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REFER TO FILE #
111111-2222

November 8, 2007

VIA FEDERAL EXPRESS

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

Re: Gil N. Mileikowsky, M.D., v. West Hills Hospital Medical Center, etc., et al.
Supreme Court Case No. S156986

Dear Chief Justice George and Associate Justices:

Request That The Supreme Court Grant Review Or, In The Alternative, Order The Court Of Appeal Decision Not To Be Published.

Under California Rules of Court, Rules 8.500(g) and 8.1125(a), this letter supports the pending request to the California Supreme Court to grant review in the above matter, or in the alternative, to order the Court of Appeal's decision not to be published in the official reports. This matter presents important issues concerning medical staff peer review hearings and is the subject of two conflicting Court of Appeal decisions.

I am an attorney licensed to practice law by the State of California since 1973 with over 25 years of experience in acting as a hearing officer in medical peer review hearings. I was the hearing officer whose decision was affirmed in *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, rehearing denied May 4, 2005, review denied (2005) 2005 D.A.R. 8474, cert. denied (2006) 126 S.Ct. 1166.

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The petition for review in this matter presents the following important issues concerning the conduct of medical staff peer review hearings pursuant to the common law right to fair procedure[1] and the statutory scheme found at Business & Professions Code § 809, et seq.:

1. Under what circumstances, if any, does a hearing officer have the right to terminate a medical staff peer review hearing?

2. If the holding in *Mileikowsky v. Tenet Healthsystem, supra,* 128 Cal.App.4th at 562, that "[a]n extensive record of misbehavior would have to exist to justify a decision to deprive a practitioner of the peer review afforded by statute" properly states the law, does the hearing officer have the right to make rulings in response to specific instances of "misbehavior" to "impose any safeguards the protection of the peer review process and justice requires" without the concurrence of the Judicial Review Committee in those rulings?

It Would Be Prejudicial To Involve The Judicial Review Committee In The Hearing Officer's Actions To Respond To Misbehavior For The Purpose Of Protecting The Peer Review Process.

The California Legislature has declared that:

> "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 healing arts practitioners by limiting access to care." (Business & Professions Code § 809, subd. (a)(3)(4).)

As a matter of experience, the vast majority of medical staff peer review hearings are conducted with experienced attorneys acting as the presiding officer and the hearing officer. Where a hearing officer acts as the presiding officer for a peer review hearing, he or she "shall consider and rule upon any request for access to information, and may impose any safeguards the protection of the peer review process and justice

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1 See e.g., *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465.

requires." (Business & Professions Code § 809.2, subd. (d).) The issues presented by this matter concern the scope of the authority of a hearing officer to impose safeguards to protect a just peer review process.

It has been my experience that a Judicial Review Committee at a medical staff hearing easily may be prejudiced by being involved in procedural matters regarding the conduct of the peer review hearing, including regarding the production of evidence. For the same reasons that a trial judge in a jury trial excludes the jury from hearing or participating in procedural decisions, the typical hearing officer conducts procedural matters without involvement or participation by the Judicial Review Committee. Indeed, it is the practice of many hearing officers to conduct procedural matters at a time when the Judicial Review Committee need not be present as a means to avoid further demands on the busy schedules of physicians who typically serve on Judicial Review Committees. However, the primary reason for handling such procedural matters without involvement of the Judicial Review Committee is to avoid prejudice.

In conducting the medical staff hearing which is the subject of *Mileikowsky v. Tenet Healthsystem, supra,* I specifically excluded the Judicial Review Committee from the various procedural decisions I made regarding discovery matters, Dr. Mileikowsky's violations of my orders regarding discovery and regarding the conduct of the hearing, and Dr. Mileikowsky's inflammatory written communications to me as hearing officer and to the representative of the Medical Executive Committee. My specific reason for doing so was that I was concerned that the inflammatory aspects of Dr. Mileikowsky's conduct in such matters would prejudice the Judicial Review Committee against him. For example, I did not wish to have Dr. Mileikowsky make reference to his pending lawsuits because in those lawsuits, he had named as defendants a significant number of members of the medical staff. I was concerned that by disclosing this or calling this to the attention of the Judicial Review Committee, it would prejudice them against Dr. Mileikowsky. The Court of Appeal decision which is at issue in the pending matter would inevitably involve the Judicial Review Committee in the various procedural rulings

that may or may not lead up to consideration of a terminating sanction against a disruptive respondent in a medical staff peer review hearing. Conducting a hearing under such circumstances not only would run an undue risk of prejudicing the Judicial Review Committee against a disruptive or an inartful physician respondent, but would greatly complicate the hearing and involve members of the Judicial Review Committee in deciding legal procedural matters. California Supreme Court consideration and ruling on such issues would do much to clarify the uncertainties and, in my opinion, the obstacles to an expeditious hearing that have been created by the Court of Appeal decision in the pending matter.

Conclusion.

For the above reasons, it is respectfully requested that the California Supreme Court should grant the above petition for review or, in the alternative, should order that the Court of Appeal's decision in *Mileikowsky v. West Hills Hospital Medical Center* not be published in the official reports.

Keith Bartel, a principal with the Burlingame firm of Carr, McClellan, Ingersoll, Thompson and Horn PC, joins in this letter. Mr. Bartel is a colleague who has served as a hearing officer in more than 75 Judicial Review Committee hearings throughout California.

Sincerely,

Daniel H. Willick

Daniel H. Willick

For the reasons discussed above, I join in Mr. Willick's Request That The Supreme Court Grant Review Or, In The Alternative, Order The Court Of Appeal Decision Not To Be Published.

Keith Bartel

DHW/mms

cc: See Attached Proof of Service