NOTES

EIDELSON V. ARCHER: EXHAUSTION OF REMEDIES IN A PRIVATE HOSPITAL

I. INTRODUCTION

In *Eidelson v. Archer,*[1] the Alaska Supreme Court for the first time applied the exhaustion of remedies doctrine to a private hospital proceeding. The unanimous court[2] did not decide whether the hospital was purely private or quasi-public.[3] It nevertheless held that before challenging the revocation of hospital staff privileges in the courts, a physician must exhaust the hospital's internal review procedures.

In 1977, the executive committee of the privately owned Alaska Hospital and Medical Center summarily suspended Dr. Gary Archer's staff privileges while investigating allegations of his misconduct.[4] Later, he was formally notified of his suspension, the reasons for it, and his right to a hearing under the hospital's bylaws.[5] Instead of requesting such a hearing, Archer filed a motion in superior court against the hospital alleging wrongful removal, intentional interference with contract, and defamation. Before trial the complaint was amended to substitute for the initial charges a single charge of wrongful use of the hospital's bylaws.[6] The jury returned a verdict

1. 645 P.2d 171 (Alaska 1982). On remand the case was dismissed and attorney's fees were awarded. The Alaska Supreme Court affirmed this disposition of the case in an unpublished memorandum opinion. Archer v. Eidelson, No. 132 (Aug. 31, 1983) (disposition reported in ALASKA SUP. CT. MONTHLY ACTIVITY REP. (Aug. 1983)).

2. Justice Connor did not participate.

3. 645 P.2d at 175-76 n.13.

4. *Id.* at 173-74.

5. *Id.* at 174. THE ALASKA HOSP. AND MEDICAL CENTER BYLAWS, art. VII, § 2(b), *reprinted in Eidelson,* 645 P.2d at 174 n.9, provided:

> A practitioner whose clinical privileges have been summarily suspended shall be entitled to request that the executive committee of the medical staff hold a hearing on the matter within such reasonable time period thereafter as the executive committee may be convened in accordance with Article VIII of these bylaws.

6. The wrongful use claim derived from the RESTATEMENT (SECOND) OF TORTS § 680 (1976), which states:

> One who takes an active part in the initiation, continuation or procure-

in favor of Archer and awarded compensatory and punitive damages.[7] The hospital appealed. The Alaska Supreme Court reversed, holding that the doctrine of exhaustion of remedies applied and that the exceptions to the doctrine were inapplicable.[8]

Chief Justice Rabinowitz, writing for the court, began the opinion by analyzing the basic principles behind the exhaustion doctrine.[9] The *Eidelson* court found that the benefits of allowing a public agency to create factual records, apply its expertise, and correct its own errors would also accrue to a private hospital if the exhaustion of remedies doctrine were applied to the hospital's peer review procedures.[10] After balancing the hospital's interest in maintaining the integrity of its internal procedures against Archer's interest in adequate redress of his grievances, the court concluded there was no reason to hold that the exhaustion rule was inapplicable or that immediate judicial intervention was necessary.[11] The court rejected Archer's asserted justifications for failing to exhaust the internal hospital procedures: improper notice, invalidity of the suspension due to a lack of probable cause and a failure to provide a hearing prior to suspension, and the unavailability of an impartial tribunal to review the suspension. After scrutinizing the procedure set out in the bylaws, the court determined that the internal remedies adequately protected Archer's interests and that the actual proceedings had not been tainted by any hospital wrongdoing.[12]

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ment of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other, is subject to liability for any special harm caused thereby, if

(a) he acts without probable cause to believe that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of securing appropriate action by the board, and

(b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

On appeal, in addition to the exhaustion of remedies argument, the hospital asserted that the disciplinary procedures were not proceedings before an "administrative board" and therefore Archer's claim under section 680 was improper. *Eidelson,* 645 P.2d at 173 n.4. The court chose to limit its decision to the exhaustion doctrine, thereby making it unnecessary to address this issue.

7. *Eidelson,* 645 P.2d at 173.

8. *Id.* at 179, 183.

9. *Id.* at 176 (quoting McKart v. United States, 395 U.S. 185 (1969), and Van Hyning v. University of Alaska, 621 P.2d 1354 (Alaska), *cert. denied,* 454 U.S. 958 (1981)).

10. 645 P.2d at 177.

11. *Id.* at 177-78.

12. *Id.* at 179-83.

II. BLURRING THE PUBLIC-PRIVATE DICHOTOMY

Traditionally, the administrative decisions and internal procedures of a *public* hospital have been subject to judicial review; conversely, *private* hospital procedures and decisions have been considered beyond judicial scrutiny.[13] Under this traditional rule, the disgruntled physician in a private hospital had no recourse in the courts except when the hospital's action was deemed contrary to hospital rules and regulations.[14] This approach reflected the long-standing distinction between public and private institutions.

Recently, the Alaska courts have eroded this bright-line distinction by determining that a hospital which receives government funds or which is the only hospital serving the community in the area is deemed to be a quasi-public institution.[15] The internal procedures and decisions of quasi-public institutions, like those of public institutions, are subject to judicial review.[16]

Even though the *Eidelson* court did not actually decide whether the Alaska Hospital and Medical Center was a quasi-public or private hospital,[17] it held that the exhaustion of remedies doctrine applied.[18] Thus, the court in effect decided that the exhaustion of remedies doctrine applied to private hospitals. By requiring remedies to be exhausted in a private hospital, the court has almost completely eroded the distinction between public and private institutions. The decision to apply the doctrine to private hospitals required analyzing the principles behind the doctrine and examining the possible exceptions to the doctrine;[19] an analysis of the exceptions involved evaluating the adequacy of internal hospital procedures and their ability to protect the doctor's interests.[20] Such an approach necessitated scrutiny of the procedures and decisions of a private hospital which were previously beyond judicial review.

