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VIA FEDERAL EXPRESS

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

Re: ***Mileikowsky v. West Hills Hospital Medical Center, etc., et al.***
Supreme Court Case No. S156986

Dear Chief Justice George and Associate Justices:

This law firm represents the California Hospital Association ("CHA"). Under California Rules of Court, rules 8.500(g) and 8.1125(a), the CHA respectfully requests the court grant review in the above matter ("*West Hills*"), or in the alternative order the Court of Appeal's decision not to be published in the official reports. If left undisturbed, the *West Hills* decision will undermine hospitals' ability to conduct physician disciplinary hearings and will further burden the medical staff peer review process, which is vital to protecting the public from substandard medical practitioners.

The CHA is a nonprofit organization dedicated to representing the interests of hospitals and health systems in California. CHA has nearly 450 hospital and health system members, including general acute care hospitals, children's hospitals, rural hospitals, psychiatric hospitals, academic medical centers, county hospitals, investor-owned hospitals, and multi-hospital health systems. These members furnish vital health care services to millions of our states' citizens. CHA also represents more than 100 affiliate, associate, and personal members. CHA provides its members with state and federal representation in the legislative, judicial, and regulatory arenas, in an effort to improve health care quality, access and coverage; promote health care reform and integration; achieve adequate health care funding; improve and update laws and regulations; and maintain public trust in healthcare.

This letter is submitted in support of the defendants and petitioners in the matter of *Mileikowsky v. West Hills Hospital and Medical Center*, etc., et al. (2007) Supreme Court Case No. S15698. CHA members have an ongoing and increasing interest in the appropriate, fair and effective application of the peer review process and applicable procedural safeguards aimed at insuring fair process for all parties.

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I. SECTIONS 70701 AND 70703 OF TITLE 22 OF THE CALIFORNIA CODE OF REGULATIONS MANDATE THAT CALIFORNIA HOSPITALS ENSURE THE COMPETENCE OF EVERY MEMBER OF THE MEDICAL STAFF.

A. The Statutory Scheme Imposes On Hospitals Full Responsibility for the Vital Function of Medical Staff Peer Review

The importance of fair medical staff peer review procedures to the provision of qualitative health care in California hospitals cannot be overstated. As a condition of licensure, hospitals are required to participate in the state's regulation of physician conduct for the benefit of the public. California regulations mandate that the governing body of each California hospital require the hospital's medical staff to establish controls designed to "ensure the maintenance and achievement of high standards of professional and ethical practices of all of the members of the medical staff." (Cal. Code Regs., tit. 22, § 70701 subd. (a)(7).) The medical staff must ensure that all of its members "demonstrate their ability to perform surgical and/or other procedures competently and to the satisfaction of an appropriate committee or committees of the [medical] staff." (*Id.*) This duty is perpetual: Medical staff members must demonstrate such competence upon filing an initial application with the medical staff and at least every two years thereafter (*Ibid.*), and review of competency continues throughout the members' tenure on the medical staff.

The role of the medical staff in peer review is crucial: The organized medical staff is responsible to the hospital's governing body for the adequacy and quality of patient care. The hospital, however, is ultimately responsible for ensuring the competence of each member of the medical staff. (Cal. Code Regs., tit. 22, § 70703 subd. (a); *Elam v. College Park Hospital* (1982) 132 Cal. App. 3d 332.) Hospitals' responsibilities in this regard never cease: They have a clear, non-delegable duty, mandated by law, to regulate physician conduct.

B. The Pressure on Hospitals to Ensure That Peer Review Is Conducted Aggressively, But with Exactitude, Is Increasing

State agencies responsible for enforcing the laws related to peer review and protection of the public are making it clear that Hospitals will be held accountable for adequately and aggressively screening a licentiate's competence and quality of care when he or she first applies for privileges and membership, and on an ongoing basis throughout any physician's tenure on the medical staff. Regarding peer review, hospitals accordingly must devote considerable resources to ensuring that they "get it right;" there is very little margin for error.

For example, California Business and Professions Code § 805 ("Section 805") requires hospitals to file reports with the Medical Board of California when they take disciplinary action

against physicians serving on their medical staffs. This public protection statute serves a dual purpose: First, it allows the Medical Board to investigate the facts underlying the hospital's action and thus to determine whether action should be taken against the physician's license. Second, the hospital disciplinary action, once reported to the Medical Board, is also disclosed to the public on the Medical Board's internet site.

And yet there are increasingly significant consequences to such "805 reports." When hospitals file such reports, the subject physician is almost always entitled to a formal evidentiary hearing to challenge the underlying disciplinary action, pursuant to Business and Professions Code §§ 809 et seq. ("Section 809"). Those hearings are increasingly burdensome, time-consuming, and expensive for everyone involved, and require substantial investment of volunteer time by other members of the hospital's medical staff.

