



KRAMER, SOPKO & LEVENSTEIN, P.A.

ROBERT S. KRAMER
JAMES SOPKO
Board Certified Tax Lawyer
Board Certified Wills, Trust
and Estates Lawyer
RICHARD H. LEVENSTEIN
Board Certified Business Litigation Lawyer
DAVID STEINFELD

853 S.E. MONTEREY COMMONS BLVD.
STUART, FLORIDA 34996
POST OFFICE BOX 2421
STUART, FLORIDA 34995

(772) 288-0048
FAX (772) 288-0049
BOCA RATON: (561) 394-8886
E-mail: rlevenstein@KSLattorneys.com
E-mail: dsteinfeld@KSLattorneys.com
JOHN K. COPELAND – OF COUNSEL
THOMAS J. ROONEY – OF COUNSEL

October 29, 2008

The Honorable 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

Dear Honorable Justices of the California Supreme Court:

Pursuant to Rule 14(b) of the California Rules of Court, I submit a request to file this Amicus Curiae letter in support of the Amicus Brief filed by the American Association for Justice authored by Jeffrey White, Esquire, Senior Amicus counsel for that organization.

Interest of Amicus

I am an attorney based in Stuart, Florida, and have practiced law for thirty-two (32) years. My practice primarily involves representation of physicians, hospital medical staffs, and hospital staff medical executive committees. My representation of physicians includes extensive experience in peer review proceedings, both representing physicians, peer review committees, and medical executive committees for the past ten (10) years. I presently represent physicians, medical staffs and medical executive committees at hospitals located throughout the State of Florida. I do not represent hospitals in any capacity in my practice.

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During the years of my practice, I have been involved in litigation extensively between physicians and hospitals in connection with peer review matters; between hospital medical staffs and hospital administration involving issues of every kind imaginable; and litigation between hospital medical executive committees and hospital administration; matters of peer review and medical practice credentialing; exclusive contracting, and almost every issue in between.

I was the lead counsel in what has become known as the St Lucie County Hospital Governance law litigation, a lawsuit which originated from the passage of a law known as the St Lucie County Hospital Governance Law a law passed by the Florida Legislature applicable to only two (2) hospitals in one (1) county in Florida, both owned by HCA. On August 28, 2008, the Florida Supreme Court rendered its decision affirming the unconstitutionality of that statute, and I have attached a copy of that decision to this letter for your reference and review. I believe that the Florida Supreme Court's decision, and the attached decision of the First District Court of Appeal and attached underlying trial court decision will give you sufficient background with regard to that litigation, and the far reaching affect that law may have on the practice of medicine in hospitals throughout the State of Florida and possibly throughout the United States, had that law not been declared unconstitutional.

I write in support of the Amicus Brief filed by the American Association for Justice based upon my extensive practice representing physicians, medical staffs and medical executive committees in my home State of Florida, and in particular my experience in dealing with HCA, and hospitals it owns and operates in the State of Florida.

Peer review which is neither fair, nor impartial is nothing more than a sham. It subjects physicians, who have devoted, in some cases, more than half their lives to training to practice in the profession which they have chosen, often times to arbitrary and capricious so-called "peer review panels" which hold the fate of their professional lives in their hands, and who often times act arbitrarily and capriciously, and at the direction of hospital administrators who have the self-interest of the hospital for whom they work as their primary objective and concern. Adverse peer review decisions can have disastrous consequences for physicians, not only resulting in loss of medical staff privileges at the institution responsible for the peer review proceeding, but often times the total loss of the ability to obtain hospital medical staff privileges anywhere, as a result of the adverse action to which the physician is subjected, and the requirement of reporting that adverse action to the National Practitioner's Data Bank. Often times physicians lose their ability to practice their chosen profession to which they have devoted significant portions of their lives to be educated and trained for, as a result of what often times is nothing more than a sham known proceeding known as "peer review".