Without deciding whether the court's decision to blur the public-private distinction was correct, this note contends that once the court has delved into the workings of a private hospital, little difference exists between public and private hospitals. When exhaustion of remedies is required, both types of hospitals should provide some

13. *See* Note, *Denial of Hospital Staff Privileges: Hearing and Judicial Review,* 56 IOWA L. REV. 1351, 1374 (1971).

14. *See* Note, *The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy,* 1966 WASH. U.L.Q. 485, 492.

15. *See* Storrs v. Lutheran Hosp. & Homes Soc'y, 609 P.2d 24 (Alaska 1980), *aff'd,* 661 P.2d 632 (Alaska 1983).

16. *See, e.g., id.*

17. 645 P.2d at 175 n.13.

18. *Id.* at 179.

19. *See infra* notes 21-68 and accompanying text.

20. *See infra* notes 69-108 and accompanying text.

modicum of procedural safeguards. This note examines the court's scrutiny of a private hospital's procedures and proposes guidelines which should govern the application of the exhaustion doctrine and its exceptions in both public and private hospitals.

III. PRINCIPLES BEHIND THE DOCTRINE OF EXHAUSTION OF REMEDIES

Exhaustion of remedies is a well-established doctrine in administrative law.[21] The doctrine provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[22] The rationales for applying the exhaustion doctrine are numerous and varied.[23] The United States Supreme Court has cautioned, however, that the doctrine should not be blindly applied.[24] Accordingly, the principles behind the doctrine must be carefully examined and each supporting rationale should be given appropriate weight in light of the criticism of the rationale and the facts of the particular case. The *Eidelson* court enunciated four basic rationales which courts and commentators have both lauded and attacked.[25]

A. Agency Expertise

The first reason stated by the *Eidelson* court for applying the doctrine was to allow the agency to perform functions within its special competence.[26] A hospital board presumably has expertise in determining the professional competence of its staff doctors in relation

21. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.01 (1958 & Supp. 1970); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424 (1965).

22. Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (footnote omitted); *see also* McKart v. United States, 395 U.S. 185 (1969).

23. *See, e.g.,* ACLU, DEMOCRACY IN TRADE UNIONS 73 (1943) (an exhaustion requirement improves the organization's internal appellate process which benefits all members); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship,* 61 MICH. L. REV. 1435 (1963) (an exhaustion requirement promotes the democratic values of self government and private decisionmaking); Chafee, *The Internal Affairs of Associations Not For Profit,* 43 HARV. L. REV. 993 (1930); Note, *Developments in the Law: Judicial Control of Actions of Private Associations,* 76 HARV. L. REV. 983 (1963) (an exhaustion requirement serves society by minimizing governmental interference and thereby promoting the autonomy of private associations).

24. *See McKart,* 395 U.S. at 200.

25. The four rationales were: agency expertise, development of a factual record, internal correction of errors, and contract theory. 645 P.2d at 176-79. *See infra* notes 26-48 and accompanying text.

26. *Eidelson,* 645 P.2d at 176 (quoting Van Hyning v. University of Alaska, 621 P.2d 1354, 1355 (Alaska), *cert. denied,* 454 U.S. 958 (1981)).

to the personnel needs and facilities of the hospital.[27] A hospital board is in a unique position to evaluate the performance of a staff physician because of its intimate knowledge of the technical aspects of medicine, as well as its daily contact with hospital operations. Because of this expertise, courts have traditionally declined to intervene until all internal remedies have been exhausted.[28]

This deference to expertise, however, is misapplied where, as in *Eidelson,* the plaintiff attacked the validity, adequacy, or use of the internal hospital procedures.[29] In such a case, the plaintiff is not challenging the findings regarding his medical qualifications, the area in which the hospital has expertise; rather, the plaintiff is challenging the fairness of such procedures and the violation of his rights from the application of the procedures. The latter are areas in which courts, not hospitals, possess expertise.[30] Under these circumstances, the expertise of the hospital board alone should not preclude judicial intervention to protect the plaintiff's rights.

B. Development of a Factual Record

The *Eidelson* court also concluded that the exhaustion doctrine was applicable because it promotes judicial efficiency by unearthing the relevant evidence and providing a factual record for the courts to review.[31] The utility, however, of spending agency time to uncover facts and to develop a record is often limited. In many cases, the internal procedures are so informal that the record provided inadequately defines the issues and facts necessary for judicial review.[32] Under such circumstances, the court has saved nothing by requiring exhaustion of remedies.

Placing importance on creating a factual record at the agency level is also inappropriate when the procedures themselves are challenged. The issues of prior hearings, impartial tribunals, and notice are purely legal, needing little factual development. "The only result of requiring an exhaustion of administrative remedies where only a

27. *Eidelson,* 645 P.2d at 177 (quoting Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 559, 401 A.2d 533, 538 (1979)); *see also* Sosa v. Board of Managers, 437 F.2d 173, 177 (5th Cir. 1971).

28. *See Garrow,* 79 N.J. at 559-60, 401 A.2d at 538 (quoting Greisman v. Newcomb Hosp., 40 N.J. 389, 403, 192 A.2d 817, 825 (1963)).

29. Doctor Archer attacked the adequacy and validity of the hospital's disciplinary procedures. He alleged that the procedures failed to give him a hearing, proper notice, and an impartial appellate tribunal. *Eidelson,* 645 P.2d at 179-80.

