regional Administrators, and any other executive or manager.
- **Death Reviews:** Death Review Committee, the Suicide Prevention and Response Focus Improvement Team, and any death reviewer authorized by the PPEC to perform death reviews.
- **Physician Supervisors:** Chief Medical Officers and Chief Physician and Surgeons.
- **Other Clinical Practice Reviews:** the Quality Improvement in Correctional Medicine (QICM) Program, 10- and 60-Day Clinical Evaluations, QMAT Medical Officers, and local organized peer review.
- **Federal Court Receiver** and his designees.
- **Professional Practices Executive Committee**

**Initiation by  
Governing Body**

If PPEC fails to investigate or take disciplinary action contrary to the weight of the evidence, the Governing Body may direct PPEC to initiate an investigation or disciplinary action, after consultation with PPEC. No such action shall be taken in an unreasonable manner. (Business and Professions Code section 809.05(b))

**Written Referrals**

A referral for PPEC review must be in writing and supported by reference to specific activities or conduct alleged. If PPEC initiates the review it shall make an appropriate recording of the reasons.

A "Referral Form" is available and its use is encouraged but not mandatory. Referrals should include:

1. A concise statement about the incident, allegation or reasonable suspicion pertaining to the practitioner.
2. Any evidence supporting the suspicion of substandard clinical practice(s) to the extent that the evidence is known and/or presently available.

3. All relevant documentation insofar as it is known and available to the individual(s) making the referral.

**Expediting Referrals**

When a referral is being made for conduct that appears to require immediate action to protect life or well-being or to reduce an imminent likelihood of impairment to life, health or safety, the PPEC chairperson or designee (and PPEC Coordinator) shall be immediately contacted by telephone, and the written referral shall be submitted by facsimile.

**Where to Submit Referrals**

Referrals are sent to:

PPEC Coordinator  
Division of Correctional Health Care Services  
California Department of Corrections and Rehabilitation  
P.O. Box 942883  
Sacramento, CA 94283-001

The PPEC Coordinator shall make all reasonable efforts to provide the Intake Screening Physician with relevant information within three (3) business days of receiving the referral unless circumstances warrant expedited processing.

**Intake Screening Physician**

The Intake Screening Physician shall be a physician member of PPEC, as determined by the Statewide Medical Officer.

**Timing of Intake Screening**

The Intake Screening Physician will review all referrals within five (5) business days after receipt from the PPEC coordinator or sooner as warranted by circumstances surrounding the referral.

**Criteria Applied by Intake Screening Physician & Potential Need for Summary Suspension**

The Intake Screening Physician has two roles:

1. The Intake Screening Physician shall immediately call the PPEC Chairperson (i.e., Statewide Medical Officer or designee) when it appears summary suspension *must* be imposed because "the failure to take that action may result in an imminent danger to the health of any individual." (Business and Professions Code § 809.5(a).)
2. The Intake Screening Physician is to prevent matters that do not bear upon the quality of medical care from being submitted to PPEC through this process. All doubts shall be resolved by the Intake Screening Physician in favor of advancing referral forward in the process.

Intake screening is neither for purposes of determining the adequacy of information received nor for passing judgment about suspected substandard clinical practices.

**Result of Intake Screening**

If the Intake Screening Physician determines the matter is not such that it may bear on the quality of medical care s/he shall make a record of his/her decision and provide the record to PPEC.

If the Intake Screening Physician determines the referral is consistent with the reasons for referral as set forth above, s/he shall forward the referral to PPEC.

<b>CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION</b> Plata Personnel Services and Staff Development	TOPIC: <b>DANGER DETERMINATIONS, SUMMARY SUSPENSIONS and INFORMAL APPEALS OF SUMMARY SUSPENSIONS</b>
	CONTROL NUMBER:
	ADOPTION DATE:

**Purpose of Danger Determinations** Danger determinations are to decide whether – based on the duties assigned by management -- failure to take immediate action may result in an imminent danger to the health of any individual.

**Person/Entity Making Danger** PPEC (or a member of PPEC) shall make danger determinations.

**Danger Determination Requests** Medical staff members shall immediately request that PPEC make a danger determination where the failure to take that action may result in an imminent danger to the health of any individual. (Business and Professions Code section 809.5(a).)

All medical managers and supervisors (e.g., Health Care Managers, Chief Medical Officers, Regional Medical Officers) shall immediately request that PPEC make a danger determination where the failure to take that action may result in an imminent danger to the health of any individual. **While waiting for PPEC to act, medical managers and supervisors must temporarily redirect practitioners to perform duties that prevent the prospect of imminent danger.** Practitioners may only be placed on paid administrative time off (ATO) with the approval of the Statewide Medical Officer under limited circumstances set forth in the Receiver's February 7, 2007, ATO policy memorandum.

**Timing of PPEC Danger Determination** Except in emergency situations requiring action sooner, PPEC (or a member of PPEC) shall generally make a danger determination within 24 hours after receiving a case referral, and again at any time during the peer review investigation and hearing process that it determines prudent.

**Danger Determinations by Governing Body When PPEC Unavailable** When members of PPEC (and their designees) are unavailable to summarily restrict or suspend privileges, the Governing Body (or designee) may immediately suspend privileges if a failure to suspend privileges is likely to result in an imminent danger to the health of any person, provided that before the suspension, reasonable attempts to contact said individuals is made.

Such suspensions are subject to ratification by PPEC. If ratification does not occur within two (2) working days, excluding weekends and holidays, the summary suspension shall terminate automatically. Under such circumstances the physician shall not, however, be assigned clinical duties until approved by the Statewide Medical Director (or designee). (Business and Professions Code section 809.5)

**Standard For  
Danger  
Determinations**

PPEC members making danger determinations shall immediately suspend or restrict clinical privileges (or ratify the same by the Governing Body) whenever -- based on duties assigned by management -- the failure to summarily suspend or restrict clinical privileges may result in an imminent danger to the health of any patient, prospective patient or other person. (Business and Professions Code section 809.5.)

When PPEC determines -- based on the duties assigned by management -- there is no danger, the practitioner shall (1) receive a notice terminating any prior initial action that may be in effect; and, (2) receive a Notice of Pending Peer Review Investigation and remain at work while PPEC proceeds with its review and investigation.

**Notice of PPEC  
Action**

When PPEC determines there is a danger, the practitioner shall be notified in writing that (1) his/her privileges have been restricted; or (2) his/her clinical privileges have been summarily suspended.

**Service of Notice  
of PPEC Action re  
Summary  
Suspension**

The notification shall be served within three (3) business days of PPEC's decision to summarily suspend or restrict privileges.

**Content of Notices  
of PPEC Action**

The Notice of PPEC Action pertaining to summary suspensions or privilege restrictions shall be personally served or served by overnight mail to the last known address of the practitioner, return receipt requested. Said notice shall include:

1. A statement of facts demonstrating that the suspension was necessary because failure to suspend or restrict the practitioner's privileges summarily could reasonably result in an imminent danger to the health of an individual. The statement of facts provided in this Notice of PPEC Action shall also include a summary of one or more particular incidents giving rise to the assessment of imminent danger;

2. A description of the appeal procedure to challenge the summary suspension and paid administrative time off, and instructions about how the appeal must be filed;
3. Notification of the practitioner's right to a representative at the informal appeal hearing;
4. Copies of the documents PPEC used for purposes of making its decision to summarily suspend or restrict privileges.
5. Notification to the practitioner about how to make an appointment to examine additional relevant documents that are in the possession or under the control of CDCR within five (5) calendar days from service of the Notice of PPEC Action.
6. A clear, bolded notification that any appeal from the summary suspension or restriction must be made within five (5) business days of service of the Notice of PPEC Action.
7. A clear, bolded notification that pursuant to the California Business and Professions Code section 805, summary suspensions lasting more than 14 days must be reported to the Medical Board.
8. Notice that the informal hearing will be recorded, and that the practitioner may make his/her own recording, of the informal hearing if an appeal is filed.

**Health Care  
Manager  
Notification**

A copy of the Notice of PPEC Action shall also be provided to the practitioner's Health Care Manager who shall be encouraged to contact the practitioner in person or by telephone to ensure that the practitioner received the notice.

**Form of Appeal**

The practitioner may appeal a summary suspension or restriction by informing the PPEC Coordinator (by telephone, electronic mail, or in person) of the appeal.

**Scheduling of  
Informal Hearing**

Within two (2) business days of receiving a timely appeal regarding a restriction or summary suspension, the PPEC Coordinator shall schedule an informal appeal hearing on the matter.