At the same time, hospitals that fail to file 805 reports when required are subject to substantial fines. Section 805(k) provides for fines of up to $100,000 for failure to file such reports. In his October 7, 2007 address to the Los Angeles County Bar Association Health Law Section, Deputy Attorney General Steve V. Adler announced that the California Attorney General's office intends to make it a priority to seek such fines against hospitals.

Finally, a hospital that is found to have taken unwarranted peer review action against a physician is subject to liability to the physician. If a serious error is made in peer review, that liability can be substantial. See, e.g. *Westlake Community Hospital v. Superior Court*, 17 Cal.3d 465. (1976).

California hospitals, therefore, are under pressure from multiple directions in the peer review arena: They bear the final and ultimate responsibility for ensuring that peer review takes place; must report peer review actions to the Medical Board, or face substantial fines; must offer the affected physician a comprehensive hearing for actions thus reported; and must stand ready to defend those actions in court later. With this legal and regulatory environment as background, in the remaining paragraphs of this letter we discuss the reasons why the Court of Appeal's decision in the *West Hills* case needlessly makes the already exacting peer review process even more burdensome.

II. THE CALIFORNIA LEGISLATURE INTENDED THAT MEDICAL STAFF PEER REVIEW HEARING BE CONDUCTED FAIRLY AND EXPEDITIOUSLY FOR ALL PARTIES.

As noted above, the California Legislature sought fair process in medical staff peer review matters tailored to the needs of the California health care public with the enactment of Section 809. The legislature articulated its intent in Section 809 (a) (3) – (5) , when it declared:

> (3) Peer review, fairly conducted, is essential to preserving the highest standards of medical practice.

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(4) Peer review that 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.

A recent Court of Appeal decision described section 809's essence:

"The statute [] recognizes not only the balance between the rights of the physician to practice his or her profession and the duty of the hospital to ensure quality care, but also the importance of a fair procedure, free of arbitrary and discriminatory acts." (*Unnamed Physician v. Board of Trustees,* (2001) 93 Cal.App.4th at p. 616, 113 Cal.Rptr.2d 309.)

Implementing the Legislature's intent to preserve these high standards through a fair peer review process has become increasingly burdensome and difficult. A rule like the one in *West Hills* deprives hospitals and their medical staffs of essential tools in combating efforts by physicians to further burden the process and frustrate the peer review effort.

Both the *West Hills* decision and an earlier Court of Appeal matter involving the same physician, *Mileikowski v. Tenet HealthSystem,* (2005) 128 Cal.App.4th 531, 27 Cal.Rptr.3d 171, addressed the scope of authority held by hearing officers in the proceedings mandated by Section 809. In *Tenet Healthsystem,* the Court of Appeal held that hearing officers have both the authority to terminate a medical staff peer review hearing if the physician abuses discovery tools. In contrast, the *West Hills* court understates and undervalues a physician's discovery obligations as set forth in Section 809.2 (d) which provides:

the peer review body shall have the right to inspect and copy at the peer review body's expense any documentary information relevant to the charges which the licentiate has in his or her possession or control as soon as practicable after receipt of the peer review body's request.

By siding with Dr. Mileikowsky in *West Hills,* the Court of appeal created a mechanism by which physicians can make an "end run" around their document production obligations under Section 809 (2)(d) and thereby contravene the legislative intent of the law aimed at providing fair process for all participants. Physicians cannot be allowed to disrupt the medical staff hearing process by bootstrapping a third-party-hospital's need to obtain a patient's consent to release records as a fortuitous shield from their own document production obligations. Furthermore, by

citing the California Evidence Code Section 1157 privilege against discovery, Dr. Mileikowsky successfully creates a production impasse, allowing him to avoid his document production requirements and stall the entire fair hearing process leaving no practical way to proceed.

III. THE HEARING OFFICER MUST HAVE THE POWER AND AUTHORITY TO CONTROL THE HEARING PROCESS.

CHA disputes the *West Hills* court's contention that the holding in *Tenet HealthSystem* is inapplicable in the present matter. On the contrary, CHA believes that the *Tenet HealthSystem* court correctly held that the hearing officer is vested with the authority to impose terminating sanctions in instances where a party has utterly disregarded his discovery obligations.

