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November 10, 2007

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

Re: ***Gil N. Mileikowsky, M.D. v. West Hills Hospital Medical Center et al.***
Supreme Court Case No. S1569186

Dear Chief Justice George and Associate Justices:

Under California Rules of Court, rules 8.500(g) and 8.1125(a), I respectfully urge the Court to grant review in the above matter, or in the alternative order the Court of Appeal's decision not to be published in the official reports.

I have been licensed to practice law in California since 1980. I have been a healthcare specialist for my entire legal career spanning 27 years and I have devoted a significant portion of my time to medical staff peer review matters. Representative clients of mine currently include Good Samaritan Hospital in Los Angeles, Catholic Healthcare West and several of its Southern California Hospitals, Adventist Health and three of its hospitals located in Central California, a small district hospital in central California, and Daughters of Charity and two of its hospitals in Los Angeles. I have been retained by other hospitals to serve as a hearing officer in medical staff peer review hearings and at the governing board's appellate review. In the past, I advised the California Hospital Association on its model medical staff bylaws and more recently I have actively participated in a committee dedicated to improving the peer review hearing process.

Medical Staff peer review hearings have grown considerably more formal since California's courts first held in *Ascherman v. Saint Francis Memorial Hosp.* (1975) 45 Cal.App.3d 507 [119 Cal.Rptr. 507], that private hospitals were required to provide fair procedure for physicians who were denied hospital privileges or whose hospital privileges were terminated. The courts have never insisted on the full panoply of rights required by due process, emphasizing that the hearing rights arose from fair procedure rather than due process. *Anton v. San Antonio Community Hospital* ((1977) 19 Cal.3d

802 [140 Cal.Rptr. 442; 567 P.2d 1162]. Nevertheless, increasingly complex procedural protections have developed over the years from judicial decisions in various medical staff peer review cases, plus the enactment of California's medical staff peer review hearing law, Business and Professions Code § 809 *et seq*.

A private hospital, such as West Hills Hospital Medical Center, certainly is required to afford a doctor "minimal due process of law protection" before terminating his medical staff membership and clinical privileges. *Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 488-489, *citing Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 155-156. But, as has been said over and over:

> "This does not, however, compel adherence to formal proceedings or to any single mode of process. Instead it may be satisfied by any of a variety of procedures. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555 [116 Cal.Rptr. 245, 526 P.2d 253].) The hospitals themselves have the primary responsibility for providing a fair procedure which ensures that an applicant receive adequate notice of the charges against him and a reasonable opportunity to respond. (Ibid.) *Id.* at 489.

The courts have pointed out that the purpose of a medical staff hearing is to protect the public rather than punish the physician. For that reason:

> "A physician's right to pursue his livelihood free from arbitrary exclusionary practices must be balanced against other competing interests: the interest of members of the public in receiving quality medical care, and the duty of the hospital to its patients to provide competent staff physicians. (*Elam v. College* Park Hospital (1982) 132 Cal.App.3d 332, 337-341 [183 Cal.Rptr. 156].) Consequently, disciplinary procedures involving physicians have developed primarily from a protective rather than a punitive purpose. (*Cipriotti v. Board of Directors*, *supra*, 147 Cal.App.3d, at p. 157.) The hospital has 'a direct and independent responsibility to its patients of insuring the competency of its medical staff and the quality of medical care provided ....' (*Elam v. College Park* Hospital, supra, at p. 346.) Hospitals must be able to establish high standards of professional work and to maintain those standards through careful selection and review of staff. And they are required to do so by both state and federal law. (Cal. Code Regs., tit. 22, § 70701, subd. (a)(7) and § 70703, subds. (a) and (b); 42 C.F.R. § 482.22 (1987); *Hay v. Scripps Memorial Hospital* (1986) 183 Cal.App.3d 753, 756 [228 Cal.Rptr. 413].)" *Id.* at p.489.

The courts have been unwilling to impose stringent due process protections on the private hospitals. In *Rhee*, *supra*, the court explained:

> "We do not wish to denigrate the importance of due process rights; however, it must be emphasized that this is not a criminal setting, where the confrontation is between the state and the person facing sanctions. Here the rights of the patients to rely upon competent medical treatment are directly affected, and must always be kept in mind. An analogy between a surgeon and an airline pilot is not inapt: a hospital which closes its eyes to questionable competence and resolves all doubts in favor of the doctor does so at the peril of the public.
>
> "The appropriate standard to bring to bear on judicial review of hospital disciplinary procedures is therefore this: courts must not interfere to set aside decisions regarding hospital staff privileges unless it can be shown that a procedure is 'substantively irrational or otherwise unreasonably susceptible of arbitrary or discriminatory application ....' (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d. 614, 626-627 [166 Cal.Rptr. 826, 614 P.2d 258], fn. omitted; *Smith v. Vallejo General Hospital* (1985) 170 Cal.App.3d 450, 456 [216 Cal.Rptr. 189].)" *Rhee*, *supra*, 201 Cal.App.3d at 490.