<b>Date of Informal Hearing</b>	The informal hearing shall take place no later than ten (10) business days after the effective date of the restriction or summary suspension.
<b>Consequences of Failing to Timely Appeal</b>	Failing to appeal, and failing to file a timely appeal, shall result in the summary suspension continuing; a notice of summary suspension to the Medical Board; and, the practitioner temporarily remaining on ATO pending investigation by PPEC.
<b>No Prejudice</b>	Failing to appeal shall not be deemed an admission of the charges leading to summary suspension and shall not prejudice the practitioner's right to participate in the peer review investigation pertaining to the same matter or the practitioner's right to appeal any Final Proposed Action of the Governing Body.
<b>Purpose of Informal Hearing</b>	The informal hearing is to provide the practitioner with an opportunity to respond to the charges set forth in the notice.
<b>Informal PPEC Hearing Officer</b>	A physician-member of PPEC shall conduct the informal hearing upon appeal of privilege restrictions or suspensions, and at least one other PPEC member shall be present.
<b>During the Hearing</b>	<p>The practitioner may be accompanied by a representative.</p> <p>The informal hearing may be recorded by the practitioner and/or PPEC representative at their discretion.</p> <p>The suspended physician may make a statement concerning the issues under investigation, on such terms and conditions as PPEC may impose.</p> <p>No witness will present evidence and no witness testimony will be taken.</p> <p>The practitioner may provide the PPEC informal hearing officer with any relevant documents in his/her possession that s/he chooses to present.</p>
<b>Hearing Decisions</b>	A written informal hearing decision shall be rendered no more than 14 calendar days after the effective date of the summary suspension.

**Appeal Granted** If the appeal is granted and the summary suspension reversed, the practitioner shall have his/her privileges reinstated and shall remain at work during the course of the peer review process, provided no additional information is discovered that warrants a subsequent danger determination and the suspension of privileges.

**Appeal Denied** If the appeal is denied the summary suspension shall continue in effect and the practitioner shall remain on paid administrative leave during the peer review investigation process, unless the summary suspension is later terminated or modified by PPEC.

**Report to Medical Board** Pursuant to California Business and Professions Code section 805, a report shall be filed with the California Medical Board within 15 calendar days of any summary suspension of staff privileges that remains in effect for a period of more than 14 days.

**Automatic Suspension or Limitation** In the following instances, a member's privileges may be suspended or limited as described and appropriate action taken will be taken with regard to employment.

Physicians shall immediately notify the PPEC Coordinator of any known adverse action pending against his/her license or DEA certificate.

A hearing, if requested shall be limited to the question of whether the grounds for automatic suspension as set forth below have occurred.

1. **Revocation or suspension of license or credentials:** Whenever a practitioner's license or other legal credential authorizing practice in California is revoked or suspended, clinical privileges shall be automatically revoked as of the date such action becomes effective.
2. **Restriction:** Whenever a practitioner's license or other legal credential authorizing practice in California is limited or restricted by the applicable licensing or certifying authority, any clinical privileges which the practitioner has been granted which are within the scope of said limitation or restriction shall be automatically limited or restricted in a similar manner, as of the date such action becomes effective and throughout its term.

3. **Probation:** Whenever a practitioner is placed on probation by the applicable licensing or certifying authority, clinical privileges shall automatically become subject to the same terms and conditions of the probations as of the date such action becomes effective and throughout its term.
4. **DEA Certificate:** Whenever a practitioner's DEA certificate is revoked, limited or suspended, the member shall automatically and correspondingly be divested of the right to prescribe medications covered by the certificate, as of the date such action becomes effective and throughout its term.

<b>CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION</b> Plata Personnel Services and Staff Development	TOPIC: <b>PPEC, PEER REVIEW INVESTIGATIONS &amp; RECOMMENDATIONS</b>
	CONTROL NUMBER:
	ADOPTION DATE:

**Purpose of PPEC Investigations** Peer review, fairly conducted, is essential to preserving the highest standards of medical practice. Peer review which is not conducted fairly results in harm both to patients and to medical practitioners. (Business and Professions Code section 809(a)(3)(4).)

**Performed by Licentiates** Professional Practice Executive Committee (PPEC) reviews, investigations and determinations shall be performed by licentiates.

**PPEC Members** PPEC shall be comprised of up to ten (10) members. Two of these members shall be physician nominees of the Union of American Physicians and Dentists (UAPD) who have been approved by the CDCR Statewide Medical Director (or designee) who shall be the PPEC chairperson.

PPEC reviews, PPEC investigations and PPEC determinations under this policy shall only be performed by physician members of PPEC (or physician designees), though other disciplines may be present and/or consulted.

**Conflicts of Interest** No PPEC member or alternate shall participate in any decision under the breach of professional clinical practice peer review process if s/he has a personal conflict of interest. A personal conflict is defined as a professional, financial or other obligation or interest that is likely to limit the member's ability to participate impartially in PPEC decision-making. All potential and actual conflicts of interest shall be disclosed by the member or alternate prior to participating in decision-making. PPEC members and the practitioner under review or investigation may raise potential conflicts of interest concerning other PPEC members to the PPEC chairperson who shall decide the matter.

**Meetings** PPEC shall meet at least twice each month unless there are no matters pending before it that require action.

The PPEC Coordinator shall endeavor to provide at least three (3) business days advance notice of regularly scheduled meetings by telephone, facsimile, email or regular mail.

<b>Emergency meetings</b>	Emergency meetings may be held as necessary, and reasonable efforts to contact all PPEC members shall be undertaken.
<b>Means of Participating</b>	Appearances and participation by telephone shall be permissible for both emergency and regularly scheduled meetings.
<b>Designees</b>	PPEC members may select standing alternates to act as their proxy at both regularly scheduled and emergency meetings, subject to the consent of the PPEC chairperson.
<b>Voting</b>	PPEC decisions concerning physicians shall be by majority vote of its physician membership.
<b>Quorum</b>	<p>For purposes of rendering decisions concerning recommendations for Proposed Final Actions, a quorum shall be defined as at least 50% of all PPEC physician members.</p> <p>The CDCR Statewide Medical Officer may permit alternate members to vote, provided they have been provided the ability to view all documents, exhibits and other materials relied upon by standing members of PPEC.</p>
<b>Notice to Physician of Impending Peer Review</b>	<p>Within five (5) business days of PPEC's decision to initiate a peer review investigation, the PPEC Coordinator will notify the practitioner by sending a "Notice of Pending Peer Review Investigation" to his or her last known home address, return receipt requested.</p> <p>Copies of documents reviewed by PPEC that triggered the initiation of investigation will be included with the notification.</p> <p>An informational copy of the notice will be sent to the practitioner's Health Care Manager.</p>
<b>PPEC Assignments to Conduct Peer Review Investigations</b>	<p>PPEC may conduct investigations of the practitioners' conduct or practice or may delegate the investigation.</p> <p>The PPEC shall designate authorized peer reviewers from sources including but not limited to:</p> <ul style="list-style-type: none"> <li>• QMAT Physicians</li> <li>• Physicians affiliated with the University of California</li> <li>• Consulting physicians</li> </ul>

When designating peer reviewer investigators, PPEC will take into consideration recent clinical practice and knowledge of the peer review process, and experience with medical care in correctional settings.

**Sources of Information**

The peer review investigations may consist of, but are not limited to the following:

- An examination of documents
- An investigation of the event in question.
- A pattern of practice review of the physician's patient charts to assess overall quality of clinical care.
- Interviews with staff possessing knowledge about the physician's clinical practices.
- Interviewing the subject practitioner

**Interviewing Subject Practitioner**

The subject practitioner shall be offered an opportunity to provide a response to the allegations to the investigator through a scheduled interview.

The practitioner may end the interview at any time.

If interviewed, the practitioner may be accompanied by a representative of his/her own choosing who shall not disrupt or interfere with the interview.

**Contents of Peer Review Investigation Reports**

The meeting may be recorded by both the interviewer and/or practitioner.

Peer review investigation reports shall contain the reviewer's findings, conclusions and recommendations.

Findings based on medical records and other written material or tangible items should be cross-referenced.

Clear explanations should be given as to why a clinical practice variation exists or does not exist.

Peer reviewers must analyze all reported incidents or cases for the following factors, if relevant:

- Clinical management
- Timeliness of medical interventions
- Adherence to the Department's critical pathways and/or other established guidelines or medically appropriate care and evaluation of any variations
- Medical record documentation
- Follow-up case management
- Professional conduct
- Patterns of practice
- Skills, knowledge, training and experience
- Any impediments (e.g., inability to get test results back, lack of access to patient) to the delivery of appropriate types and levels of care
- Possible impairment of the practitioner
- Such other factors as requested by the PPEC or which appear relevant to the peer review investigator.

**Timelines for Completing Investigation Report**

The peer reviewer must generally complete the peer review investigation and issue a report within ten (10) business days of being assigned to investigate the matter, unless an extension of time is granted by PPEC.

**Distribution of Investigation Report**

A copy of investigation report shall be sent to the PPEC Coordinator for distribution to PPEC members and service on the practitioner at his/her last known home address by overnight mail, return receipt requested.

**Practitioner Right to File Rebuttal to Charges**

Practitioner will have ten (10) calendar days to submit a written rebuttal regarding the investigation report to PPEC following service of the investigation report.

**Scheduling PPEC Meeting**

The PPEC Coordinator will schedule a review of the peer review investigation report at the next PPEC meeting after the practitioner's time to rebut has elapsed.

**Practitioner Statement**

PPEC may permit the practitioner to provide a statement concerning the issue(s) under investigation on such terms and conditions as PPEC may impose.

