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November 26, 2007

VIA OVERNIGHT COURIER

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

Re: *Mileikowsky v. West Hills Hospital Medical Center, et al.*, California Supreme Court No. S156986; Letter in Support of Petition for Review

Dear Chief Justice George and Associate Justices:

We represent Catholic Healthcare West ("CHW"), California's largest non-profit provider of hospital services, and we write on behalf of CHW – and ourselves, as CHW's counsel in numerous hospital peer review matters – in support of West Hills Hospital Medical Center's Petition for Review of *Mileikowsky v. West Hills Hospital Medical Center, et al.*, 154 Cal. App. 4th (2007) ("*West Hills*").

As the owner and operator of more than thirty hospitals throughout California, CHW is responsible for providing appropriate, high-quality care to millions of California citizens each year, and therefore CHW is vitally interested in application of the laws governing physician peer review in California. For example, CHW appeared and argued as an *amicus* in this Court in *Kibler v. Northern Inyo County Local Hosp. Dist.*, 39 Cal. 4th 192 (2006) ("*Kibler*"), where the Court held that hospital peer review proceedings are "official proceedings" under California's anti-SLAPP statute. *See Kibler* at 201 (referring to CHW's *amicus* brief).

When a judicial decision threatens the ability of all California hospitals and their medical staffs to conduct effective peer review, that decision thereby jeopardizes public safety and causes deep concern to CHW and the leaders and peer reviewers in every California CHW hospital. *West Hills* poses such a threat, and thus it plainly presents an issue of statewide importance. *West Hills* also creates a conflict between two reported decisions, fostering confusion about the scope of hearing officer authority to preside over and control peer review proceedings. Accordingly, *West Hills* meets the criteria for

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review in Rule 8.500(b)(1) of the California Rules of Court, and CHW urges this Court to accept review of *West Hills*.

I. Interest of Catholic Healthcare West

CHW is California's largest not-for-profit hospital owner/operator, with more than thirty California hospitals. CHW is comprised of numerous Catholic orders (*i.e.*, groups of nuns) that serve as its sponsoring organizations. CHW's mission, among others, is "deliver[ing] compassionate, high quality, affordable health care services," "serving and advocating for ... the poor and disenfranchised," and "partnering with others in the community to improve the quality of life." In CHW's network of hospitals (which includes several in Arizona and Nevada in addition to the California facilities), nearly 7,500 physicians and approximately 40,000 employees provide quality healthcare services during more than *four million patient visits* annually. Each year, CHW provides hundreds of millions of dollars worth of community benefit and free care for the poor,[1] in addition to the healthcare services for which CHW is reimbursed. Thus, CHW is an essential healthcare resource for the citizens of California.

CHW has a compelling interest in the legal framework governing hospital peer review, because a large hospital has hundreds of doctors on its medical staff, and inevitably some of them will experience professional problems. Therefore, at any given time, CHW has multiple ongoing peer review proceedings. CHW's hospitals cannot provide the highest possible quality of healthcare services to Californians if problem physicians can drain hospital resources, and hamstring hospitals and their medical staffs in their efforts to conduct effective peer review, by dragging out peer review proceedings interminably.

Yet, that is precisely what will happen if – as the *West Hills* court ruled – multiple continuances are the only consequence when a physician who is the subject of peer review repeatedly fails to submit documents, witness lists, etc., as and when required. It is absolutely critical for peer review hearing officers to have the power to control the hearing process, and even to impose terminating sanctions where warranted, as the court held in the conflicting decision involving the same doctor's peer review at a different

[1] For more information about CHW, see CHW's website: http://www.chwhealth.org/stellent/websites/get_page_cache.asp?ssDocName=MSYS_M030441.

hospital, *Mileikowsky v. Tenet HealthSystem*, 128 Cal. App. 4th 531 (2005).[2]

It is essential for hearing officers to have this power not only because someone must be authorized to control the hearing process, but also because experienced peer review hearing officers have the requisite knowledge of the applicable law. Physician peer reviewers do not have that knowledge, nor do they want to be saddled with the increased burdens of considering and ruling on procedural/legal issues in addition to deciding complex questions about the medical standard of care, or about the effects of disruptive physician behavior on the delivery of patient care by others. CHW, its hospitals, and their medical staffs have the utmost interest in this decision, because it affects their ability to conduct effective peer review.

II. Review Should Be Granted Because the Power of Peer Review Hearing Officers to Make the Full Range of Procedural Rulings Is Absolutely a Legal Issue of Statewide Importance.