30. *See Garrow,* 79 N.J. at 570, 401 A.2d at 543 (Pashman, J., dissenting).

31. 645 P.2d at 177 (quoting Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 476, 551 P.2d 410, 416, 131 Cal. Rptr. 90, 96 (1976)).

32. *See* Blumrosen, *supra* note 23, at 1457; *see also* Summers, *The Law of Union Discipline: What the Courts Do In Fact,* 70 YALE L.J. 175, 211 (1960).

question of law is in issue would be useless delay; in the interests of justice this cannot be countenanced."[33] Thus, the need to create a factual record should not be overemphasized when balancing the interest in requiring exhaustion with the need to protect the plaintiff through judicial intervention.

C. Internal Correction of Errors

The *Eidelson* court also considered the time and expense saved by allowing an agency to discover and correct its own errors.[34] If the complaining party prevailed before the hospital board, judicial proceedings would be unnecessary and other damages would be minimized because of the expedited reversal of the initial decision.[35] Even though this may be a valid reason for applying the exhaustion doctrine in some cases, the court should not overlook the fact that in many cases time and expense will not, in fact, be saved.[36]

It has been suggested that it is naive to believe that a hospital which has made a preliminary decision to deny staff privileges will reverse that decision on appeal.[37] Requiring a plaintiff to exhaust internal procedures in such an instance would be an exercise in futility if the goal of exhaustion is to allow the agency to correct its own errors.

In addition, before too much weight is attached to this goal of exhaustion, the court should be certain that the administrative proceedings can resolve a dispute more quickly than can the courts. Unless the hospital can handle the case more quickly than the court, it is inequitable to require the plaintiff to exhaust administrative remedies. "More than one private litigant has died on the vine in an attempt to exhaust an inexorably inexhaustible (in time) administra-

33. Nolan v. Fitzpatrick, 9 N.J. 477, 487, 89 A.2d 13, 17 (1952); *see also* Goodwin v. City of Louisville, 309 Ky. 11, 15, 215 S.W.2d 557, 559 (1948); St. Luke's Hosp. v. Labor Relations Comm'n, 320 Mass. 467, 470, 70 N.E.2d 10, 12 (1946); 2 COOPER, STATE ADMINISTRATIVE LAW 578 (1965).

34. 645 P.2d at 176-77; *see also* Van Hyning v. University of Alaska, 621 P.2d 1354, 1355-56 (Alaska) *cert. denied,* 454 U.S. 958, (1981); Comment, *Exhaustion of Remedies in Private, Voluntary Associations,* 65 YALE L.J. 369, 376 (1956).

35. *See* Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 476, 551 P.2d 410, 416, 131 Cal. Rptr. 90, 96 (1976).

36. This rationale for exhaustion was correctly considered in *Eidelson.* The bylaws provided for a quick hearing to review the preliminary decision. Article VIII, section 3 provided for a hearing within ten days after receipt of a request for a hearing. *Eidelson,* 645 P.2d at 178 n.18. Under these circumstances, allowing the hospital to correct its own errors would have saved time.

37. *See Garrow,* 79 N.J. at 571, 401 A.2d at 544 (Pashman, J., dissenting).

tive remedy, when had there been access to the courts the manifest justice of his case would have removed the stigma."[38]

D. "Contract" Theory

Another factor the court examined was the contractual relationship between the hospital and Archer, and to what extent that relationship bound him to the hospital bylaws. The court stated that "in accepting an appointment to the medical staff, Archer agreed to abide by the provisions of the hospital bylaws."[39]

As a general rule, the parties to a contract must exhaust the remedies provided by the contract before seeking judicial relief.[40] The hospital's constitution and bylaws form a contract between the staff and hospital. As long as a board adheres to its rules there is no breach of contract and the doctor is not entitled to judicial relief.[41] The contract theory, however, has been the subject of extensive criticism; its critics suggest that contract theory is an inadequate justification for the exhaustion of remedies doctrine where the contract arises from an adhesion situation.[42]

Under the contract theory, the hospital bylaws and constitution essentially become incorporated into the doctor's employment contract. However, the hospital-staff contract is much like an adhesion contract;[43] a physician seeking a staff position rarely has the opportunity to bargain for a change in the bylaws.[44] In the usual adhesion

38. Netterville, *The Administrative Procedure Act: A Study in Interpretation,* 20 GEO. WASH. L. REV. 1, 86 (1951).

39. 645 P.2d at 178. Article III of the Bylaws provided:

> Every application for staff appointment shall be signed by the applicant and shall contain the applicant's specific acknowledgement of every medical staff member's obligations to provide continuous care and supervision of his patients, to abide by the medical staff bylaws, rules and regulations, to accept committee assignments, to accept consultation assignments, and to participate in staffing the emergency service area and other special care units.

Reprinted in Eidelson, 645 P.2d at 178 n.18.

40. *See, e.g.,* International Bhd. of Teamsters, Local 959 v. King, 572 P.2d 1168, 1172 n.9 (Alaska 1977); Holderby v. International Union of Operating Eng'rs, Local 112, 45 Cal. 2d 843, 846, 291 P.2d 463, 466 (1955).

41. *See* Note, *Expulsion and Exclusion From Hospital Practice and Organized Medical Societies,* 15 RUTGERS L. REV. 327, 330-31 (1961).

42. *See infra* notes 43-48 and accompanying text.

43. *Westlake,* 17 Cal. 3d at 480, 551 P.2d at 419, 131 Cal. Rptr. at 99; *See* Note, *supra* note 41, at 330-31; *cf.* Blumrosen, *supra* note 23, at 1458 (comparing union-employee contracts to adhesion contracts). A hospital-staff contract does differ from a typical adhesion contract in that, although the constitution and bylaws set out contract terms which are not subject to bargaining, the physician may bargain for salary and benefits.