By recasting the hearing officer's *procedural* decision to terminate the proceedings due to the physician's blatant abuses of discovery as a final decision on the merits, the *West Hills* court mischaracterizes the hearing officer's ruling and role in the proceedings. In the frequent experience of CHA members, not every physician engaged in a peer review hearing wishes for an efficient and expeditious outcome. On the contrary, a physician who is able to continue to exercise his medical staff membership and privileges during the pendency of a peer review hearing has an undeniable interest in delaying an ultimate resolution in the matter in order to maintain the status quo. The holding in *West Hills* has created a permissible stalling tactic that can be employed to disrupt the process interminably. With its holding to limit the power and authority of a hearing officer to rule on procedural matters that go to the very heart of procedural fairness, the *West Hills* court has made the ultimate goal of fair procedure in the peer review arena much more difficult to reach. This is a high stakes issue for CHA member facilities due to their obligation to provide quality medical care to the California public.

IV. TERMINATION BEFORE A DECISION ON THE MERITS SHOULD NOT BE THE EXCLUSIVE PURVIEW OF THE TRIER OF FACT.

The *West Hills* decision acknowledges that on a proper showing, a hearing convened pursuant to section 809.2 can be terminated before a decision on the merits. (*Id.* at 773.) CHA disagrees with the *West Hills* court's assertion that the integrity of the peer review system requires that *only* the trier of fact make such decisions. On the contrary, requiring the trier of fact to be involved in the often frustrating task of disciplining a physician for failing to abide by procedural requirements serves only to *compromise* the integrity of the hearing by creating opportunities for the hearing panel to become biased against the physician.

As Daniel Willick aptly observed in his letter to the Court dated November 8, 2007, also urging review of this case, hearing panel members faced with delays caused by physician participants are likely to lose their objectivity and take personally lost time and energy spent on

what will likely be viewed as an unnecessary waste of time. Try as it might, the *West Hills* decision does not create a solution for managing a disruptive physician in a Section 809 hearing. Rather, it creates a novel theory on which the disruptive physician may claim reversible error, giving the physician new ammunition to argue that an adverse decision against him was the product of the prejudices of self-interested hearing panel members.

The *West Hills* court further held that the hearing officer's decision in that case resulted in *premature termination* of the hearing, which the court defined as termination "when either one of the parties has not been *afforded the opportunity* to exercise the rights set forth in section 809.3(a)." (*Id.* at 896.) (Emphasis in original.) CHA believes this holding flatly contravenes section 809's clear language and intent. Section 809.3 (a) states

> During a hearing concerning a final proposed action for which reporting is required to be filed under Section 805, both parties shall have all of the following rights:
>
> (1) To be provided with all of the information made available to the trier of fact.
> (2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the preparation thereof.
> (3) To call, examine, and cross-examine witnesses.
> (4) To present and rebut evidence determined by the arbitrator or presiding officer to be relevant.
> (5) To submit a written statement at the close of the hearing.

Based on the fact that in *West Hills* no hearing sessions on the merits were conducted prior to termination of the hearing, the Court of Appeal there held that Dr. Mileikowsky was not afforded the section 809 rights above. This conclusion is ironic when one considers that Dr. Mileikowsky apparently orchestrated that outcome by committing repeated discovery violations aimed at obstructing the hospital from the opportunity to examine, present and rebut evidence concerning his termination at Cedars Sinai. Had the hearing proceeded without such evidence, would the hospital have been afforded the opportunity to exercise its right to present and rebut evidence that the hearing officer clearly thought relevant, as required in Section 809.3(a)(4)? The *West Hills* court seems to have forgotten that the hearing officer must balance the rights of *both* parties to the action, which we believe the hearing officer effectively did in that very case.

Practically speaking, limiting termination decisions to the trier of fact will be insufficient to control disruptive conduct that occurs *before* the 809.3 (a) phase of the hearing begins. Under the *West Hills* court's holding, a physician interested in delaying the hearing process need only

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dodge the 809.3(a) phase of a hearing to ensure near-immunity from termination. A physician will have wide latitude to engage in pre-hearing procedural shenanigans in order to forestall the beginning of the 809.3(a) phase of the hearing. As preposterous as it may seem, in *Tenet HealthSystem* Dr. Mileikowsky demonstrated that voir dire may be dragged out over eight months. (*Id.* at 546.) If *West Hills* is not reversed or depublished, a disruptive physician will have ample opportunity to evade his procedural duties and obligations. The only "punishment" for such efforts will be a continuance, resulting in further delays in the hearing process—too often the very object of a physician's efforts in such situations.

For the above reasons, this court should grant West Hills Hospital Medical Center's petition for review. In the alternative, this court should order the Court of Appeal's *Mileikowsky v. West Hills Hospital Medical Center, etc., et al.* opinion not be published in the official reports.

Respectfully submitted,

By: _____
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Attorneys for California Hospital Association

LCB/glm
cc: See attached proof of service