In this case, the appellate court seeks to impose new burdens on the medical staff peer review hearing process that were not imposed by California's legislature in the medical staff hearing law, Bus. & Prof. Code Section 809 et seq., and have not to date, and should not in the future be imposed under the fair hearing analysis conducted by the courts.

There is nothing in the medical staff hearing law that suggests a hospital cannot allow its hearing officer to make rulings on all procedural matters, and even to impose the ultimate sanction of terminating the hearing if a doctor refuses to proceed at the hearing in an orderly and efficient manner. There is nothing in the history of fair procedure that suggests physicians on a hearing panel are the only people who can decide that a doctor has so abused the hearing process that he has lost his right to make use of it. Indeed, this ruling runs contrary to the well accepted custom in the California hospital industry, as reflected in the Model Medical Staff Bylaws of both the California Hospital Association and the California Medical Association, to provide for the appointment of a hearing officer, who generally is an attorney at law, and to give him or her broad authority and responsibility to rule on all procedural issues and to move the hearing process along in an

orderly and efficient manner.[1] Further, the hearing officer typically is given absolute discretion to take whatever action seems warranted if either side is not proceeding in an efficient and expeditious manner.[2]

It makes sense that the hearing officer would be given full discretion to take whatever action he or she deems warranted, which would by it very nature include the option of terminating the hearing for a refusal to proceed in an efficient manner. Indeed, in order to maintain decorum and run an orderly hearing process, the hearing officer needs to have the discretion to sanction a party who refuses to abide by the rulings. It makes no sense to require the hearing officer to present to a hearing panel of physicians the history of the procedural deficiencies to obtain a ruling from the physicians on whether the procedural abuse justifies termination since medical training provides no insight whatsoever on administrative hearing procedural issues.

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[1] Since California courts have given hospitals the right, in the first instance, to fashion their own rules, it is theoretically possible that a hospital could choose to adopt its own internal rule that allowed only a hearing panel to terminate a hearing because of a doctor's procedural deficiencies. However, no such rule was in effect in this case, and it would be rare to find such a bylaws provision given the prevailing standard in the industry.

[2] Both the California Hospital Association ("CHA") and the California Medical Association ("CMA) publish model medical staff bylaws that are used by in most California hospitals as a starting point for developing their own medical staff bylaws. The CMA Model Medical Staff Bylaws Section 7.4-3, states: "The hearing officer shall endeavor to assure that all participants in the hearing 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 hearing officer shall be entitled to determine the order of or procedure for presenting evidence and argument during the hearing and shall have the authority and discretion to make all rulings on questions which pertain to matters of law, procedure or the admissibility of evidence. If the hearing officer determines that either side in a 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 CHA Model Medical Staff Bylaws has a virtually identical provision.

This is not an issue of limited concern to just one hospital (West Hills Hospital Medical Center) and one doctor (Dr. Mileikowsky). The issue of what sanctions a hearing officer may impose for abuse of the process arises very frequently in the medical staff peer review process. In order to protect the viability of the hearing process, which is particularly important in light of the public interest in protecting peer review, I urge the Court to accept this case and reverse the Court of Appeals decision which would seriously hamper effective peer review.

Sincerely,

Suzanne F. van HALL, P.C.
for van Hall Law Office

cc: See Proof of Service

PROOF OF SERVICE BY OVERNIGHT MAIL

I am over age 18, not a party to this action, and am employed in Jefferson County, Colorado at 31692 Horseshoe Drive, Evergreen, Colorado, 80439. On November 10, 2007, following ordinary business practices, I served the original and eight copies of the foregoing **Letter** in a sealed United States Postal Office Express envelope addressed as follows:

California Supreme Court
350 McAllister Street
San Francisco, CA 94102-3600

I deposited the envelope at a designated United Stated Post Office Express pick-up box located at Evergreen Parkway, Evergreen, Colorado for overnight delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 10th day of November, 2007, at Evergreen, Colorado.

Suzanne F. van Hall

PROOF OF SERVICE BY MAIL

I am over age 18, not a party to this action, and am employed in Jefferson County, Colorado with my business address at van Hall Law Office, 31692 Horseshoe Drive, Evergreen, Colorado, 80439. On November 10, 2007, following ordinary business practices, I enclosed an original of the foregoing Letter in six envelopes addressed as follows:

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Second Appellate District, Division Eight
300 S. Spring Street, 2nd Floor, N. Tower
Los Angeles, CA 90013-1213 Court of Appeal No. B186238

I deposited the sealed envelopes with postage prepaid in a designated United Stated Post Office collection box located at Evergreen Parkway, Evergreen, Colorado for overnight delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 10th day of November, 2007, at Evergreen, Colorado.

Suzanne F. van Hall