44. The California Supreme Court in *Westlake,* 17 Cal. 3d at 480, 551 P.2d at 419, 131 Cal. Rptr. at 99, stated that clauses incorporated into hospital bylaws "constitute the epitome of an adhesion provision, offered to affected doctors strictly on a

situation, such as an auto sales contract, the court construes the contract to protect the weaker bargaining party for public policy reasons.[45] Like the relationship between automobile buyer and seller, there is a great disparity in bargaining power between doctor and hospital. Without staff privileges, it is extremely difficult for a doctor to practice medicine.[46] Accordingly, the hospital has a bargaining advantage,[47] and a physician may be forced to accept contract terms and hospital review procedures that are far from adequate. Strict enforcement of such a contract often goes against the principle that where there is a great disparity in bargaining power, the court will protect the weaker party by not enforcing the offending provisions.[48] Requiring exhaustion of remedies simply because certain procedures are stated in the bylaws and constitution may be unfair to the staff physician and violate the public policy reflected in the adhesion doctrine. Consequently, courts should not give an inordinate amount of weight to the contract theory when deciding whether to require exhaustion of remedies.

E. Need for Caution in Application of the Principles

The efficiency of applying a particular rationale supporting the exhaustion doctrine depends on the facts of the case under review. A court must be careful not to cite the litany of principles behind the exhaustion doctrine without carefully examining how they fit the facts of the case at hand. A mechanical application could lead to gross unfairness to the expelled doctor and ultimately consume more agency and court time than was initially saved by the administrative procedure. The doctrine has the potential to provide both the doctor

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'take it or leave it basis.' " Although the court was discussing exculpatory clauses in a physician's contract, the rationale applies equally to other parts of a hospital's bylaws and constitution.

45. For an analysis of adhesion contracts in automobile sales, see Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

46. Foster v. Mobile County Hosp. Bd., 398 F.2d 227, 229 (5th Cir. 1968) (quoting Wyatt v. Tahoe Forest Hosp. Dist., 174 Cal. App. 2d 709, 715, 345 P.2d 93, 97 (1959) ("It is common knowledge that a physician or surgeon who is not permitted to practice his profession in a hospital is as a practical matter denied the right to fully practice his profession.")).

47. *Westlake*, 17 Cal. 3d at 480, 551 P.2d at 419, 131 Cal. Rptr. at 99 ("Such institutions [hospitals] certainly occupy a 'superior bargaining position' to an individual physician with respect to the granting or withholding of their own membership privileges.").

48. *See* Inman v. Clyde Hall Drilling Co., 369 P.2d 498, 500 (Alaska 1962) (quoting United States v. Bethlehem Steel Corp., 315 U.S. 289, 327-28 (1942) (Frankfurter, J., dissenting) ("The fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably taken advantage . . . of the other has found expression in an almost infinite variety of cases.")).

and the hospital with a means of settling their conflicts without unnecessarily damaging themselves or the public.[49] It is the court's responsibility to examine carefully the reasons behind the doctrine before applying it, to insure that this potential is realized.

IV. JUDICIAL REVIEW OF PRIVATE HOSPITALS THROUGH GENERAL EXCEPTIONS TO THE EXHAUSTION OF REMEDIES DOCTRINE

Following *Eidelson,* an aggrieved staff physician at a private hospital is required to exhaust internal remedies before seeking judicial relief. With the imposition of the exhaustion doctrine comes the need to scrutinize the doctrine's various exceptions to determine whether an exemption is justified in the particular case. This judicial scrutiny conflicts with the traditional rule that the internal processes and decisions of a private hospital are not reviewable. The exhaustion rule, however, cannot be applied without reviewing its possible exceptions. Since this review requires examining internal hospital procedures, the application of the exhaustion of remedies doctrine and its exceptions may lead Alaska courts to review many aspects of private hospital procedures which until now have been beyond judicial scrutiny.[50]

The exhaustion of remedies doctrine is riddled with exceptions.[51] Indeed, there are so many exceptions that some commentators have concluded that nothing of substance is left to the doctrine because courts can virtually avoid it at will.[52] Exceptions were developed because strict application of the doctrine may, in some cases, lead to unduly harsh results. Thus, the courts have allowed certain litigants to circumvent the exhaustion requirement by invoking an exception. A litigant seeking exemption from exhaustion will most frequently assert the following exceptions: illusory remedies, unjust burden on the plaintiff, and inadequate procedures.[53]

A. Illusory Remedy

Remedies are considered illusory when there is no provision for

49. *Cf.* Note, *supra* note 13, at 1377 (referring to a fair hearing and the right to judicial review).

50. Arizona, California, Colorado, Hawaii, Illinois, New Hampshire, New Jersey, New York, Ohio, Tennessee, and Vermont allow some judicial review of private administrative decisions. *See generally,* Annot., 37 A.L.R. 3D 645, 661-63 (1971 & Supp. 1983).

51. *See* McKart v. United States, 395 U.S. 185, 193 (1969).

52. *See, e.g.,* Vorenberg, *Exhaustion of Intraunion Remedies,* 2 LAB. L.J. 487 (1951).

53. *See* Note, *supra* note 41, at 330.

them in the organization's constitution or bylaws[54] or when they become available only after a suit has been instituted.[55] Some courts have determined that an appearance before a board that has no power to redress the wrong is also an illusory remedy.[56] Exhaustion of internal remedies will not be required when the plaintiff has no adequate, efficient, or usable method of appeal within the organization.[57] If the procedures will not yield a remedy the court will generally excuse the plaintiff from exhaustion.