Dr. Mileikowsky is an individual physician practicing in one geographic area, and thus he is hardly in a position to pronounce (as he nevertheless has done) that the decision in this case is not important to anyone except the parties. Obviously, the Court of Appeal

[2] As explained in West Hills Hospital Medical Center's Reply to Answer to Petition for Review, Mileikowsky is simply wrong to assert that no conflict exists merely because the two decisions reaching opposite conclusions on the hearing officer authority issue came from different divisions of the same appellate district. Trial courts can follow either decision (*Auto Equity Sales v. Superior Ct.*, 57 Cal. 2d 450, 455 (1962)), and thus review by this Court is necessary "to secure uniformity of decision" as contemplated in Rule 8.500(b)(1). Indeed, in *Kibler*, this Court's most recent decision involving peer review, the Court accepted review of conflicting decisions by two different divisions of the Fourth District Court of Appeal. *See* http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=360047&doc_no=S131874 (Supreme Court docket entry dated May 18, 2005 showing that *Omeara v. Palomar Pomerado Health System*, Supreme Court Case No. S131874, Fourth District Court of Appeal Case No. D043099, was being held pending decision in *Kibler*.

thought otherwise, or it would not have certified its opinion for publication.[3] CHW and its counsel can assure this Court with certainty that the issue of hearing officer authority presented by this case is important to hospitals and their medical staffs throughout the state, as well as to the lawyers who represent them, and those who serve as peer review hearing officers.

CHW's California hospitals operate 24 hours a day, 7 days a week, 365 days a year, providing vital healthcare services to the citizens of this state in times of acute illness and emergency – often when patients' lives are at stake. Although hospitals obviously are essential to the public welfare, California's hospitals currently are confronting severe challenges to their very existence on multiple fronts, including (among many others) declining reimbursement from both public and private payers, astronomical costs of mandated (but unfunded) seismic retrofitting, steep increases in energy costs, and minimum nurse staffing ratios that were imposed in the midst of a severe nursing shortage.[4]

State officials and the public understandably are deeply concerned about the accelerating rate of hospital closures resulting from these intense pressures.[5] Dozens of hospitals and more than sixty-five hospital emergency rooms have closed in California over the past decade. *See* Melissa Evans, "Hospital is swamped by patients: Executives at Centinela Freeman say closures have caused overcrowding woes," *Daily Breeze*, September 26, 2007; Chris Van Gorder, "California's shared health care crisis," *San Diego Union Tribune*, March 2, 2007 at p. B9; Steve Hymon, *et al.,* "Some Hospitals

[3] Mileikowsky argues that the absence of prior reported decisions means the issue cannot possibly be important. Answer to Petition for Review at 5-7. That theory makes no sense. If an issue could not be considered significant unless there already were published decisions on the same subject, nothing new would ever be worthy of publication. Clearly, that cannot be and is not the standard for what constitutes an important legal question – for either publication or Supreme Court review purposes.

[4] Cal. Health & Safety Code § 1276.4; California Code of Regulations ("CCR"), tit. 22, § 70217, which became effective January 1, 2004.

[5] The Petris Center on Health Care Markets and Consumer Welfare, *California's Closed Hospitals, 1995-2000* (April 2001), http://caag.state.ca.us/charities/publications/nonprofithosp/report.pdf (a report to California's Attorney General).

Giving Up Hope; Medical facilities are closing down in the face of rising costs," *Los Angeles Times*, Jan. 16, 2004, at B1.

A hospital's success – indeed, its very survival – depends to a great extent on the quality and professionalism of the medical staff doctors who treat their patients in the hospital. *A hospital has no incentive whatsoever to restrict or exclude good doctors.* Indeed, exactly the opposite is true. Every hospital wants to get and keep as many good doctors on its medical staff as its facilities possibly can accommodate. Hospital revenues come from treating patients, and it is the staff doctors who admit the patients to the hospital. Every hospital values the efforts and insights of its staff physicians, and wants to work in tandem with them to provide high-quality patient care to its community.

The hospital peer review process is necessary because, while the Medical Board of California is responsible for granting licenses to physicians, the Medical Board cannot observe how they practice day-to-day. In order to assure that the physicians who practice in hospitals continually meet high standards of competence and professional conduct, their peers must evaluate their behavior and the care they provide on an ongoing basis, and make recommendations to the hospitals' governing bodies about which doctors are qualified to practice there and what specific clinical privileges they should be given. Both federal and state law mandate that hospitals have organized medical staffs and work with them to perform this essential quality oversight function.[6] This Court repeatedly has recognized the importance of peer review. *See, e.g., Kibler*, 39 Cal. 4th at 199 ("Hospital peer review, in the words of the Legislature, 'is essential to preserving the highest standards of medical practice'"); *Alexander v. Superior Court*, 5 Cal. 4th 1218, 1227 (1993) (California Evidence Code Section 1157 was enacted to avoid "stifl[ing] candor and inhibit[ing] objectivity" in peer review).