**PPEC Actions**

PPEC may take any of the following actions in response to the peer investigation report:

1. Request additional information by a specified date
2. Recommend remedial action to the Governing Body, including but not limited to: (a) education; (b) proctoring; (c) performance monitoring; and, (e) referral for physical or mental evaluation and/or treatment.
3. Recommend modification or restriction of clinical privileges, including but not limited to restricting privileges to prescribe particular medications and/or to perform particular procedures;
4. Issuing letters of admonition, censure, reprimand or warning, although nothing herein shall be deemed to preclude medical managers from issuing informal written or oral warnings outside of the mechanism for corrective action, nor shall it preclude the Receiver or appointing authority from taking adverse action.
5. Recommend that no action against the practitioner be taken.
6. Recommend clinical privileges be restricted
7. Recommend privileges be suspended
8. Recommend privileges be revoked.

**Standard For Suspending or Revoking Privileges**

Privileges shall be revoked and the physician shall be terminated if his/her conduct has fallen below the standard of care.

**A practitioner's conduct falls below the required standard of care when the practitioner has failed to deliver care that is consistent with the degree of care, skill and learning expected of a reasonable and prudent practitioner acting in the same or similar circumstances.**

**PPEC Request for  
Proposed Final  
Action by  
Governing Body**

Upon voting to conclude a peer review investigation, PPEC will prepare a chronology of the major events in the peer review process; gather and maintain copies of all supporting documentation; and, retain a copy of its written recommendation and its Proposed Final Action submitted to the Governing Body.

Upon receipt from the PPEC Coordinator, the Governing Body Coordinator will schedule the Request for Proposed Final Action for the next Governing Body Meeting.

<b>CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION</b> Plata Personnel Services and Staff Development	TOPIC: <p style="text-align: center;"><b>GOVERNING BODY</b></p>
	CONTROL NUMBER:
	ADOPTION DATE:

**Responsibility**      The Governing Body shall act exclusively in the interest of maintaining and enhancing quality patient care.

**Weight Given to PPEC**      In all peer review matters the Governing Body shall give great weight to the actions of PPEC and shall not act in an arbitrary or capricious manner.

**Composition of Governing Body**      The Governing Body shall consist of the Receiver’s Chief Medical Officer and other members appointed by the Receiver.

**Meetings**      The Governing Body shall meet monthly to consider PPEC recommendations regarding Proposed Final Actions. The Receiver’s Chief Medical Officer or designee shall chair the meetings.

**Directing PPEC to Act**      In those instances where PPEC’s failure to investigate or initiate disciplinary action is contrary to the weight of the evidence, the Governing Body has the authority to direct PPEC to initiate an investigation or recommend disciplinary action, after consultation with PPEC. No such action shall be taken in an unreasonable manner. (Business and Professions Code section 809.05(c).)

**When PPEC Fails to Act**      In the event PPEC 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 only be taken after written notice to PPEC. (Business and Professions Code section 809.05(d).)

**Governing Body Review of PPEC Recommendations**      The Governing Body shall act upon PPEC’s recommendations regarding a Proposed Final Action.

**Actions Available to Governing Body**      The Governing Body may:

1. Accept the factual findings and recommendations of PPEC;
2. Accept the factual findings of PPEC but reject the inferences drawn from these factual findings and determine that a different final proposed action than that recommended is warranted; or,

3. Remand the matter to PPEC for additional investigation or deliberation. Under such circumstances PPEC shall be given a date by which the Governing Body expects the matter to be returned to it.

**Notice of Final  
Proposed Action**

Once the Governing Body decides a Proposed Final Action it must serve the practitioner within five (5) business days regarding the decision.

The Notice of Proposed Final Action is a combined notice pertaining to privileges and continued employment.

The effective date of the Proposed Final Action insofar as it pertains to *employment* shall be no fewer than five (5) days after service of the Notice of Proposed Final Action.

The Notice of Proposed Final Action shall be substantially in the following form:

1. The nature of the Final Proposed Action (e.g., privileges revoked and employment terminated).
2. The consequences of the action with regard to privileges, employment, and reporting to the Medical Board and/or to the National Practitioner Data Bank, as required or appropriate.
3. The effective date of the action insofar as it pertains to employment which shall be no fewer than five (5) days after service of the Notice of Proposed Final Action)
4. The reasons for action, including the acts and/or omissions with which the physician is charged.
5. A copy of all material relied upon by the Governing Body in making the decision
6. Notice of the right to respond and request a *Skelly* hearing before the effective date of the action where representation is permitted.
7. Instructions regarding when and how to appeal the Governing Body decision.

8. Notification that failing to appeal the Governing Body decision will result in the action taking effect and corresponding notification to the Medical Board.

**Filing Copy of Proposed Final Action**

A copy of the Notice of Final Proposed Action served on the practitioner shall be filed with the State Personnel Board, when it pertains to continued employment.

**Skelly Officer**

The *Skelly* Officer shall be selected by the Governing Body when the Notice of Final Proposed Action also impacts employment. The *Skelly* officer shall be a licensed physician.

**Skelly Hearing**

A *Skelly* hearing, if requested in a timely manner, shall be held before the effective date of the action.

**Governing Body Rescinds Action**

If, after considering the *Skelly* Officer's recommendation the Governing Body rescinds the Proposed Final Action, any summary suspension in effect shall be immediately terminated, a notice will be sent to the Medical Board, and the peer review process shall end.

**Proposed Final Action Takes Effect**

After considering the *Skelly* Officer's recommendation the Governing Body may affirm the action as noticed, or modify the action as noticed. The action insofar as it concerns *employment* shall be considered final and take effect (e.g., employment terminated).

<b>CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION</b> Plata Personnel Services and Staff Development	TOPIC: <b>APPEALING FINAL PROPOSED ACTIONS TO JUDICIAL REVIEW COMMITTEE AND STATE PERSONNEL BOARD</b>
	CONTROL NUMBER:
	ADOPTION DATE:

**Deadline for Appeals** Final Proposed Actions must be appealed in writing and received within 30 calendar days in order to acquire an evidentiary hearing before and administrative law judge and the judicial review committee.

**Lodging Appeals** Appeals for a hearing before the judicial review committee shall be in writing and must be delivered to or sent to:

Professional Practices Executive Committee Coordinator  
 Division of Correctional Health Care Services  
 California Department of Corrections and Rehabilitation  
 P.O. Box 94283-001

**Effect of Failure to Appeal** Failing to timely appeal shall be deemed as having failed to exhaust administrative remedies and having waived all rights to challenge the action, including but not limited to the judicial review committee, the State Personnel Board and actions brought in the superior court.

**Representation** The parties shall notwithstanding Business and Professions Code section 809.3(c) each be represented by the person(s) of their own choosing, including but not limited to an attorney.

**Time and Place for Hearing Before Judicial Review Committee** The Governing Body shall schedule (or cause to be scheduled) a hearing before the judicial review committee and within 15 days give notice to the parties of the time, place and date of the hearing as required by Business and Professions Code § 809.1(c)(2).

**Hearing Date** Scheduling a hearing date shall be as set forth in Business and Professions Code § 809.2(h) which generally states unless extended for good cause, the date for commencement of the hearing shall be not less than 60 days from the date of notice.

**Conduct of Proceedings - Generally** An administrative law judge shall administer pre-hearing and hearing processes under terms and conditions ordinarily applicable to SPB disciplinary action hearings to ensure constitutionally appropriate due process. Hearing rights include but are not limited to the right to:

1. Be provided with all information made available to the trier of fact
2. Have a record made of the proceedings (excluding deliberations) available to both parties at their own expense.
3. To call, examine and cross-examine witnesses
4. To present and rebut evidence determined by the administrative law judge to be relevant; and,
5. To submit an oral or written statement at the close of the hearing.

**Confidentiality**

To the extent Evidence Code section 1157 is applicable on its own terms it shall apply to judicial review committee proceedings and records.

**Role of Administrative Law Judge**

The administrative law judge (ALJ) shall endeavor to ensure all participants have a reasonable opportunity to be heard and to present relevant oral and documentary evidence in an efficient and expeditious manner, and that proper decorum is maintained.

The ALJ shall have the authority and discretion to make all rulings on questions pertaining to matters of law, procedure or the admissibility of evidence. The ALJ shall not have the authority to rule on the sufficiency of the evidence.

If the ALJ determines that either side at the hearing is not proceeding in an efficient and expeditious manner, the hearing officer may take such discretionary action as seems warranted by the circumstances.

The hearing officer shall not participate in the deliberations unless requested to do so by the judicial review committee but only insofar as it pertain to matters of law.

The hearing officer shall not be entitled to vote nor comment or otherwise advise any person or entity regarding the case.

**Role of Judicial Review Committee**

The scope of the judicial review committees' authority is to by majority vote, determine by a preponderance of the evidence, whether the nature of the action pertaining to privileges as set forth in the Notice of Final Proposed Action is reasonable and warranted (Business and Professions Code section 809.3(b)(3))

and whether the action pertaining to employment is just and proper.