> To require exhaustion in such cases [involving inadequate and illusory remedies] would be to permit use of the rule as a defensive vehicle to avoid granting any relief to a member by adding delaying and expensive preliminary and inconclusive procedures. This would be a disservice to the aggrieved parties, a [poor] reflection on the association and an abrogation of judicial responsibility.[58]

In cases where an illusory remedy would lead to injustice, an exception to the exhaustion rule is appropriate.

B. Unjust Burden

The courts also allow the doctrine to be circumvented if the exhaustion of internal remedies would unjustly burden the plaintiff. To determine whether the burden is unjust, courts examine the time, expense, geographic inaccessibility, and the injuries suffered by the plaintiff in the interim between suspension and hearing or appeal.[59] The amount of time before appeal and the expense will vary among hospitals, depending on each institution's particular constitution and bylaws. The more intricate the appellate procedure, the greater the cost. An attorney may be required and other expenses, such as discovery and stenography costs, that are not present in a less formal process may arise in preparing for a more formal hearing. Geographic inaccessibility is usually unimportant in hospital-staff dismissals because generally both the doctor and hospital are located in the same community.[60]

The most important factor in determining whether exhaustion places an unjust burden on the plaintiff is the injury he suffers before and during the organization's appellate process. A physician's in-

54. *Cf.* Hooper v. Stone, 54 Cal. App. 668, 673, 202 P. 485, 487 (1921) (organization did not provide an appellate tribunal).

55. *See* Armstrong v. Duffy, 90 Ohio App. 233, 251, 103 N.E.2d 760, 769 (1951).

56. See cases cited in Comment, *Exhaustion of Remedies in Private, Voluntary Associations,* 65 YALE L.J. 369, 378 n.60 (1955).

57. *See, e.g.,* Born v. Cease, 101 F. Supp. 473, 475 (D. Alaska 1951), *aff'd sub nom.* Born v. Laude, 213 F.2d 407 (9th Cir.), *cert. denied,* 348 U.S. 855 (1954).

58. Rensch v. General Drivers, 268 Minn. 307, 314, 129 N.W.2d 341, 346 (1964).

59. *See* Comment, *supra* note 34, at 382.

60. If the suspended doctor has left the community, determining the location of the appeal could become burdensome.

come is damaged by the suspension or the accusation of wrongdoing. "[I]t is probable that the restriction of a physician's privileges redounds to his detriment in the eyes of other physicians who customarily refer patients to him for treatment and probably reduces his income."[61] For a surgeon, like Dr. Archer, loss of hospital privileges is most detrimental since one clearly cannot practice without operating facilities.

The doctor's reputation is also impugned by a suspension or an accusation of wrongdoing. Once damaged, a reputation is extremely difficult to rebuild. Even though the physician may eventually be cleared of the charges or be reinstated by the hospital, his professional reputation, and consequently his practice, may be irreparably damaged.[62]

A court must weigh all these factors before requiring a plaintiff to exhaust internal remedies prior to judicial intervention. If harm to the plaintiff outweighs the benefit to the hospital and the judicial system, the court should apply the exception to the doctrine and allow an appeal directly to the judiciary.

C. Inadequate Procedures

The courts are also willing to find an exception to the exhaustion doctrine when the hospital procedures are found to be inadequate. This exception was important in *Eidelson*, since the court examined the adequacy of the hospital's internal procedures before requiring exhaustion of these procedures by Dr. Archer. "The exhaustion requirement has been dispensed with where the administrative remedy is inadequate . . . . We must therefore assess the adequacy of the hospital's internal procedures."[63] This exception is often allowed when the plaintiff is not given due notice, a hearing, or an unbiased appellate tribunal.[64]

It is clear from the court's opinion that a physician will be exempt from exhausting the hospital's remedies if the procedures are found to be inadequate. It is less clear what this court and future courts will consider to be adequate. Full constitutional due process is required when a physician is dismissed from a public or quasi-

61. Citta v. Delaware Valley Hosp., 313 F. Supp. 301, 309 (E.D. Pa. 1970), *disapproved on other grounds,* Hodge v. Paoli Mem. Hosp., 546 F.2d 563 (3d Cir. 1978) (receipt of Hill-Burton funds does not constitute state action under 42 U.S.C. § 1983 (1976)).

62. *See* Note, *supra* note 13, at 1370.

63. *Eidelson,* 645 P.2d at 181 (citations omitted).

64. *See* Pinsker v. Pacific Coast Soc'y of Orthodontists, 12 Cal. 3d 541, 553, 526 P.2d 253, 262, 112 Cal. Rptr. 245, 254 (1974); Swital v. Real Estate Comm'r, 116 Cal. App. 2d 677, 679, 254 P.2d 587, 588 (1953); Malmstead v. Minneapolis Aerie, 111 Minn. 119, 122, 126 N.W. 486, 487 (1910).

public hospital.[65] Although private associations and hospitals need not provide the same degree of due process, they must provide some modicum of procedural safeguards.

