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VIA FEDERAL EXPRESS

November 12, 2007

The Honorable Ronald M. George, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

Re: ***Gil N. Mileikowsky v. West Hills Hospital Medical Center et al.***
(Case No. S156986)

Dear Justice George and Associate Justices:

Amicus curiae the Ware Law Group respectfully requests that the Court grant the Petition for Review currently pending in *Mileikowsky v. West Hills Hospital Medical Center et al.* (2007) 154 Cal.App.4th 752 to address and resolve an issue of vital importance to patient safety in California.

Interest of Amicus Curiae

As principal of the Ware Law Group, I have represented the interests of physicians, hospitals and hospital medical staffs in California for over twenty years. Before forming the Ware Law Group, for a period of seven years I represented the interests of approximately 33,000 physician members of the California Medical Association (CMA). During that time, as in-house legal counsel to the association and its members, including the Organized Medical Staff Section of CMA (the function of which was to address issues unique to hospital medical staffs), I was responsible for legal analysis and assistance with respect to all matters related to physician peer review.

Before and after my tenure with the CMA, altogether for a period of over fourteen years, I and my firm affiliates (including the Ware Law Group) have represented the medical staffs of more than twenty hospitals and clinics throughout California. Our practice continues to focus on all aspects of medical peer review, including the broad range of issues attendant to the peer review hearing process. I have served as the medical staff's legal counsel in many California peer review hearings and as hearing officer in a significant number of other such hearings and appeals. Thus, both I and my firm have a strong interest in clarification of California law regarding the authority of peer review hearing officers and in seeing that the split of authority on this issue within the Court of Appeal is resolved. We urge the Court to grant review in this matter to clarify the proper role of hearing officers in imposing "any appropriate safeguards the protection of the peer review process

and justice requires," as is called for under Business & Professions Code Section 809.2(d) and may be further detailed in an institution's pertinent medical staff Bylaws.

1. The Hearing Officer Plays a Vital Role in Ensuring Fairness and Efficiency in the Medical Peer Review Process.

Business & Professions Code Section 809 expresses the Legislature's intent underlying the statutory scheme provided to encourage medical peer review for the public's protection while, at the same time, provide fair process to individuals who are the subject of adverse peer review actions and recommendations. Two of the many important goals expressed by the Legislature are (1) that peer review should be fairly conducted in order to preserve the highest medical standards, and (2) that health care peer review should be performed efficiently. (Bus. & Profs. Code § 809(a)(3), (7).)

Just as other forms of adjudication are generally performed by judges and lawyers, who have the legal training for this function, so too are peer review hearing officers generally experienced lawyers, who are uniquely situated to facilitate the hearing process in order to ensure both fairness to the parties and efficiency.

With respect to fairness concerns, in our experience during a recent hearing lasting over three years, the subject physician (who was in pro per) wrote an average of 1.5 letters every three days to the hearing officer and/or opposing party – sometimes up to six often lengthy letters in one day – raising detailed procedural issues. Resolution of these matters consumed an enormous amount of time outside of the hearing sessions themselves and sessions were often delayed pending resolution of the procedural matters. The process became so prolonged that one hearing officer quit and the replacement hearing officer felt compelled to revisit many of the matters that were previously resolved by the first. A hearing panel member also quit in protest against the length of service he was being asked to provide.

Such delays in commencement and completion of these hearings are common. Because hearing panels are almost always comprised of physicians and other busy healthcare practitioners with full office schedules and hospital duties, the hearings of necessity mostly occur at night. The panel members must finish their office schedules and perform necessary hospital rounds before the hearings can even begin. The hearings sessions, which generally last for three to four hours, take them away from administrative work, patients and their families. They may have on-call duties to the Emergency Department over the night and then a full patient schedule at their offices and in the hospital on the next day. Panel members are volunteers who provide extraordinary service in this capacity. However, due to the associated burdens, they will generally agree to service no more often than one time per week or every other week. Additional delays occur due to absences for attendance at professional conferences and family vacations. Depending upon

the complexity of the issues to be decided, hearing panel service can last well over a year – and in our experience, often lasts for two to three years. Appeals to hospital boards can add an additional two to six months to the process.