All factual issues shall be decided by judicial review committee consisting of three (3) physicians. The ALJ may assist the panel of physicians in writing a decision that is grounded in the evidentiary record.

The judicial review committee decision shall be based on the evidence introduced at the hearing, including logical and reasonable inferences from the evidence and the testimony.

The judicial review committee may sustain, modify or reject in their entirety the privileging and employment actions set forth in the Notice of Final Proposed Action.

**Time for Decision**

Within 30 days after final adjournment of the hearing, the judicial review committee shall render a decision that shall be accompanied by a report in writing and shall be delivered to the parties.

The report shall contain a concise statement of the reasons in support of the decision, including finding of fact and conclusion articulating the connection between the evidence produced at the hearing and the conclusion reached. (Business and Professions Code § 809.4(a)(1).)

The decision shall be final and binding upon the parties, except insofar as it pertains to the employment aspects of the matter that may be appealed by either party to the five (5) member State Personnel Board.

Instructions for taking an appeal to the Board shall be included in the decision.

**Judicial Review Committee**

The parties shall request a judicial review committee pool of at least five (5) primary care physicians through the California Medical Association Institute for Medical Quality. The institute shall be asked to provide the names of physicians familiar with correctional medicine to the extent reasonably possible.

In any matter concerning a non-primary care specialist, the California Medical Association Institute for Medical Quality shall provide the names of three (3) licensed practitioners in that area of specialty so that one may be selected as the third judicial review committee member instead of a primary care physician.

**Matters Not Involving Specialty Care**

In matters not involving specialty care physicians, the practitioner shall select one judicial review committee member from the pool and the Governing Body shall select one judicial review committee member from the primary care physician pool. The Governing Body and the practitioner shall then each alternately strike one name from the five (5) remaining primary care judicial review committee nominees until only one is left, with the first strike determined by coin toss.

**Matters Involving Specialty Care**

In matters involving specialty care physicians, the practitioner shall select one judicial review committee member from the pool and the Governing Body shall select one judicial review committee member from the primary care physician pool. The Governing Body and the practitioner shall then each alternately strike one name from the list of specialty providers and last remaining specialist shall serve as the third judicial review committee member. The first to strike shall be determined by coin toss.

**Voir Dire**

Judicial review committee members shall be subject to *voir dire* as provided for in Business and Professions Code section 809.2(c) except that it shall apply to both parties rather than just the licentiate.

**Binding Nature of Judicial Review Committee Decision**

The judicial review committee decision is final and binding, unless either party appeals in the manner and time prescribed to the five (5) member State Personnel Board for review.

**State Personnel Board Scope of Review**

The Board will only consider the *employment* aspects of judicial review committee's decision (e.g., termination).

Decisions pertaining to clinical privileges are not subject to appeal or review by the Board.

Decisions pertaining to remedial measures that do not impact such employment such as wages or grade levels (e.g., education, monitoring, job assignments and/or duty changes) may not be appealed to the Board.

Whether physicians have privileges to practice in CDCR adult institutions remains subject solely to the outcome of the Professional Clinical Practice Peer Review and Disciplinary Hearing Process.

The five (5) members Board will make its decision based on the record below, and will not conduct a trial de novo.

**Licensing Actions** In those cases where privileges have been automatically suspended or revoked due to an action against the physician's license and there has been a corresponding non-cause separation, SPB review if requested shall be limited to the question of whether the action against the license occurred.

**Medical Disciplinary Action** In those cases involving the employment aspect of medical disciplinary actions, as that term is defined in Business and Professions Code section 805(a)(6), the Board shall either sustain the decision of the judicial review committee, or reverse the decision of the judicial review committee in its entirety. It may not modify the action determined appropriate by the judicial review committee.

# **EXHIBIT 4**



# CALIFORNIA STATE PERSONNEL BOARD

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ARNOLD SCHWARZENEGGER, Governor



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August 16, 2006

Mr. Robert Sillen  
Receiver  
Officer of the California Prison Receivership  
1731 Technology Drive, Suite 700  
San Jose, CA 95110

Re Discipline Under the Plata Receivership

Dear Mr. Sillen:

I was copied on the August 14<sup>th</sup> letter to you from Mr. Bruce Slavin, Chief Counsel of California Department of Corrections and Rehabilitation (CDCR). I concur with most of the analysis, however, I want to briefly address a couple of issues relevant to your consideration of the various options available to you to address substandard performance or misconduct by state civil service physicians employed by CDCR. Basically, you have three options:

1. Tweak the current system.<sup>1</sup> Currently, CDCR investigates physician misconduct in the same way it investigates the misconduct of other civil service employees and has disciplined those physicians based on that investigation. The physicians appeal their discipline to the SPB, with varying results depending upon the thoroughness and timeliness of the investigation and the relative experience and competency of the hearing representatives.

To improve the current system of disciplining state physicians, strengthen the investigatory process to include a team of medical as well as internal affairs investigators. Those medical investigators could be witnesses, along with other designated experts, in any disciplinary hearing. CDCR attorneys could receive special training to try such cases or CDCR could retain lawyers from the Office of the Attorney General who are already experienced in trying medical license revocation appeals. Seek relief from the

<sup>1</sup>In considering this option, note that the current system does not in fact consist of duplicative processes for terminating the employment of a state civil service physician. While CDCR is in the process of modifying its peer review process to include a fair hearing component, to my knowledge CDCR has not, prior to this receivership, provided a peer review process that incorporates a "fair hearing" for the physicians it disciplines. In fact, current law does not appear to provide that government physicians are entitled to the "fair process" hearing process described in the peer review statutes and in CDCR's letter. Section 809.7 of the Business and Professions Code provides that sections 809.1 - 809.4 (peer review fair hearing process) "shall not apply to peer review proceedings conducted in state or county hospitals," noting that licensees involved in peer review proceedings in these hospitals are entitled to "due process of law."

In Kaiser Foundation Hospitals v. Superior Court (2005) 128 Cal.App.4<sup>th</sup> 85,102, fn. 15, a court interpreted section 809.7 finding that unlike the fair process provided to private physicians going through a peer review process, "constitutional due process governs peer review in government owned hospitals." (emphasis added). Thus, the assumption that CDCR is currently legally required to provide both peer review fair process hearings as well as constitutional due process hearings in seeking to discipline a state physician is unfounded. That said, implementation of the peer review process proposal described in CDCR's letter (which I understand is now in the works) while maintaining the current civil service discipline process would create duplication.

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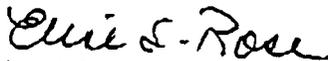
court to insure that the investigation would not be considered confidential under the peer review statutes so that the results could be utilized to support disciplinary action. Use peer review for investigations that call for remedial training or removal of limited staff privileges.

2. Reclassify physician positions as exempt. You can make physicians be "exempt" from the state civil service. Exempt employees do not have a property interest in their jobs and therefore can be terminated at will, so long as the termination is not for illegal reasons. To implement this option, you would seek a court order for relief from the constitutional provisions that restrict the designation of state employees as exempt. This option is most defensible applied to future hires—application to vested civil service employees could result in a legal challenge. If the reclassification is done on a voluntary basis, however, in conjunction with a substantial compensating increase in salary or benefits for those employees accepting the reclassification, the reclassified employees may feel compensated for the relinquished property interest and may not contest the reclassification. Exempt physicians would likely still be entitled to the peer review hearing just as are private physicians.

3- Utilize a combination peer review/non-punitive termination process. You can take appropriate action against a substandard physician through a non-disciplinary process with some changes to existing specifications and/or statutes. Government Code section 19585 provides for the non-punitive termination, demotion or transfer of an employee "...who fails to meet a requirement for continuing employment that is prescribed by the board...in the specification for the classification to which the employee is appointed." Clearly, the state can invoke this statute once a physician's license is pulled. To utilize the non-punitive termination process for physicians in the process of license revocation, however, the specifications and minimum qualifications for physician classes would need to be amended to include, for example, a requirement that the physician has not had any staff privileges finally revoked pursuant to a peer review process. Alternatively, the statute could be amended to allow for non-punitive termination based on lost privileges. After completion of the peer review process, CDCR could serve notice of a non-punitive termination and the physician could appeal to SPB only on the grounds that the physician does in fact meet the requirements in the specification.

Thank you for the opportunity to provide input on this very difficult issue.

Sincerely,



Elise S. Rose  
Chief Counsel  
State Personnel Board  
(916) 653-1403

cc: Andrea Hoch  
John Hagar  
Jim Tilton  
Peter Farber Sykrenyi  
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Steve Shnier  
Floyd Shimomura  
William Elkins

[Silent/development]

# **EXHIBIT 5**

**DEPARTMENT OF CORRECTIONS AND REHABILITATION**

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August 19, 2006

Mr. Robert Sillen  
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RE: DISCIPLINE UNDER THE PLATA RECEIVERSHIP

Dear Mr. Sillen:

This letter is written in response to your request for a legal opinion concerning whether the receiver is bound by the California Civil Service Act. Specifically, we address whether the procedures contained in that Act, as enforced by the State Personnel Board (SPB), must be utilized when disciplining healing arts practitioners under the control of the receivership.