In *Eidelson,* the Alaska Supreme Court did not decide whether the hospital was public or private.[66] The court stated:

> [I]t is unclear whether the hospital in this case should be held to the constitutional due process standard. We conclude, however, that where a hospital seeks to assert an exhaustion of remedies defense to a physician's challenge of the suspension of his hospital privileges, our assessment of the adequacy of the internal remedies includes a determination of the availability of an impartial tribunal.[67]

The court also considered Archer's right to appeal and right to a hearing prior to suspension in its assessment of the adequacy of the internal procedures.[68]

Though the court examined these three factors, the question still remained as to exactly which procedures would be deemed adequate. This lack of clarity arises from the court's examination of certain hospital procedures without clearly stating whether those are the only safeguards needed for an adequate internal process. The court should articulate guidelines for what it considers to be proper internal procedures. Hospitals need guidance so that constitutions, bylaws, and staff contracts can conform to the court's requirements. Guidelines would also allow hospitals to correct their own procedural errors without the need for judicial intervention, thus preserving hospital autonomy. Supreme court standards for adequate procedures would also aid lower courts to initially determine the validity of the hospital's remedies. A set of guidelines would enable the courts to apply the requirements uniformly, leading to fair administration of justice.

1. *Alaska Guidelines for Adequate Procedures.* In the *Eidelson* case, the supreme court began developing guidelines for adequate internal procedures. The court examined the hospital's hearing and review procedures and the impartiality of the deciding tribunal.[69] Since it singled out these elements, the court must have considered them to be vital to an adequate internal process.

a. *Hearing.* Traditionally, in a private hospital, revocation of staff privileges was within the board's complete discretion. A physician had a right to a hearing only if the right was created in the

65. Storrs v. Lutheran Hosp. & Homes Soc'y, 609 P.2d 24, 28 (Alaska 1980) *aff'd,* 661 P.2d 632 (Alaska 1983).
66. 645 P.2d at 175 n.13.
67. *Id.* at 181.
68. *Id.* at 180-82.
69. *See infra* notes 70-84 and accompanying text.

bylaws or his contract.[70] This autonomy of private hospitals, however, appears to have given way as the courts increasingly require that there be some internal hearing to address the complaint before they will apply the exhaustion doctrine.[71] If no hearing procedure exists, courts will exempt the plaintiff from exhausting the internal remedies and allow him to proceed straight to court.[72]

The *Eidelson* court followed this trend. Although the bylaws provided for a hearing, the court, by stating that it would examine the adequacy of the procedures and the impartiality of the tribunal in all cases where the defense of the exhaustion of remedies is used, implied that the plaintiff had a right to a hearing.[73] Thus, it appears that, under the *Eidelson* opinion, an internal system is not adequate unless it provides for some type of hearing. The court did not, however, discuss the type of hearing required.

b. *Timing of the Hearing.* A second important procedural aspect is the timing of the hearing. The issue is whether the hearing must be held prior to or after the revocation of privileges. The proper time for a hearing is usually determined by weighing the hospital's and patients' interests in a summary suspension against the physician's interest in a hearing prior to suspension.[74] The *Eidelson* court interpreted the hospital's bylaws as providing for summary action without a hearing whenever immediate action was in the best interest of the patients.[75] If no immediate and legitimate threat to patient welfare exists, a hearing before suspension may be appropriate. In a case such as this a pre-suspension hearing protects the physician's reputation without harming patients or the hospital. When the potential danger to patients is both great and immediate, however, it is more reasonable to allow a summary revocation with a hearing as soon after revocation as possible.[76] Thus, at the very least, the court appears to be calling for a hearing before corrective action unless there is an overriding interest in patient welfare. In *Eidelson,* the court held that the interests of the hospital and its patients did outweigh Archer's interest in a hearing prior to suspension.[77]

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70. *See* Note, *supra* note 13, at 1356-57.

71. *See, e.g.,* Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 564, 401 A.2d 533, 541 (1979); Ascherman v. San Francisco Medical Soc'y, 39 Cal. App. 3d 623, 648, 114 Cal. Rptr. 681, 697 (1974).

72. *See supra* note 58 and accompanying text.

73. 645 P.2d at 181.

74. *See* Note, *supra* note 13, at 1370.

75. 645 P.2d at 180.

76. *See Citta,* 313 F. Supp. at 309.

77. 645 P.2d at 180.

c. *Internal Appeal.* The basic right to appeal the initial decision is another procedural requirement recognized in the *Eidelson* opinion.[78] Without a right to appeal there is no further internal remedy to exhaust; thus, there is no need to apply the doctrine. An adequate remedy, therefore, must contain a provision granting the physician a right to appeal.

d. *Impartial Tribunal.* According to the Alaska Supreme Court, adequate internal remedies require that the case be decided by an impartial tribunal.[79] When "the functions of investigating, prosecuting, and adjudicating have been combined in the same person, due process has been violated."[80] Although this constitutional due process standard is usually applied exclusively to public institutions, the court applied it to the private hospital in *Eidelson.*[81]

The court did not require that those ultimately deciding the issue have absolutely no connection with the case prior to the hearing. "The fact that the executive committee [of the board] becomes involved with the case prior to the proposed suspension hearing does not mean that the board was automatically biased."[82] The earlier adoption of an ex parte recommendation concerning the physician in question was not enough prior involvement to taint the tribunal.[83] Courts have held that the tribunal is presumed to be impartial, and that no exception to the exhaustion of remedies doctrine will be allowed even when a minority of the tribunal has had too much prior involvement or is found to be biased.[84] Impartiality, however, must always be examined to determine whether the tribunal is, in fact, capable of fairly evaluating the physician.

In sum, the *Eidelson* decision sets out four basic factors which could be used as guidelines by lower courts in determining the adequacy of the internal remedies: a hearing, a right to an appeal, a hearing prior to suspension when patient welfare is not threatened, and an impartial tribunal to hear the appeal. While these constitute the beginning of a comprehensive set of guidelines, other jurisdictions require additional procedures which the court should consider.

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78. *Id.* at 182.

79. *Id.* at 181.

80. *Storrs,* 609 P.2d at 28 n.12.

81. *See* 645 P.2d at 182-83.