The failure of a party repeatedly to comply with discovery or other process rulings has frequently, in our experience, resulted in additional delays of often many months.

To avoid what could become an imminent and complete break-down of the peer review hearing process, it is essential that hearing officers have authority to implement appropriate safeguards designed to move the process forward fairly, but also as expeditiously as possible.

Given the split within the Court of Appeal over the lawful scope of the hearing officer's authority, many hearing officers may be hesitant to perform their expected quasi-judicial functions, fearing that they may be limited to granting continuances when either side refuses to comply with reasonable directives that are necessary to a fair hearing of the issues. They may fail to take necessary steps to control the process, even when those steps are clearly contemplated by provisions of the Medical Staff Bylaws. Such a result would provide no incentive whatsoever for compliance by an offending party. Of greater concern, we fear that the granting of serial continuances will exacerbate the rampant problems already caused by the delays inherent in a hearing process that depends heavily on the participation of reluctant volunteer panel members.

2. Patient Protection is Better Served When the Hearing Officer Has Broad Authority to Control the Process.

Perhaps highest among the Legislative goals expressed in Business & Professions Code § 809 is protection of the public health and welfare, by facilitating a process through which practitioners who engage in substandard care or professional misconduct may be excluded and reported to the appropriate state licensing boards who have responsibility to regulate licensees for the public's protection.

Except in cases where there is proof of a danger of imminent harm, protective corrective actions and reports to the licensing authorities can occur only following the conclusion of the hearing and any appeal. Thus, even if a physician or other practitioner were ultimately found to present substandard care or professional misconduct adversely affecting the delivery of patient care, the corrective action finally imposed to protect the public is often delayed by years as a matter of course. All incentives are aligned for such a practitioner to delay implementation of corrective action, and continue practicing at the institution, as long as possible. The public safety remains at stake until final resolution of the matter.

3. Fairness issues, including those related to document discovery and exchange, are uniquely legal in nature and should not be resolved by a fact-finding lay panel.

In *Rosenblit v. Superior Court* (1991) 231 Cal. App.3d 1434, 1443-44, the California Court of Appeal held that, while there may be foundational questions of fact involved, the ultimate question of whether there had been a fair peer review hearing was a question of law (which must therefore be reviewed on appeal under an independent judgment standard). Peer review hearing panels generally are comprised of medical professionals with essential understanding of the clinical and professional conduct issues at stake. They are well equipped to hear evidence and reach conclusions concerning clinical care and professional conduct that may adversely impact the delivery of that care. They are not, however, trained or well equipped to address questions or reach conclusions pertaining to the rights of the parties under the statute, Bylaws and cases, the discovery and exchange of documents, or any sanctions that may lawfully be imposed upon either party for failure to cooperate with the process. To ask the panel members to review and decide such issues not only places them in a very awkward position, but could also result in unfair (maybe even unintended) consequences to a party, having major legal significance.

For example, while jurors are often asked to decide difficult factual questions, they are not competent to decide what is "fair." That is a function of the law and of the courts:

> The tradition and heredity of the flexible equitable powers of the modern trial judge derive from the role of the trained and experienced chancellor and depend upon skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury. *A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 473 (issue of promissory estoppel to avoid injustice is for the court to determine, not the jury).

See also *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6-8 (same); *Stark v. Coker* (1942) 20 Cal.2d 839, 846.

The same concept holds true for physicians serving on peer review committees: they can and should resolve factual issues concerning the subject physician's competence to exercise clinical privileges, but they should not attempt to resolve legal issues concerning how the proceedings should be conducted. That is the job of the hearing officer.