Peer review, in its truest form, is a valuable vocational and self-evaluative process for physicians engaged in the practice of medicine at hospitals and similar institutions. In its purest form, it is indeed the review of professionals by their peers in an objective, confidential manner, which should be designed to improve the quality of patient care, and the level of care to be provided by physicians. However, the peer review system has been hijacked to a great extent by hospital administration in many locations in the state in which I practice, and all objectivity and focus on improvement of care has been lost.

My interest in submitting this amicus letter is therefore based upon my firsthand experience in representing clients at different levels and stages of the peer review process, from informal hearings to full-blown litigation, and from representing physicians who are the subject of peer review, as well as committees engaged in that peer review, and the medical executive committees which ultimately accept recommendations from those committees, and make recommendations to the governing body of the hospital in which they practice. As a result of that firsthand practice experience, I was compelled to submit this Amicus Curiae letter.

My Concerns as an Attorney Practicing in the Area of Health Care Law

I am deeply concerned about the rights of physicians and the common law principles of fundamental fairness and procedural and due process. From my professional experience as discussed hereinabove, it is easy for me to support the position advocated by the AAJ, and the concerns discussed in its Brief, about California's doctrine prohibiting the corporate practice of medicine and restricting professional peer review of physicians to other similarly trained, certified and qualified medical professionals. It is clear that hearing officers should not be able to unilaterally terminate a peer review administrative hearing without a decision from the actual hearing panel.

All steps should be taken to ensure fundamental fairness and provision of procedural and due process to any physician involved in the peer review procedure of any kind. What is at stake is not only the professional reputation and the practice of the affected physician, but in many instances, the issue of patient care, patient choice, and the ability of patients to have access to the best possible care from the best possible physicians. Sham peer review or arbitrary and capricious peer review proceedings enable a hospital administration to in effect eliminate physicians who do not "play ball", or who advocate better conditions and better patient care at the hospital in which they practice, notwithstanding that those are almost always words hospital administration never wants to hear.

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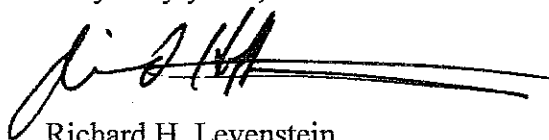
Reasons Why the Court Should Find in Favor of the Plaintiff in this Matter

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 or peer review dispute. It is my understanding that California case law has previously outlined strict prohibition of conflicts of interest by Hearings Officers involved in judicial review committee hearings in the State of California. *Jaqub v. Salinas Valley Memorial Healthcare System*, 122 Cal.App.4th, 474, 18 Cal.Rptr.3d 780, Cal.App.6 Dist. (2004). Furthermore, Section 805 of the California Business and Professional Code 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 lack of bias. These procedures and processes are of signal importance to ensure fairness and objectivity, and to ensure that the "peer review" process remains exactly that a review by a physician's peers, objectivity, impartially, and without outside, undue influence.

For the State of California to have provided such a well-reasoned and fundamentally fair process in these arenas and processes, and then to allow a Hearing Officer the authority to terminate a physician's right to such a hearing in the first place (thereby precluding a physician from receiving a fair hearing) not only flies in the face of applicable state case law, but also is direct contravention to rule of reason and fundamental fairness.

In short, the undersigned proudly supports the Amicus Curiae Brief submitted by the American Association of Justice on all grounds asserted in the Brief. The undersigned urges this Court to advance the common law of civil 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 State of California, and to continue to ensure the peer review process will provide fundamental fairness and procedural due process as a matter of right to physicians who become involved in that system.

Very truly yours,



Richard H. Levenstein

RHL/shb

cc: Lawrence Huntoon, M.D., Ph.D.
Jane M. Orient, M.D., Executive Director – AAPS
Andrew Schlafly, Esquire – General Counsel – AAPS
Gil Mileikowsky, M.D.

Enclosures