82. *Id.* at 183. In *Eidelson* the executive board met on August 29, 1977, and adopted Doctor Ivy's ex parte recommendation that Archer's suspension should be extended and the investigation continued. This board also comprised the applicable tribunal. *Id.* at 182.

83. *Id.* at 183.

84. *See, e.g.,* Correia v. Supreme Lodge of Portuguese Fraternity, 218 Mass. 305, 309, 105 N.E. 977, 979 (1914); Way v. Patton, 195 Or. 36, 60, 241 P.2d 895, 906 (1952).

2. *Guidelines for Adequate Procedures in Other Jurisdictions.* In deciding to require exhaustion of remedies in a private hospital, the Alaska Supreme Court looked to California and New Jersey decisions. The next logical step is for the court to examine the procedures insisted upon by these two states for adequate internal remedies.

New Jersey was one of the first states to blur the public-private hospital distinction in determining the requirements for internal procedures. Under the traditional rule regarding private hospitals, no procedures are required, and no judicial review is allowed unless a plaintiff can prove breach of contract, violation of hospital bylaws, or a staff conspiracy.[85] The New Jersey Supreme Court, in *Greisman v. Newcomb Hospital,*[86] swept aside the traditional rule of public-private dichotomy and went beyond the distinction of public, quasi-public, and private hospitals which the Alaska courts later adopted. The New Jersey court reasoned that although hospitals may be privately owned, they receive public support and are devoted to the public function of serving the sick and injured.[87] Hospitals have been described as owing a fiduciary duty to the public.[88] Since hospitals serve the public interest, they should be subject to procedural requirements which place a check on potentially arbitrary and capricious decisions by the hospital board. *Greisman* also indicates that a physician has the right to be treated fairly.[89]

In California, the "unmistakable trend of the judicial decisions and legislative enactments . . . supports the principle that a private hospital may not deprive a physician of staff privileges without giving him minimal due process of law protection."[90] This approach is consistent with the history of the exhaustion doctrine under California common law. At common law, the plaintiff had a right to fair procedures. The court in *James v. Marinship Corp.*[91] held that a labor union could not dismiss members without a fair proceeding. The idea of fair procedure has been expanded beyond the labor union context to include professional societies and staff decisions in private hospitals. For example, the court in *Pinsker v. Pacific Coast Society of Orthodontists*[92] explained that fair procedure included adequate notice of charges and a reasonable opportunity to respond.[93]

85. *See* Ludlam, *Physician-Hospital Relations: The Role of Staff Privileges,* 35 LAW & CONTEMP. PROBS. 879, 885 (1970).

86. 40 N.J. 389, 192 A.2d 817 (1963).

87. *Id.* at 404, 192 A.2d at 825.

88. Guerroro v. Burlington City Memorial Hosp., 70 N.J. 344, 361, 360 A.2d 334, 343 (1976) (Pashman, J., dissenting).

89. 40 N.J. at 403-04, 192 A.2d at 825.

90. *Ascherman,* 39 Cal. App. 3d at 648, 114 Cal. Rptr. at 696.

91. 25 Cal. 2d 721, 155 P.2d 329 (1945).

92. 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974).

93. *Id.,* at 555, 526 P.2d at 264, 116 Cal. Rptr. at 255; *see also* Ezekial v. Win-

The more recent California decisions have continued to define *adequate* notice and *reasonable* opportunity; they now require the safeguards discussed below as part of these "fair procedure[s]."[94]

a. *Notice of Hearing, Written Statement of Charges, and the Right to Confront Witnesses.* Like Alaska, the California and New Jersey courts require that an adequate internal procedure include a hearing before the decisional board. These two states, however, go one step further by demanding that the physician be given *notice* of his right to a hearing[95] within sufficient time to allow the physician to prepare an adequate defense.[96] At the same time notice of the hearing is given, the doctor should be provided with a written statement of the charges against him.[97] The statement should be detailed enough to apprise the doctor of the specific charges against him. A detailed statement of charges is essential to the preparation of an adequate defense.

While the right to confront and cross-examine witnesses is required under the United States Constitution pursuant to the due process clause, both California and New Jersey agree that this right is not an absolute requirement in hearings before a private hospital board.[98] As a practical matter, the right to confront witnesses is impossible to effectuate in some instances because a hospital board possesses no subpoena power.[99] Therefore, the doctor's right to confrontation is necessarily restricted to those persons who voluntarily testify at the hearing.[100]

b. *Right to Counsel.* The courts of California and New Jersey, like many commentators,[101] disagree on whether counsel may attend and participate in the hearing. The California Supreme Court in

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kley, 20 Cal. 3d 267, 273-74, 572 P.2d 32, 36, 142 Cal. Rptr. 418, 422 (1977) (such minimal procedures are required because the right to practice a lawful trade is sufficiently fundamental and valuable to warrant protection from arbitrary action).

94. *See, e.g.,* Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 551 P.2d 410, 131 Cal. Rptr. 90 (1976); *Ascherman,* 39 Cal. App. 3d 623, 114 Cal. Rptr. 681.

95. *See Westlake,* 17 Cal. 3d at 485, 551 P.2d at 417, 131 Cal. Rptr. at 97; *Pinsker,* 12 Cal. 2d at 555, 526 P.2d at 263, 116 Cal. Rptr. at 255; *Ascherman,* 39 Cal. App. 3d at 649, 114 Cal. Rptr. at 697; *Guerroro,* 70 N.J. at 359, 360 A.2d at 342.

96. *See Ascherman,* 39 Cal. App. 3d at 649, 114 Cal. Rptr. at 697; *Guerroro,* 70 N.J. at 359, 360 A.2d at 342.