4. Involvement of the panel members in procedural disputes implicating party rights would be unduly burdensome, would likely cause confusion, and could result in unwarranted bias against a party.

In our experience, as noted above, the hearing panel members are heavily burdened by the realities of serving on the panel, in light of their already extremely taxing professional

responsibilities. To expect them to participate in important decisions respecting party rights would add tremendously to this burden.

It would also tend to cause confusion, as these highly intelligent and diligent professionals would likely want to master the process issues presented to them, but could misconstrue technical legal points involving evidence, discovery, party rights, etc. The very reason why hearings are almost always conducted by attorneys in the role of hearing officer is to shield the panel from such burdens, but also to avoid diversion of their attention to procedural matters that generally require legal training and experience for proper resolution. Also, understandably, some panel members might be reluctant to assume this role, fearing liability for any mistakes in judgment as to these matters.

Finally, it may be anticipated that panel members who are asked to review and decide important process questions would develop biases for or against a party for its conduct with regard to procedural matters. Such biases could then influence the panel members improperly with respect to the substantive issues under review, potentially resulting in an unjust decision.

While the split within the Court of Appeal in the *Mileikowsky* cases focuses on the precise issue of whether a peer review hearing officer may issue an ultimate terminating sanction, as opposed to lesser sanctions, the confusion and other ramifications expected from this split of authority will, in our opinion, pose further impediments to any hopes for efficient resolution of these disputes and could, as a result, increase the risk to public health and safety.

For all of the above-noted reasons, we urge the Court to grant review in this case in order to allow for a full hearing of the many important relevant considerations. In the alternative, we ask the Court to order that the opinion in *Mileikowksy v. West Hills Hospital Medical Center et al.* not be published in the official reports.

Respectfully submitted,

WARE LAW GROUP
Kimberly S. Ware

By 

Kimberly S. Ware

cc: See attached proof of service.

PROOF OF SERVICE - C.C.P. § 1013(a), 2015.5

The undersigned declares:

I am employed in the County of Alameda, State of California. I am over the age of 18 and am not a party to the within action; my business address is c/o Ware Law Group, 1500 Park Avenue, Suite 212, Emeryville, California 94608-3531.

On November 12, 2007, I served the foregoing document described as:

AMICUS CURIAE LETTER

on parties to the within action as follows:

☒ (By U.S. Mail) On the same date, at my said place of business, an original enclosed in a sealed envelope, addressed as shown on the attached service list was placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Emeryville, California.

☐ (By Facsimile) I served a true and correct copy by facsimile pursuant to C.C.P. 1013(e), to the number(s) listed on the attached sheet. Said transmission was reported complete and without error. A transmission report was properly issued by the transmitting facsimile machine, which report states the time and date of sending and the telephone number of the sending facsimile machine. A copy of that transmission report is attached hereto.

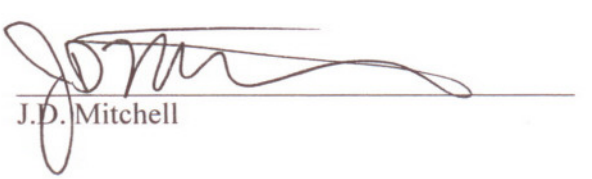
☐ (By Overnight Service) I served a true and correct copy by overnight delivery service for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

☐ (By Electronic Service) By emailing true and correct copies to the persons at the electronic notification address(es) shown on the accompanying service list. The document(s) was/were served electronically and the transmission was reported as complete and without error.

Executed on November 12, 2007.

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

☐ (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



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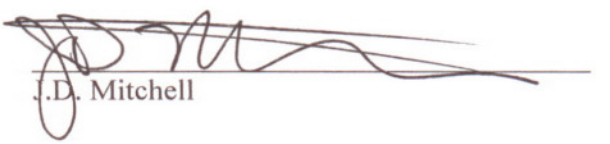

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