

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 8

Gil N. Mileikowsky, M.D.,

Petitioner/Appellant

v.

West Hills Hospital Medical Center and
Medical Staff of West Hills Medical
Center, Medical Staff of West Hills
Hospital Medical Center, Hospital
Corporation of America a/k/a HCA,
Inc., John D. Harwell, and James R.
Lahana,

Respondents/Respondents.

No. B186238

Los Angeles County Superior
Court No. BS091943

Honorable Dzintra Janavs, Judge
Presiding

APPELLANT'S REPLY BRIEF

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Addendum to 1999 Application of Dr. Gil Mileikowsky for Reappointment to the Medical Staff of West Hills Hospital (AR P003230)

Signed authorization for Cedars-Sinai Hospital to release information re Dr. Gil Mileikowsky, dated 8/11/99 (AR CH00138)

West Hills Hospital Delineation of Privileges for Dr. Gil Mileikowsky, approved 9/99 (AR CH00143-44)

Signed authorization for Cedars-Sinai Hospital to release information re Dr. Gil Mileikowsky, dated 12/5/00 (AR P003269)

Letter of James Lahana, attorney for West Hills Hospital, to attorney for Century City Hospital, requesting information about Dr. Gil Mileikowsky, dated 1/10/02, with signed authorization attached (AR CH01980-81)

Letter of attorney for Century City Hospital to James Lahana, attorney for West Hills Hospital, dated 1/16/02, providing information and documents re Dr. Gil Mileikowsky (AR CH01982)

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I. INTRODUCTION

Dr. Mileikowsky was absolutely entitled to receive a fair hearing before a peer review panel of physicians, with an unconflicted hearing officer. Instead, Respondents hired a conflicted hearing officer, demanded that Dr. Mileikowsky produce documents they knew he could not produce (but that they could easily have obtained by other means), and then induced their selected hearing officer to terminate the proceedings before a peer review panel could act.

Respondents cannot articulate a justification for these clearly illegal actions. Instead, they mount strident personal attacks on Dr. Mileikowsky while deflecting any discussion of their failure to follow the law.

II. REPLY TO RESPONDENTS' SUMMARY OF FACTS

To a disturbing degree, Respondents' Statement of Fact is just an *ad hominem* offensive against Dr. Mileikowsky. The apparent strategy is to paint him, inaccurately, as a devious and deficient doctor who does not merit fair consideration.

Respondents set the tone in the footnote opening their fact summary:

Petitioner’s Opening Brief offers a truncated, selective and inaccurate summary of events. . . . The degree to which Petitioner has distorted the record is troublesome because the misrepresentations are often material and create an unreliable picture.

(RB at 3, n. 3.)

Respondents do not support this very serious accusation of inaccuracy and distortion. Instead of identifying any misrepresented facts, Respondents give a blanket citation to sections spanning 38 pages of their brief, and to a 19 page fact statement in a trial court brief.¹ (*Ibid.*) (RB at 3, n. 3.) A meaningful response to such unfocused allegations is impossible.²

¹ Incorporation of trial court arguments into appellate briefs is “inappropriate.” (*Banning v. Newdow* (2004) 119 Cal.App.4th 438, 455.)

² Respondents also point to six footnotes of their brief that supposedly identify “inaccurate” and “distorted” factual statements in the AOB. (RB at 3, n. 3.) But these footnotes identify no inaccuracies or distortions:

- Note 14: “Petitioner is disingenuous in suggesting he never had an opportunity to express his views on terminating sanctions.” (RB at 16.)

- In fact, the AOB accurately quoted Mr. Harwell’s February 5 and March 18, 2003 statements that he would call for discussion on the issue of appropriate sanctions, and reported that sanctions were imposed on March 26, 2003, without further discussion. (AOB at 18.)

(continued...)

²(...continued)

- Note 25: “Petitioner’s insistence that ‘the Hearing Officer himself correctly acknowledged, repeatedly, that he did not have the power to enter a dispositive ruling’ is disingenuous. The Hearing Officer only stated that he lacked power to make *substantive* rulings on the merits.” (RB at 27 (emphasis in original).)

- ▶ In fact, none of the cited statements makes any distinction between substantive and procedural rulings. (AOB at 35-37 and Rule 14(d) attachments.)

- Notes 36 and 39: “It appears that Petitioner’s position was an artifice, designed to disrupt the JRC hearing” (RB at 36.) “The Cedars-Sinai documents were available only from Cedars-Sinai and Petitioner. . . .” (RB at 40.)

- ▶ In fact, these footnotes make factual assertions without citation to the record, but they do not identify any “inaccuracy” or “distortion” in the AOB.

- Note 44: “Petitioner’s Opening Brief contains yet another factual fallacy. The Brief claims he provided a second signed authorization to release the Cedars-Sinai Documents in January 2003 and that the Medical Staff did not submit the second authorization to Cedars-Sinai. No second authorization was ever provided.” (RB at 47-48.)