97. *See Ascherman,* 39 Cal. App. at 649, 114 Cal. Rptr. at 697; *Garrow,* 79 N.J. at 564, 401 A.2d at 541; *Guerroro,* 70 N.J. at 359, 360 A.2d at 342.

98. *See Ascherman,* 39 Cal. App. 3d at 649, 114 Cal. Rptr. at 697; *Garrow,* 79 N.J. at 566, 401 A.2d at 542.

99. *See Ascherman,* 39 Cal. App. 3d at 649, 114 Cal. Rptr. at 697; *Garrow,* 79 N.J. at 566, 401 A.2d at 542.

100. *See Ascherman,* 39 Cal. App. 3d at 649, 114 Cal. Rptr. at 697; *Garrow,* 79 N.J. at 566, 401 A.2d at 542.

101. *See* Note, *The Right to Counsel at Hospital Hearings—One View,* 101 N.J.

Ascherman v. San Francisco Medical Society[102] held that it is within the discretion of the hospital board to determine whether counsel is required.

> Participation of counsel would probably not be necessary unless the hospital's attorney is used in the proceeding or the extreme nature of the charges involved indicated that representation by an attorney would be advantageous. Such a limitation would not preclude a doctor from consulting an attorney prior to the hearing even though the attorney was not allowed to participate in the hearing itself.[103]

New Jersey courts, on the other hand, found that while the counsel's role may be limited because of the lack of an opportunity to cross-examine adverse witnesses, he should still have the opportunity to advise the doctor during the hearing and should be allowed to present evidence and an argument to the board. In *Garrow v. Elizabeth Hospital & Dispensary,* the court held: "In view of the physician's substantial interest in proceedings of this nature, on balance we believe that the physician should have the right to have counsel present at mandated hospital hearings . . . ."[104] Under this view, however, the attorney's role in the hearing is subject to reasonable rules promulgated by the hospital.[105]

c. *Standard for Review.* Both California and New Jersey require that the reviewing board's final decision be written and based on the record.[106] The standard for review, however, is different in each state. The California court in *Ascherman* felt that the basis for the decision must "come from substantial evidence which was produced at the hearing."[107] The board's decision cannot be based upon ex parte communications not revealed to the doctor prior to trial.[108] The New Jersey court applied a more liberal standard, requiring that the record "contain sufficient reliable evidence, even though hearsay in nature, to justify the result."[109] That court determined that the substantial evidence rule was unwarranted in light of the nature of the hearing.[110]

L.J. 92 (1978). *But see* Note, *The Right to Counsel at Hospital Hearings: Why Not?,* 101 N.J. L.J. 116 (1978).

102. 39 Cal. App. 3d 623, 114 Cal. Rptr. 681 (1974).

103. *Id.* at 649, 114 Cal. Rptr. at 697 (quoting Silver v. Castle Memorial Hosp., 53 Hawaii 475, 484-85, 497 P.2d 564, 571-72, *cert. denied,* 409 U.S. 1048 (1972).

104. 79 N.J. 549, 566, 401 A.2d 533, 542 (1979).

105. *See id.*

106. *See Ascherman,* 39 Cal. App. 3d at 649, 114 Cal. Rptr. at 697; *Garrow,* 79 N.J. at 555, 401 A.2d at 541.

107. 39 Cal. App. 3d at 649, 114 Cal. Rptr. at 697.

108. *See id.*

109. *Garrow,* 79 N.J. at 565, 401 A.2d at 542.

110. *See id.*

None of these procedures are inconsistent with the Alaska Supreme Court's requirements of a hearing, an appeal, and an impartial tribunal. New Jersey and California merely have defined more fully the type of hearing and other procedural safeguards that are required for an adequate internal remedy. These two states have moved very close to announcing that adequate internal procedures of a private hospital must include many of the elements of constitutional due process. The Alaska Supreme Court should incorporate these additional procedures into future guidelines for internal hospital proceedings.

V. CONCLUSION: IMPACT OF THE END OF THE PUBLIC-PRIVATE DICHOTOMY

The Alaska Supreme Court, by requiring exhaustion of remedies in private hospitals, has opened the floodgates for judicial involvement in the workings of private hospitals. Applying the doctrine and its numerous exceptions is impossible without scrutinizing procedures and decisions that previously were beyond judicial review. The adequacy of a hospital's internal procedures must now be examined. Adequate internal procedures must provide some fundamental safeguards to protect the physician against potentially arbitrary and capricious decisions by the hospital's board. To aid the lower courts in determining if a hospital's procedures are adequate, the Alaska Supreme Court should describe procedures it would consider adequate.

In determining which procedures and safeguards are required, the Alaska Supreme Court must decide whether it, like the courts of California and New Jersey, will continue to blur the bright-line distinction between public and private hospitals. Most of the procedures required by California and New Jersey are derived from the constitutional due process standards required in public hospitals. If the Alaska court intends to require some procedural safeguards in a private hospital, it need not distinguish between public and private institutions. Once a hearing is required, different procedures are not needed because the interests of the private and public hospitals are substantially the same.[111] Having already opened the door by requiring a hearing, the court should follow the New Jersey and California lead and require many of the same procedures for both public and private hospitals.

This outcome is probably not what the Alaska Hospital and Medical Center intended to achieve by raising the exhaustion doctrine as a defense in *Eidelson.* The hospital, in defending this suit,

111. *See* Note, *supra* note 13, at 1361.

sought to preserve its autonomy and prevent judicial intervention in its private decisionmaking processes. The hospital may have won the initial battle, but the war for autonomy and freedom from governmental and judicial intervention has been lost.

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