[6] *See* 42 Code of Fed. Regs. ("CFR") § 482.22; Cal. Bus. § Prof. ("B&P") Code § 2282; Cal. Health & Safety Code § 1250(a); Cal. Code of Regs. §§ 70701, 70703. California imposes liability on *hospitals* for failing to screen their medical staff physicians adequately and continuously (*Elam v. College Park Hospital*, 132 Cal. App. 3d 332 (1982)), while simultaneously requiring hospitals to bend over backward to protect every physician's right to "fair procedure" in the peer review process. One court of appeal justice noted that sometimes there is so much due process in California's peer review process "that one cannot help tripping on it." *Oskooi v. Fountain Valley Reg'l Hosp. and Med. Ctr.*, 42 Cal. App. 4th 233, 249 (Sills, J, concurring).

Nevertheless, physician participation in peer review is voluntary,[7] and as a general rule, physicians receive no compensation for the substantial time and effort that peer review demands. Many physicians find it extremely difficult to sit in judgment of their colleagues. Not only that, but the California peer review process is time-consuming and complicated, as the result of the requirements imposed by, *inter alia*, (1) the federal Health Care Quality Improvement Act, 42 United States Code Section 11112; (2) California Business and Professions Code Section 809 *et seq.*; (3) the standards of the Joint Commission, the organization that surveys and accredits hospitals for participation in the federal Medicare Program (*see* Joint Commission, *Comprehensive Accreditation Manual for Hospitals: The Official Handbook* (2007), at pp. MS-12 – MS-24); and (4) the practical difficulties of assembling numerous busy professionals (including the subject of the hearing, the physician hearing panel members, the percipient and expert witnesses, and either attorneys or physician representatives for the parties) multiple times to get through the evidence and arguments in often complex cases where the physician's livelihood may be at stake. Some hearings take years to complete. As a result, recruiting willing peer review participants can be a serious challenge for medical staffs.

Hospitals must anticipate that physicians who lose their internal challenges to adverse peer review actions will seek judicial review under CCP section 1094.5. It can be quite difficult for courts to understand how the peer review process is supposed to work, and how to balance the competing concerns about protecting the public from problem physicians on the one hand, and protecting the fair procedure rights of physicians on the other. *See, e.g., Medical Staff of Sharp Memorial Hospital v. Pancoast*, 121 Cal. App. 4th 173 (2004) (granting a writ of mandate to overturn a trial court order requiring a hospital to reinstate a physician who had been suspended, even though she had not practiced in the hospital for three years, so the hospital had no idea of her current competence, and by her own admission she had been emotionally unstable when the hospital suspended her privileges). While courts may hesitate to second-guess hospitals on quality-of-care issues, there is a significantly greater possibility that a hospital peer review decision will be overturned on procedural grounds. *See, e.g., Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434 (1991) (a hospital's decision to suspend a physician's privileges was overturned by the court of appeal because the physician was

[7] *See University of So. Cal. v. Superior Ct.*, 45 Cal. App. 4th 1283, 1288 (1996) (acknowledging that physician participation in peer review is voluntary).

denied a fair hearing due to inadequate notice of charges, denial of access to patient charts at issue, "secret" *voir dire* of hearing panel members, etc.).

For all these legal and practical reasons, hospitals try their best to engage experienced hearing officers who are very familiar with the applicable law to preside over peer review hearings. Shifting the task of making complex peer review procedural rulings, from the expert hearing officer to the physician hearing panel members – as the *West Hills* court did – is like reassigning responsibility for ruling on motions to compel and for terminating sanctions from a trial judge to the jury. There is no basis in law or logic to impose such burdens on ill-equipped physician volunteers who are simply supposed to be serving as triers of fact. If, as the *West Hills* court also ruled, all a hearing officer can do in the face of repeated physician refusal to produce documents or other information as and when required is to order continuances (because only the physician hearing panel can decide that terminating sanctions are warranted), then a physician who is trying to forestall a final adverse action has every incentive not to fulfill his or her hearing participation obligations in a timely manner.

As noted above, it is already extremely difficult to find physicians willing to serve as hearing panel members, and rulings like this only make it harder. Thus, the *West Hills* decision threatens the ability of California hospitals and their medical staffs to conduct effective peer review, and thereby threatens the safety of California hospital patients. The legal question presented by this case is manifestly one of statewide import.

III. Conclusion

For all the foregoing reasons, the Court should grant review of *West Hills*, to resolve the conflict with *Tenet Healthsystem* and to establish definitively that peer review hearing officers have the power accorded them by the Legislature to "impose any safeguards the protection of the peer review process and justice requires"[8] – for the benefit of California hospitals, their medical staffs, and the public they serve.

[8] Cal. Bus. & Prof. Code § 809.2(d).

We sincerely appreciate the Court's consideration of this request.

Yours very truly,

Barry S. Landsberg

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