We conclude that while existing procedures need not be utilized, assuming either statutory amendments to these procedures or a court ordered modification, the Fourteenth Amendment to the United States Constitution requires that there be a process in place. In this letter we will review possible alternatives to current procedures that we believe will satisfy the due process rights of the medical care providers.

As the analysis below shows, the Fourteenth Amendment to the United States Constitution guarantees that adverse action will not be taken against public employees' without due process of law. This is because under applicable federal law, public employees have property interests in their positions. So long as they are consistent with the minimum requirements of due process, the laws and procedures that govern the California Civil Service System define the process that is due under the Fourteenth Amendment. In essence, court authorization to take discipline without adhering to the California Civil Service Act would constitute a violation of due process under the Fourteenth Amendment as well as a taking of property in violation of the Fifth Amendment to the United States Constitution. Given that the Plata court does not have jurisdiction over the person of impacted employees and thus, cannot adjudicate the rights of those employees, any disciplinary action taken without complying with the Civil Service Act would be vulnerable to collateral attack. This is because, in the absence of Plata court jurisdiction over the person of impacted employees, the court's order empowering the receiver to disregard state and federal law would be unenforceable against the employees since no court could find that the issues presented here have been actually and necessarily litigated by the employee.

In addition to addressing the government's civil service obligations to public employees, we address the requirement of providing due process to practitioners when a peer review body takes action against medical privileges for a medical cause or reason. The peer review process currently being administered through the Professional Practices Executive Committee (PPEC) at the CDCR Division of Correctional Health Care Services is governed by federal and state legislation aimed at improving the quality of healthcare in this country. The federal statutory scheme attempts to assure improved quality by affording immunities and other protections to practitioners participating in the peer review process so long as the process is administered in accordance with specified statutory procedures. In promulgating these statutory schemes, the United States Congress and the California Legislature provided healthcare practitioners with a constitutionally protected property interest in their medical privileges.

As is explained below, the existence of these two separate and independent constitutionally protected property interests requires state officials to comply with two separate statutory schemes to satisfy due process when taking disciplinary action against physicians for a medical cause or reason. Under the current system, such discipline requires a full evidentiary hearing associated with removal of privileges by the PPEC as well as a subsequent hearing before the State Personnel Board associated with termination of employment. To a certain extent, these two processes are redundant. Moreover, there is uncertainty regarding the extent to which investigations in the peer review process can be used in the subsequent employment hearings. This is because the applicable federal and state statutes seek to achieve improved medical quality by imposing a cloak of confidentiality and secrecy around the peer review process. As a result, it is unclear at this time whether the opinions of expert witnesses and other evidence developed in the peer review process are admissible to prove the same conduct in the employment process.

In the course of discussing how the confidentiality issues complicate the physician discipline process, we set forth options for accomplishing physician discipline in this legal environment. The first option is to maintain the status quo by administering medical discipline through both statutory processes by developing the cases independently. The second option is to make statutory changes to create a crossover scheme in which the confidentiality protections of the peer review process are waived when the disciplined physician opts to assert his or her rights in the employment arena. The third option is to amend the civil service statutes to make the possession of medical privileges a minimum job requirement such that loss of privileges via the peer review process would result in a non-punitive termination. We conclude by recommending the adoption of the third option.

#### **THE CIVIL SERVICE ACT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT**

The State of California instituted a civil service system to put an end to the widespread practice of public employment by patronage. In addition to providing employees a modicum of protection from partisan favoritism, the civil service system is aimed at securing a more professional work force through merit-based hiring and retention. The civil service system is consistent with federal

law. The state system has been effectuated through statutes that allow public employees to retain their positions during good behavior and efficient service.

The United States Supreme Court has held that civil service systems that allow public employees to retain their position during good behavior and efficient service create a property interest in continued employment. (*Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 538-539 [105 S.Ct. 1487, 1491-1492] (hereafter *Loudermill*)). Property interests in continued public employment are protected by the Due Process Clause of the Fourteenth Amendment. (*Ibid.*; *Board of Regents v. Roth* (1972) 408 U.S. 564, 576-578 [92 S.Ct. 2701, 2708-2710].) An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and an opportunity for hearing appropriate to the nature of the case. (*Loudermill, supra*, at p. 541 [citing *Mullane v. Central Hanover Bank & Trust Co.* (1950) 330 U.S. 306, 313 [70 S.Ct. 652, 656].) The Supreme Court has described “the root requirement” of the Due Process Clause as being “that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.” (*Loudermill, supra*, at p. 541 [citing *Boddie v. Connecticut* (1971) 401 U.S. 371, 379 [91 S.Ct. 780, 786].)

Once it is determined that the Due Process Clause applies to an interest, “the question remains what process is due.” (*Loudermill, supra*, 470 U.S. at p. 541 [citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593, 2600].) This question is more easily asked than answered. In *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 24 [101 S.Ct. 2153], the Supreme Court acknowledged that the “due process” concept “has never been, and perhaps never can be, precisely defined.” The court explained that the phrase “expresses the requirement of ‘fundamental fairness,’ a requirement whose meaning can be as opaque as its importance is lofty.” (*Ibid.*) Accordingly, the court held that deciphering and applying the Due Process Clause is, at best, “an uncertain enterprise.” (*Ibid.*) Given that “due process” is not a technical conception with a fixed content unrelated to time, place, and circumstances, the determination of the precise procedures required under the Due Process Clause in any given case is a function of context. (*Brewster v. Board of Education of Lynwood Unified School District* (9<sup>th</sup> Cir. 1998) 149 F.3d 971, 983 (hereafter *Brewster*) [citing *Cafeteria & Restaurant Workers Union v. McElroy* (1961) 367 U.S. 886, 895 [81 S.Ct. 1743].)

The determination of what procedures satisfy due process in a given situation depends upon an analysis of the particular case in accordance with the three part balancing test outlined in *Mathews v. Eldridge* (1976) 424 U.S. 319 [96 S.Ct. 893]. (*Brewster, supra*, 149 F.3d at p. 983 [citing *Orloff v. Cleland* (9<sup>th</sup> Cir. 1983) 708 F.2d 372, 378-379].) In *Mathews, supra*, 424 U.S. at p. 335, the Supreme Court stated:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the

function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

In *Loudermill*, *supra*, 470 U.S. at p. 542-543, the Supreme Court identified the interests to be balanced in the termination of public employment: “These are the private interests in retaining employment, the government interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination.” (*Ibid.*) In its analysis, the Court found that given the severity of depriving a person of the means of livelihood, the employee’s private interest in retaining employment could not be denied. (*Ibid.*) “While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.” (*Ibid.*) Moreover, since dismissals for cause often involve factual disputes, the court held that affording the employee an opportunity to present his or her side of the case to be of obvious value in assuring an accurate decision. The Court explained: “Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect.” (*Ibid.*) In illustrating these considerations, the Court noted that in both of the cases before it, the employees had arguments to make that might have prevented their discharge had they been afforded an opportunity to be heard. (*Id.* at p. 544.)

The *Loudermill* Court found that the governmental interest in immediate termination does not outweigh the employee’s substantial interests in retaining employment. (*Loudermill*, *supra*, 470 U.S. at p. 542-543.) The court stated:

As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay. (*Id.* at p. 544-545.)

The only question before the Court in *Loudermill*, *supra*, 470 U.S. at p. 545, was what steps are required before the termination took effect. In holding that a pre-termination hearing is necessary under the Due Process Clause, the *Loudermill* court pointed out that “the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.” (*Ibid.*) Given that the Ohio statutory scheme provided for a full post-termination hearing, the Court held that the pre-termination hearing need not be an elaborate full evidentiary hearing. (*Id.* at p. 545-546.)

In the final analysis, the question of determining the minimum protections required under the Due Process Clause is a matter of federal law. These protections are not diminished by the fact that the state may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action. (*Loudermill, supra*, 470 U.S. at p. 541 [citing *Vitek v. Jones* (1980) 445 U.S. 480, 491 [100 S.Ct. 1254, 1263].) As the procedures promulgated under the California Civil Service Act are consistent with the minimum protections required under federal law, the State Personnel Board process is the process that is due under the Fourteenth Amendment.

### **THE SPB'S JURISDICTION AND THE CALIFORNIA CIVIL SERVICE ACT**

Under current California law, the CDCR must comply with the civil service statutes to terminate the employment of a physician who is a public employee. As a result, the State must afford an employee a hearing in accordance with the procedures of the State Personnel Board. This is somewhat problematic in that the State may be precluded from introducing evidence developed in the peer review process by various provisions of State and Federal law aimed at preserving the confidentiality of the peer review process. (See generally, Evid. Code §§ 1156-1157.6.)

The SPB was created by article VII, section 2, of the California Constitution. The SPB's constitutional powers derive from section 3, subdivision (a) of article VII as follows: "The board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions."