- ▶ In fact, the AOB accurately states that, in January 2003, Dr. Mileikowsky informed West Hills that he had previously provided two signed authorizations. (AOB at 17, citing 1/12/03 letter at 5, AR P003451.) Both authorizations are in the record. (8/11/99 Authorization, AR CH00138 (attached); 12/5/00 Authorization, AR P003269 (attached).)

- Note 47: “Petitioner misconstrues Mr. Helton’s pre-hearing letter which pointed out that since the entire record of what transpired below was submitted to the Governing Board as evidence, that evidence need not be taken again before the Governing Board.” (RB at 51-52.)

(continued...)

Respondents are more expansive, but even less accurate, when they attempt to characterize Dr. Mileikowsky himself as a bad person who merits punishment from the legal system. According to Respondents, Dr. Mileikowsky is trying to “relocate his hospital activity to West Hills,” and to “bully his way to medical staff privileges,” by “not allowing proper peer review” and by filing repeated “lawsuit[s] . . . to obtain through litigation privileges denied to him as the result of adverse peer review.” (RB at 6, 1, 3.) This is an oddly inflammatory way to describe the proceedings below – Dr. Mileikowsky’s application for routine biennial renewal of his West Hills medical staff privileges, which he had held in good standing since 1992, followed by an aborted administrative proceeding, followed a timely petition for writ of administrative mandate.

²(...continued)

► In fact, the Opening Brief paraphrased and quoted Mr. Helton’s letter accurately, and urged an interpretation entirely consistent with its content. (AOB at 20-21, 41.)

Respondents urge this Court to make a factual finding that Dr. Mileikowsky is a bad doctor who does not deserve a fair proceeding.³ They repeatedly refer to negative 805 reports submitted about him by the Cedars-Sinai and Encino-Tarzana hospitals, as if every accusation they contain is an established fact. (RB 5 and 6, n. 6.) Two of these reports are pre-hearing accusations against Dr. Mileikowsky. (CT12:2460-61; CT5:893-99.) The post-hearing Cedars-Sinai 805 report that Respondents cite gives no hint of what accusations were actually upheld. (CT5:891-92.) The Encino-Tarzana accusations never resulted in any factual determinations because the Hearing Officer summarily terminated the proceeding. (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 550.) Dr. Mileikowsky would vigorously contest the charges made against him regarding those hospitals, if those charges were being tried in this forum; some of his evidence is in the administrative record. (See Mileikowsky Decl., AR P002595-2604; Yamini Decl., AR P002668-74; Herbert Decl., AR P002675-88; patient letter, AR P002835-38; patient pictures and notes, AR P002839-42.)

³The story Respondents tell at pages 5 to 9 of their Brief is given largely without dates and out of chronological order.

But this appeal is not about the resolution of charges brought by other hospitals.

Respondents also assert that Dr. Mileikowsky falsified his 2001 West Hills application by concealing disciplinary action taken against him at Cedars-Sinai, Encino-Tarzana, Century City, and Valley Presbyterian Hospitals. (RB at 6 n. 6, 8 n. 9.) The few citations they provide refute this accusation. His 2001 application forthrightly disclosed that he had in the previous two years been subject to such disciplinary proceedings. (2001 Application at 2, AR P003275 (attached).) He corresponded extensively with the West Hills Medical Staff concerning the proceedings at Cedars-Sinai, Encino-Tarzana, and Century City, before and after he submitted his application. (11/27/00 letter, AR P000916; 11/29/00 letter at 2-5 and attachment, CT 12:002451-54, 2463-66; 11/2/01 letter, AR P003286; 3/4/02 letter at 5-16 and attachments, AR P003299-310, P003322-35.) The record does not address Valley Presbyterian Hospital – there were no allegations below concerning that hospital, and Respondents cite nothing to support their insinuation that that hospital ever took disciplinary action against him.

Respondents repeat (without citations) West Hills' allegation that Dr. Mileikowsky falsely stated that he voluntarily resigned from Encino-Tarzana and concealed the fact that his privileges were suspended there. (RB at 8 n. 9.) They ignore the demonstration (with citations) in Appellant's Opening Brief that this allegation was categorically false. (AOB at 10-11.)

Respondents' efforts to tar Dr. Mileikowsky are not just misguided but also beside the point. Dr. Mileikowsky has not been shown to be a bad doctor, but even if he had been, both good and bad doctors are entitled to fair peer review; the hearing process is designed to distinguish the two. Respondents want to avoid fair peer review because they are not at all confident it will give them the result they want – removal of Dr. Mileikowsky from West Hills.

III. ARGUMENT

A. Reply to Respondents' Statement of Standard of Review

Respondents misapprehend the standard of review, attempting to recast a *de novo* review of legal questions as a deferential review of fact determinations.

Respondents correctly note that factual findings in a hospital credentialing proceeding are reviewed for substantial evidence. However, Dr. Mileikowsky is not seeking review of any factual findings. A JRC⁴ was never constituted, and so no findings were ever made. West Hills' Board of Trustees performed a deferential review of the Hearing Officer's procedural decision. The substance of the dispute was never reached.

