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October 14, 2008

The Hon. Ronald M. George
Chief Justice of California and
the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-3600

**RE: *Mileikowsky v. West Hills Hospital Medical Center*
Case No. S156986**

Dear Honorable Justices of the California Supreme Court:

Pursuant to Rule 14(b) of the California Rules of Court, the American College of Legal Medicine (ACLM) submits and requests to file this Amicus Curiae letter in support of the Amicus Curiae Brief filed by the American Association for Justice (AAJ) and its associated amici therein so indicated.

Interest of Amicus

Founded in 1960, the ACLM is the official organization for professionals who focus on the important issues where law and medicine converge. The ACLM is a professional community including physicians, attorneys, dentists, healthcare professionals, administrators, scientists and others with a sustained interest in medical legal affairs, medical economics, relevant health-related legislation and those public policy issues affecting patient care delivery in this country. Through its medical legal resources the ACLM educates and assists healthcare and legal professionals, advances the administration of justice, influences health policy, improves health care, promotes research and scholarship and facilitates peer group interaction. In addition to other periodicals, the ACLM publishes the widely-recognized *Journal of Legal Medicine* which frequently publishes scholarly articles addressing medical staff issues including *inter alia* physician peer review. It is the largest organization of dually trained physician attorneys (MD-JD's) in the United States and its membership includes a number of preeminent world-renown medical and legal scholars.

The ACLM's professionals, whose diverse education, training and experience enable it to promote interdisciplinary cooperation and understanding of issues where law and medicine converge, supports and hereby adopts after approval of its Board of Governors on September 26, 2008, the Amicus Brief previously filed by the AAJ.

Heretofore the ACLM has contributed sparingly to the Amicus lexicon of the state courts, preferring instead to address federal matters before the United States Supreme Court, i.e., *Gonzalez v. Oregon*, 546 U.S. 243, 126 S.Ct. 904 (2006); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S.Ct. 2488 (2004); *Kentucky Association of Health Plans Inc. v. Miller*, 538 U.S. 329, 123 S.Ct. 1471 (2003) and *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258 (1997). In those cases, the ACLM's Amicus Briefs have addressed important national health care policy issues ranging from application of the Controlled Substances Act to the states to ERISA preemption to physician-assisted aid in dying and the right of patient self-determination.

This matter, while not federal in nature is nonetheless important as it pertains to the rights of physicians undergoing peer review in a hospital administrative setting, specifically the limited due process rights of physicians as described in Sections 805 and 809 of the California Business and Professional Code and applied in most states through the *Health Care Quality Improvement Act of 1986* (HCQIA), 42 U.S.C. § 11101 et seq.

California's well-developed body of state peer review case law turns primarily upon its opting out of HCQIA prior to its implementation in 1989, instead enacting a comprehensive state code section dealing with the same issues, that is, qualified peer review immunity when certain well-defined prerequisites are met. In its wisdom and after considerable debate, the California legislature sought to implement a more comprehensive statute than Congress, actually providing additional protections to those undergoing peer review than provided under federal law. HCQIA expressly does not preempt more-protective state statutes and California now holds the distinction of having by far the most reasoned and judicially-scrutinized body of state law dealing with medical peer review in the country. However, despite the state's considerable body of case law and as applicable instantly to the Court of Appeal's holding, the ACLM agrees with the AAJ that:

“The legislature gave no indication that it welcomed courts to revise or rewrite its handiwork. Indeed, it was lawmakers’ fear that physicians peer review rights might be undone by ‘possible adverse interpretations by the courts’ that prompted the legislature to opt out of HCQIA in the first place. § 809(a)(2). AAJ Brief, p. 17.

Members of the ACLM regularly represent physicians and surgeons in medical staff peer review proceedings and, as they are often dually-degreed (MD, DO or DDS and JD) professionals themselves, are subject to hospital-based peer review related to their own health care activities. The College's members also are very familiar with the collateral consequences adverse peer review usually brings to the involved physicians, frequently representing them in licensure matters, Drug Enforcement Administration inquiries, third-party managed care contracting disputes, inquiries by the Department of Health and Human Services and sometimes bankruptcy or other debtor-creditor matters.

Concerns of the ACLM in this Case

The ACLM is deeply concerned about the rights of physicians and the common law principles of fundamental fairness and procedural and substantive due process. A highly developed body of California case law as well as California Business and Professional Code Sections 805 and 809 outline and mandate the administrative procedural and civil appellate rights of physicians subjected to professional peer review. The ACLM supports the position advocated by the AAJ and the concerns discussed therein about California's doctrine prohibiting the corporate practice of medicine and restricting professional peer review of physicians to other similarly-trained, Board-certified and qualified medical professionals. Hearing Officers should not be able to unilaterally terminate a peer review administrative hearing without a decision from the actual Hearing Panel itself. The ACLM supports the viewpoint of the AAJ that the California legislature through its enactment of Business and Professional Code § 809 does not support such action as it effectively not only denies the involved physician of proper review of his care by those qualified to actually do so, but also may deprive him or her of a valuable property right (their hospital credentials) without fundamental procedural due process. The Court of Appeal's judgment should be upheld.

Reasons Why the Court Should Find in Favor of the Plaintiff in this Matter

The ACLM has been following the issues presented in Dr. Mileikowsky's appeal before this Honorable Court. The right to practice one's profession is a well recognized property and liberty right and is obviously at stake during the course of a hospital privileging dispute. In California, an adverse credentialing action must be reported not only to the National Practitioner Data Bank but also to the Medical Board, where it may remain as a matter of record for the remainder of the physician's career, potentially preventing him or her from ever practicing medicine again. California case law has previously outlined strict prohibition of conflicts of interest by Hearing Officers involved in Judicial Review Committee Hearings. *Yaqub v. Salinas Valley Memorial Healthcare System*, 122 Cal.App.4th 474, 18 Cal.Rptr.3d 780, Cal.App. 6 Dist. (2004). Furthermore, Business and Professional Code Section 805 governs the composition of such a Judicial Review Committee including a prohibition against economic competitors and the express inclusion of voir dire in the process of selecting appropriate committee members so as to ensure a lack of bias. For the state of California to have provided such a well-reasoned and fundamentally fair process in those arenas and then to allow a Hearing Officer the authority to terminate a physician's rights to such a hearing in the first place (thereby precluding a truly fair hearing) not only flies in the face of applicable state case law, but also in the face of basic reason and fundamental fairness. The ACLM agrees with the AAJ that to vest "such unwritten authority [in the Hearing Officer] would undermine the legislature's policy that supervision of the quality of care rendered by hospital physicians is the responsibility of an

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independent medical staff'. *AAJ Brief*, p. 2. As its Amicus Brief makes clear, "the Court's resolution of the question presented in this case will affect the people of California far beyond the interests of the parties". *AAJ Brief*, p. 1.

In short, the ACLM proudly and wholeheartedly supports the Amicus Curiae Brief submitted by the AAJ on all grounds asserted in that Brief. The ACLM urges this Court to advance the common law of civil and administrative procedure and the outstanding body of applicable California case law pertaining to medical peer review by continuing its support of the bar against the corporate practice of medicine in the great state of California.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael M. Raskin". The signature is written in a cursive, slightly slanted style.

Michael M. Raskin, MD, JD, MS, MPH, MA, FCLM
ACLM President