"The purpose of the Civil Service Act is to ensure that appointments to state office are made not on the basis of patronage, but on the basis of merit, in order to preserve the economy and efficiency of state service. (Citation omitted.)" (*State Personnel Board v. Fair Employment and Housing Commission* (1985) 39 Cal.3d 422, 432 [217 Cal.Rptr. 16].) The SPB "was granted jurisdiction to review disciplinary actions of civil service employees in order to protect civil service employees from politically partisan mistreatment or other arbitrary action inconsistent with the merit principle . . . ." (See *Id.* at p. 438 [citing *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 197-198 [172 Cal.Rptr. 487].) The implementing legislation for the exercise of the SPB's authority is Government Code, title 2, division 5, part 1, commencing with section 18000 and the State Civil Service Act (Act) set forth at Government Code, title 2, division 5, part 2, commencing with section 18500.<sup>1</sup> The Act is clarified and interpreted by the applicable regulations contained in the California Code of Regulations (CCR), title 2, section 1 through section 549.

Formal disciplinary measures taken against state civil service employees are referred to in statute as "adverse actions." Adverse actions include dismissals, suspensions, demotions, reductions in salary, disciplinary transfers and formal/official reprimands. An employee may be disciplined under any of the twenty-four legal causes for discipline as set forth in Government Code section 19572.

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<sup>1</sup> See Government Code section 18538, defining "Part", and section 18570, specifying the short title of the Act

The process for taking an adverse action against an employee is as follows:

- The Department serves the employee, at least five working days before the discipline is to become effective, written notice of the action specifying: (1) the nature of the punishment, (2) its effective date, (3) the causes therefore, (4) the employee's right to answer the charges, and (5) the employee's right to appeal. The Department must also provide the employee with copies of materials upon which the action is based. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194; Gov. Code § 19574; Cal. Code Regs., tit. 2, § 52.3.)
- When the employee receives the notice of the proposed adverse action, he/she has the right to respond verbally or in writing to the department regarding the charges prior to their effective date. If the employee chooses to respond verbally, the Department schedules an informal *Skelly* meeting at which the employee may present his or her response to the proposed adverse action. After the *Skelly* meeting, the department may modify or withdraw the proposed adverse action, or may leave the adverse action as is.
- If the proposed adverse action is not withdrawn as a result of the *Skelly* meeting, the state civil service employee may file an appeal with the SPB Appeals Division within 30-calendar days after the effective date of the action. Failure to file an appeal within the specified time period results in the disciplinary action becoming final. (Gov. Code § 19575.)
- SPB schedules the adverse action appeal for an evidentiary hearing before an SPB administrative law judge (ALJ). SPB currently has 10 ALJs, divided between Northern, Central and Southern California. In the case of California Department of Corrections and Rehabilitation, the hearings are generally held at the prison or other correctional facility.
- During the evidentiary hearing, the employing department has the burden of proving the charges by a preponderance of the evidence (i.e., the department must show that it is more likely than not that the alleged misconduct occurred); the employee has the burden of proving any affirmative defenses he or she may raise.
- The ALJ reviews the evidence to determine whether: (1) the department proved the factual acts or omissions it alleged in the notice of adverse action; (2) if so, whether those acts or omissions constitute legal cause for discipline; and (3) whether the penalty that the department imposed is just and proper for the proven misconduct.
- If the ALJ determines that the cause or causes for which the employee was disciplined were insufficient or not sustained by the employee's acts or omissions, or that the employee was justified in engaging in the conduct, which formed the basis of the charges against him, the ALJ may propose that the Board modify or revoke the disciplinary action. (Gov. Code § 19583.)

- The ALJ prepares a proposed decision for review by the Board, based upon the evidentiary record. The proposed decision may sustain the action, modify the penalty, or revoke the action. The ALJ has 90 days from the date of submission to render a decision.
- The five-member Board reviews the proposed decision at one of its bi-monthly meetings. The Board may adopt the proposed decision, modify (lower) the penalty, reject the decision and hear the case itself, and/or remand the decision to the ALJ for further findings.
- If the Board rejects the proposed decision, the parties are given an opportunity to purchase the transcript, file written arguments and present oral argument to the Board at a public meeting. The Board will then issue its own decision in the case. The Board may designate the decision as precedential if it contains a significant legal or policy determination of general application that is likely to recur. The Board's precedential decisions are published on its website.
- In the case of an adverse decision by the Board, either party may petition for a rehearing. (Gov. Code § 19586). If a rehearing is granted, the Board will allow written briefs and oral argument and will thereafter prepare its own decision. As an alternative or in addition to the rehearing procedure, either party may seek review of the Board's action by means of a petition for writ of administrative mandamus filed in the superior court. (Gov. Code § 19588; *Boren v. State Personnel Board* (1951) 37 Cal.2d 634, 637 [234 P.2d 981]; *Skelly v. State Personnel Board*, *supra*, 15 Cal.3d at pp. 202-205, fns. omitted.)

By statute, the SPB has 6 months to complete the disciplinary review process from the time of appeal to decision or 90 days from the day of submission, whichever comes sooner. Depending on the complexity of the case and/or need for remand or rehearing, the process may be shorter than this timeline, or may meet or exceed this timeline.

Because the SPB derives its adjudicatory authority from the state Constitution rather than from a legislative enactment, a superior court considering a petition for administrative mandate must defer to the Board's factual findings if they are supported by substantial evidence. (*Skelly v. State Personnel Board*, *supra*, 15 Cal.3d at p. 217, fn. 31.)

As evidenced by the above process, the process for terminating state employees can be cumbersome and time-consuming. Civil service employees cannot be terminated at will.

As discussed more thoroughly above, by virtue of the United States Constitution, both the United States Supreme Court and the California Supreme Court have long held that permanent civil services employees, whether holding civil service positions with the state or federal government, have a property interest in their jobs. They cannot be deprived of that property interest without due process of law, meaning that they are entitled to notice and opportunity to be heard before the effective date of the action (under state law, designated as a *Skelly* meeting or hearing) as well as a post-deprivation evidentiary hearing before a neutral decision maker where they have the

opportunity to examine and cross examine witnesses. (U.S. Const., 5<sup>th</sup> & 14<sup>th</sup> Amends.; see *Loudermill*, *supra*, 470 U.S. 532; *Skelly v. State Personnel Board*, *supra*, 15 Cal.3d 194.)

Under the current system, only exempt employees are truly “at will,” meaning that the state can terminate their employment for any reason, as long as it is not an illegal reason (e.g. discrimination). Employees holding Career Executive Assignments (employees in policy influencing positions which are specially designated as such by the SPB) may also be terminated for any reason or no reason. They are entitled to 20 days notice of their termination and are not entitled to a hearing except under very specific circumstances (i.e., termination for illegal reason as defined by rule). These employees generally have “return rights” to a prior position in which they had gained permanent status.

Employees holding limited term or temporary assignments are also subject to termination for any reason and are not entitled to an evidentiary hearing. They may, however, be entitled to a name clearing hearing should their termination be “stigmatizing.” Such employees also may have mandatory reinstatement rights to any civil service positions they previously held.

Employees who are rejected during their probationary periods (generally six months or one year) have mandatory reinstatement rights to their former state civil service positions. Rejecting an employee on probation is easier for the state because the burden of proof is on the employee to establish that there is no substantial evidence to support the stated reasons for the rejection or that the rejection was taken for reasons of fraud or bad faith.

Time frames for hearing and deciding an appeal can range from three months to six months or more, depending upon the complexity of the case and the availability of the parties. This can result in protracted proceedings for complicated medical negligence matters.

The requirements of due process vary, depending on the level of discipline to be imposed. State law makes a distinction between lesser adverse actions (minor pay reductions, suspensions and formal reprimands) and more serious discipline (e.g., dismissal, demotion) and provides that the SPB can investigate appeals of minor discipline with or without a hearing.

Using a different system or entity (e.g. boards of adjustment, private arbitrators, the federal Merit System Protection Board) to provide due process hearings required by both the state and federal constitutions would require a suspension of Article VII, section 2 of the State Constitution, per recent Supreme Court decisions which clarified the SPB’s exclusive, constitutional jurisdiction for reviewing discipline. (*State Personnel Board v. Cal. State Employees’ Assoc.* (2005) 36 Cal.4th 758 [31 Cal.Rptr.3d 201]; *State Personnel Board v. Dept. of Personnel Administration* (2005) 37 Cal.4th 512 [36 Cal.Rptr.3d 142].)

The use of the Merit System Protection Board would be possible under an interagency agreement, but the use of private parties to resolve discipline rather than state administrative law judges would require a waiver of the civil service mandate implicit in the state constitution.

Taking disciplinary action for a medical cause or reason against a healthcare practitioner is complicated by the fact that successful prosecution is heavily dependent upon the development of credible expert opinion evidence. Past attempts to prosecute such actions have met with only limited success. The lack of success is due, at least in part, to a historical pattern of initiating investigations without adequately framing the issues and relying heavily on the opinions of in house experts whose credibility is subject to question by administrative law judges sitting as the trier of fact. Although the peer review processes contemplated by applicable federal and state regulations have disadvantages also, the structured peer review of professional practices issues by qualified physicians gives greater assurance that the issues are properly framed for the evidentiary hearing in the investigative process. However, the peer review process required under federal and state statutes affords procedural protections in addition to the above referenced civil service protections.

### **FEDERAL AND STATE LAWS GOVERNING THE PEER REVIEW PROCESS**

The current peer review process administered by the Professional Practices Executive Committee came into existence through the implementation of the policies and procedures agreed to under the Plata Stipulation for Injunctive Relief. To be consistent with the requirements of the Eighth Amendment, a prison healthcare system must have an effective peer review process. In *Madrid v. Gomez*, 889.F. Supp. 1146, 1258 (1995), the court held that “a primary component of a minimally acceptable correctional health care system is the implementation of procedures to review the quality of medical care being provided.” In finding that the lack of quality control procedures had resulted in grossly inadequate care that was neither disciplined nor redressed, the court emphasized the need for an effective peer review and death review process. *Ibid.* at 1208-1210.

In attempting to design a system with effective quality control procedures to meet its obligations under the Plata agreement, the Division of Correctional Health Care Services carefully considered several peer review options before deciding on the current process. The decision to use a centralized executive committee to perform the quality assurance function was based, in part, on recognition of the fact that most of the prisons do not have a threshold number of practitioners with sufficient skills to carry out effective peer review. As a result, the Professional Practices Executive Committee was organized to perform the credentialing and privileging functions and to administer the review of professional practice issues. The peer review procedures now codified in federal and state legislation are firmly grounded in the common law doctrine of “fair procedure.”

Historically, medical practitioners have enjoyed common law fair procedure rights under California law. The California courts developed the common law concept of “fair procedure” in the nineteenth century to adjudicate expulsions from private associations such as unions and fraternal societies. (Merkel, *Physicians Policing Physicians: The Development of Medical Staff Peer Review Law at California Hospitals* (2004) 38 U.S.F. L.Rev. 301(hereafter Merkel).) Later, fair procedure was extended to apply to cases challenging the denial of membership in private organizations. (*Ibid.*) In *Ascherman v. San Francisco Medical Society* (1974) 39 Cal.App.3d 623, 648 [114 Cal.Rptr. 681, 696], the court applied the law of fair procedure in holding that a hospital must provide notice of the charges and a meaningful hearing to contest them prior to expelling a physician from its medical

staff. Three years later, the California Supreme Court cited *Ascherman* with approval in holding that a hospital could neither refuse admission to or expel a physician from its staff without complying with the minimum common law requirements of procedural due process. (*Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 827 [140 Cal.Rptr. 442, 457].) In subsequent decisions, the California courts fleshed out the substantive and procedural principles applicable in the medical context. (See Merkel, *supra*, 38 U.S.F. L.Rev. 301.) However, the substantive and procedural protections afforded the medical peer review process have become more formalized with the passage of state legislation in response to the passage of the Federal Health Care Quality Improvement Act of 1986 (HCQIA) (42 U.S.C.A. §§ 11101, 11111 et seq.)

The provisions of the HCQIA are derived from earlier bills that addressed a “medical malpractice crisis.” Passage of the act is based on Congressional findings that the increasing occurrence of medical malpractice would be reduced and the quality of medical care improved through effective professional peer review. (42 U.S.C.A. § 11101.) The provisions of title 42 United States Code Annotated section 11111 promote effective professional peer review by granting qualified immunity from liability to “(A) a professional review body, [¶] (B) any person acting as a member of staff to the body, [¶] (C) any person under a contract or other formal agreement with the body, and [¶] (D) any person who participates with or assists the body with respect to the action.” This applies to professional review actions that meet all the standards set forth either in section 11112 of title 42 of the United States Code Annotated, or in state legislation passed in accordance with the opt out provisions in section 11111(c)(2)(B) of title 42 of the United States Code Annotated.

In effect, the immunity granted by title 42 United States Code Annotated section 11111 is only applicable if the professional review action is taken “(1) in the reasonable belief that the action was in the furtherance of quality health care, [¶] (2) after a reasonable effort to obtain the facts of the matter, [¶] (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and [¶] (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3). (42 U.S.C.A. § 11112.) The federal standard as to the adequacy of the required notice and hearing is set forth in title 42 United States Code Annotated section 11112 (b) (see Attachment 1). The HCQIA allows each state to “opt out” of some of its provisions yet still retain qualified immunity if the state designs its own peer review system.

The California Legislature took advantage of the “opt out” provisions of title 42 United States Code Annotated section 11111 with the adoption of sections 809 (see Attachment 2) to 809.8 of the California Business and Professions Code. The legislative scheme passed by the California Legislature in response to the HCQIA sets forth comprehensive standards for the type of professional peer review contemplated by the federal statute<sup>2</sup>.

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<sup>2</sup> Section 805 of the Business and Professions Code defines the phrase “peer review body.” The Professional Practices Executive Committee, as established by the CDCR, is a peer review body under Section 805, subdivision (a)(1)(D) as it is “[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 the entity.”

Section 809.1 of the Business and Professions Code requires that a licentiate receive written notice of a final proposed action of a peer review body for which a report is required to be filed under Section 805. The notice must include the following information: “(1) That an action against the licentiate has been proposed by the peer review body, which, if adopted, shall be taken and reported pursuant to Section 805. [¶] (2) The final proposed action. [¶] (3) That the licentiate has the right to request a hearing on the final proposed action. [¶] (4) The time limit within which to request such a hearing.” (Bus. & Prof. Code § 809.1, subd. (b).)

If the licentiate makes a timely request for a hearing, section 809.1, subdivisions (c)(1) and (2) require the peer review body to give the licentiate a written notice stating the reasons for taking the final proposed action, a statement of the acts or omissions being charged, as well as the place, date, and time of the hearing. Section 809.2, subdivision (a) provides that such hearings must be held before either “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 who shall gain no direct financial benefit from the outcome, who have not acted as an accuser, investigator, fact finder, or initial decision maker in the same matter, and which shall include, where feasible, an individual practicing the same specialty as the licentiate.” Section 809.2, subdivision (c) affords the licentiate an opportunity to voir dire and challenge the panel members and any hearing officer. Section 809.2, subdivision (d) provides that the licentiate and the peer review body shall have the right to copy any documentary evidence relevant to the charges at their own expense. In addition, section 809.2, subdivisions (e) to (g) provide for discovery procedures, the exchange of witness lists, and for obtaining continuances.

Section 809.3 of the Business and Professions Code sets forth the rights of the parties at a hearing concerning a final proposed action. These rights include a right to have all information presented to the trier of fact, the right to call, examine, and cross-examine witnesses, the right to present and rebut relevant evidence, and the right to submit a written statement at the close of the hearing. Section 809.3 also establishes the burden of presenting evidence and proof during the hearing.

Section 809.4 of the Business and Professions Code states that upon completion of the hearing, the licentiate is entitled to a written decision of the trier of fact including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached. In addition, if any appellate mechanism exists, the licentiate is entitled to a written explanation of the procedure for appealing the decision. If an appellate mechanism exists, it need not provide for de novo review, but it must include the right to appear and respond, the right to be represented by an attorney or other representative, and the right to receive the written decision of the appellate body.

Section 805, subdivision (b)(2) of the Business and Professions Code requires the filing of a report with the California Medical Board when, as a result of an action of a peer review body, a licentiate’s membership, staff privileges, or employment is terminated or revoked for a medical disciplinary cause or reason. Business and Professions Code sections 809 to 809.8 provide the procedural protections contemplated by the HCQIA.

In the final analysis, revoking physician privileges and terminating a physician's employment with the CDCR for a medical cause or reason are actions that require the filing of an 805 report with the California Medical Board. So long as such actions are taken in good faith and in accordance with the procedural protections set forth above, persons involved in the professional action enjoy a qualified immunity under the above referenced provisions of the HCQIA. As the California procedures were adopted in accordance with the opt out provisions of the federal legislation and since the procedural protections afforded under California law are clearly consistent with the HCQIA procedural protections and the requirements set forth in *Loudermill*, the California legislation appears to be consistent with minimum principles of due process.

Under the applicable law, a physician must have a full evidentiary hearing before a peer review privileging action becomes final. Under the current system, a physician subject to discipline for a medical cause or reason would receive a hearing conducted by an administrative law judge with expertise in this area. A panel of three physicians would serve as the trier of fact. The administrative law judge's role is limited to procedural and evidentiary rulings and assisting the panel of physicians in writing an opinion that is grounded in the evidentiary record. The parties, the PPEC, and the practitioner are given a period of time to provide written comments on the panel's advisory opinion for consideration by the DCHCS Governing Body in rendering a final decision. In the event that the Governing Body's final action requires employee discipline, current law requires DCHCS to initiate a separate action under the Civil Service Act to effectuate the discipline. Hence, CDCR is required to afford the practitioner a second evidentiary hearing on the same conduct to satisfy the requirements of the Civil Service Act.

The most obvious problem with providing both parties with two bites at the apple in separate hearings is the risk of inconsistent decisions. The remaining discussion sets forth three options for addressing the redundancies and the associated risks of inconsistency inherent in imposing medical discipline using both processes.

## **THE THREE OPTIONS**

### **Status Quo Option**

The first option is to go forward with hearings in both arenas without any statutory changes. At first glance, compliance with both statutory schemes might be seen as a simple matter of presenting the same evidence in two forums. However, the concept of peer review is constructed around the idea of improving the quality of health care by encouraging frank discussions of care conducted under a cloak of confidentiality and granting immunity to practitioners who participate in the process. As a result, evidence collected in the course of the peer review process is subject to the provisions of statutes such as sections 1156 through 1157 of the Evidence Code which may either limit or preclude the use of peer review evidence in the subsequent civil service action.

Since we have never had a peer review case go to a civil service hearing, we do not know how these statutes will impact the admissibility of evidence in a subsequent civil service proceeding. In

negotiating the peer review due process policies, CDCR attempted to secure the right to introduce the peer review evidence in a subsequent civil service hearing. Nonetheless, relying on the contract provisions and pursuing civil service actions based solely on the same evidence developed in the peer review process is risky because an adverse ruling on the admissibility of the evidence would negate the entire case. Until this issue is resolved by the courts or through new legislation, the status quo option requires CDCR to back up its peer review case with additional independent expert opinion evidence to mitigate the risk of losing civil service actions due to adverse rulings on the admissibility of peer review evidence.

This process has also proved to be cumbersome and time consuming. Under the current system while one inmate proceeds through peer review, the other starts with an Internal Affairs investigation leading potentially to a Skelly hearing followed by an SPB hearing. Even if the Internal Affairs investigation were to be replaced by a reliance on the peer review process and evidence obtained in the peer review process was admissible, we would still have separate triers of fact. The potential for inconsistent decisions is potentially high because one trier has expertise in medical practice while the other's expertise is in process itself.

### **Cross Over Option**

Evidence Code sections that limit the use of peer review evidence are grounded in the public policy of encouraging peer review bodies to improve medical care through frank objective discussions of cases. The cross over option is aimed at avoiding the uncertainties associated with the application of the evidentiary provisions in civil service actions by proposing a legislative solution. In essence, the option requires legislation that would make it clear that a practitioner who opts to invoke the civil service process at the conclusion of the peer review proceeding waives the confidentiality protections inherent in the peer review process. The disadvantage of the cross over option is that it does nothing to mitigate the risk of inconsistent decisions in the two forums. The crossover option would also subject expert peer review to review by a tribunal (SPB) with no medical expertise.

### **Non-Punitive Discipline Option**

The third option requires new legislation amending the Civil Service Act. Government Code section 19585 addresses failure to meet requirements for continued employment. It applies to permanent and probationary employees, and may be used in lieu of adverse action "when the only cause for action against an employee is his or her failure to meet a requirement for continuing employment . . . ." That section states, in pertinent part, "[a]n appointing power may terminate, demote, or transfer an employee who fails to meet the requirement for continuing employment that is prescribed by the board . . . in the specification for the classification to which the employee is appointed." By working cooperatively with the SPB to modify the specifications for the appropriate classifications (i.e., making patient care privileges a requirement for continuing employment) and, if necessary, amend section 19585 to include peer review actions limiting or terminating a practitioner's patient care privileges as grounds for non-punitive discipline or termination.

Although the non-punitive discipline option would still require CDCR to bring discipline for a medical cause or reason before the State Personnel Board, its burden of proof would be limited to showing that a limitation or termination of privileges occurred as the result of a peer review action. Pursuing this option has two advantages. First, it eliminates the redundancies and risks of inconsistency associated with administering physician discipline through both the peer review process and the civil service system. Second, this option preserves the integrity of the peer review process by leaving the confidentiality provisions of the public policy underlying peer review in tact. By preserving the confidentiality and immunity provisions underlying peer review in tact, this option also preserves the federal and state policies of improving medical care by encouraging peer review participants to engage in frank and objective discussion of cases.

### **CONCLUSION**

In conclusion, the Fourteenth Amendment to the United States Constitution guarantees that adverse action will not be taken against public employees without due process of law. As the California Civil Service Act is consistent with the federal law governing due process, it defines the process that is due under the Fourteenth Amendment. Given that the rights of public employees to the protections afforded by the California Civil Service Act are guaranteed under the Fourteenth Amendment, federal law requires the Receiver to comply with the provisions of the act in taking adverse action against public employees.

In addition to their federally guaranteed civil service protections, those public employees who are subject to the provisions of Section 805 et. seq. of the California Business and Professions Code have a protected property interest in their patient care privileges. As a consequence, organized peer review bodies are precluded from either limiting or terminating patient privileges without affording the practitioners due process protections.

As the interests in retaining employment and patient privileges are separate and distinct property interests afforded procedural protections under different statutory schemes, there are redundancies in the processes mandated by peer review and the Civil Service Act for state employees. There is also a risk of inconsistency of decisions. To eliminate that redundancy, the risk of inconsistency, and provide the receiver with a means to ensure that competent medical evaluators are assessing the patient care capabilities of health care professionals, the peer review process could be improved by amending the Civil Service Act to effectuate the above referenced non-punitive discipline option. This option would eliminate the duplication of due process mandates, preserve the integrity of federal and state public policies underlying peer review, and allow the SPB to fulfill its constitutional mandate by means of reviewing only whether the peer review process has either revoked or limited the physician's privileges, not the substantive determinations of the peer review panel.

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I hope that this opinion is of assistance to you. Please contact me at (916) 323-6001, if you have any questions.

Sincerely,

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Attachment 1

42 U.S.C.A. section 11112 (b) states:

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating--

- (A)(i) that a professional review action has been proposed to be taken against the physician,
- (ii) reasons for the proposed action,
- (B)(i) that the physician has the right to request a hearing on the proposed action,
- (ii) any time limit (of not less than 30 days) within which to request such a hearing, and
- (C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating--

- (A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and
- (B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B)--

- (A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)--
  - (i) before an arbitrator mutually acceptable to the physician and the health care entity,
  - (ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or
  - (iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;
- (B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;
- (C) in the hearing the physician involved has the right--
  - (i) to representation by an attorney or other person of the physician's choice,

- (ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,
- (iii) to call, examine, and cross-examine witnesses,
- (iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and
- (v) to submit a written statement at the close of the hearing; and
- (D) upon completion of the hearing, the physician involved has the right—
  - (i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and
  - (ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as--

- (1) requiring the procedures referred to in subsection (a)(3) of this section-
  - (A) where there is no adverse professional review action taken, or
  - (B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or
- (2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

Attachment 2

Business and Professions Code section 809 states:

- (a) The Legislature hereby finds and declares the following:
- (1) In 1986, Congress enacted the Health Care Quality Improvement Act of 1986 (chapter 117 (commencing with section 11101) title 42, United States Code), to encourage physicians to engage in effective professional peer review, but giving each state the oppor[t]unity to "opt-out" of some of the provisions of the federal act.
  - (2) Because of deficiencies in the federal act and the possible adverse interpretations by the courts of the federal act, it is preferable for California to "opt-out" of the federal act and design its own peer review system.
  - (3) Peer review, fairly conducted, is essential to preserving the highest standards of medical practice.
  - (4) Peer review which is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care.
  - (5) Peer review, fairly conducted, will aid the appropriate state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners.
  - (6) To protect the health and welfare of the people of California, it is the policy of the State of California to exclude, through the peer review mechanism as provided for by California law, those healing arts practitioners who provide substandard care or who engage in professional misconduct, regardless of the effect of that exclusion on competition.
  - (7) It is the intent of the Legislature that peer review of professional health care services be done efficiently, on an ongoing basis, with an emphasis on early detection of potential quality problems and resolutions through informal educational interventions.
  - (8) Sections 809 to 809.8, inclusive, shall not affect the respective responsibilities of the organized medical staff or the governing body of an acute care hospital with respect to peer review in the acute care hospital setting. It is the intent of the Legislature that written provisions implementing Sections 809 to 809.8, inclusive, in the acute care hospital setting shall be included in medical staff bylaws which shall be adopted by a vote of the members of the organized medical staff and which shall be subject to governing body approval, which approval shall not be withheld unreasonably.

(9) (A) The Legislature thus finds and declares that the laws of this state pertaining to the peer review of healing arts practitioners shall apply in lieu of chapter 117 (commencing with section 11101) of title 42 of the United States Code, 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. Therefore, California exercises its right to opt out of specified provisions of the Health Care Quality Improvement Act relating to professional review actions, pursuant to subparagraph (B) of paragraph (2) of subdivision (c) of section 11111 of chapter 117 of title 42 of the United States Code. This election shall not affect the availability of any immunity under California law.

(B) The Legislature further declares that it is not the intent or purposes of Sections 809 to 809.8, inclusive, to opt out of any mandatory national data bank established pursuant to subchapter II (commencing with section 11131) of chapter 117 of title 42 of the United States Code.

(b) For the purpose of this section and sections 809.1 to 809.8, inclusive, "healing arts practitioner" or "licentiate" means a physician and surgeon, podiatrist, clinical psychologist, or dentist; and "peer review body" means a peer review body as specified in paragraph (1) of subdivision (a) of section 805, and includes any designee of the peer review body.