Respondents assert that the Hearing Officer made factual findings that the Governing Board adopted. (RB at 32.) They do not indicate what these findings were, nor can they suggest that Dr. Mileikowsky asks this Court to reach different factual conclusions.

Respondents are really asking for deferential review of the *trial court's* decision. Regarding whether Dr. Mileikowsky received a fair hearing, Respondents argue:

The trial court determined that Petitioner could not prove bias, finding factually that neither of the two elements of the *Haas* test was present. To reverse the trial court's finding under the substantial evidence test, the record must show that the trial court could reach no conclusion from the evidence *except that* both of the elements of the *Haas* test were met.

⁴Respondents' refer to the Medical Review Committee as the "JRC," and this Reply will use the same term.

(RB at 22 (emphasis in original).)

Respondents are wrong for two reasons. First, whether Dr. Mileikowsky received a fair hearing is a question of law. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1444.) Second, regardless of what is being reviewed, this Court does not defer to the superior court on appeal of administrative mandamus. “The appellate court . . . does not review the actions or reasoning of the superior court, but rather conducts its own review of the administrative proceedings to determine whether the superior court ruled correctly as a matter of law.” (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1137; accord, *Gaenslen v. Board of Directors* (1985) 185 Cal.App.3d 563, 573.) Thus, an appellate court is “at liberty to independently evaluate [a doctor’s] fair hearing claims.” (*Rosenblit*, 231 Cal.App.3d at 1444.)

**B. The Hearing Officers' Financial Conflicts of Interest
Compel Issuance of the Writ**

**1. Respondents' Newly-Minted Limitations on the
Haas/Yaqub Rule Do Not Bar Relief**

Respondents try to avoid the obvious application of the *Haas/Yaqub*⁵ rule to this case by inventing two narrow requirements that supposedly are not met: that the rule applies only if the hearing officer is “(1) appointed by one of the litigants, *and* (2) knows of a plan of that litigant for repetitive appointments.” (RB at 20 (emphasis in original).) These are meaningless distinctions designed to avoid squarely controlling authority.

The point of *Haas* and *Yaqub* is to prevent the appearance of financial conflict in an administrative hearing officer, not to make administrative bodies jump through arbitrary hoops. To this end, the Supreme Court requires exercise of appointment power “in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the [appointing entity].” (*Haas*, 27 Cal.4th at 1037.)

⁵*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017; *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474.

Consequently, Respondent's notion that *Haas* and *Yaqub* apply only when the hearing officer is "appointed by one of the litigants" misses the mark. The cases forbid appointing a hearing officer in a manner suggesting that pleasing one party will increase the chances of future appointments and, therefore, future compensation. This rule is violated whenever the hearing officer knows that one of the litigants can influence future appointments. "[A] direct, personal, and substantial pecuniary interest does indeed exist when income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions." (*Haas*, 27 Cal.4th at 1031-32.)

As Respondents acknowledge, Dr. Mileikowsky's adversary was West Hills' Medical Staff, and particularly its Medical Executive Committee (MEC). (RB at 24, n. 22.) The Hearing Officer knew perfectly well that he held his job because of the MEC's recommendation. (RT 7/1/02 25:11-21, AR P001582.) He even read into the record the letter he received from the Staff's President:

The Medical Executive Committee at West Hills Hospital and Medical Center has requested the Board of Trustees appoint you as a Hearing Officer.

(RT 7/1/02 26:4-11, AR P001583.)

Respondents blithely assert that “Mr. Harwell was not appointed by one of the litigants, but by the Hospital” (RB at 24) – meaning that the Board of Trustees rubber-stamped the choice of one litigant, its own Medical Staff. The Hearing Officer knew the Hospital followed its Medical Staff’s recommendations, not the doctor’s. He had every financial incentive to favor the Staff, and none to favor Dr. Mileikowsky.⁶ In fact, Mr. Harwell terminated the West Hills proceeding just 15 days after Dr. Mileikowsky cost him significant income by having him removed as hearing officer in another proceeding. (3/7/03 letter, P004082; 3/8/03 letter, P004084.)

Likewise, the *Haas/Yaqub* rule does not require any explicit showing that the Hearing Officer “knows of a plan of that litigant for repetitive appointments.” In *Haas*, the County conceded in a preliminary discussion that the hearing officer could be rehired (27 Cal.4th at 1022), but this discussion played no role in the Supreme Court’s decision.

⁶The Hospital tries to argue that Mr. Harwell had an incentive to favor Dr. Mileikowsky because he represented physicians in his practice. (RB at 25.) There was no evidence, let alone finding, that hearing officer decisions favoring hospitals would drive away Mr. Harwell’s physician clientele. The most likely inference is that physicians in trouble with a hospital would want to hire an attorney known to be in hospital medical staffs’ good graces.

That Court did not require that the appointing authority pre-announce a plan to rehire the officer. The possibility of future hiring is obvious to a recently-appointed hearing officer. Indeed, the whole point of the rule is to avoid giving the hearing officer an incentive to induce the appointing authority to hire again, an incentive that would be even *greater* if the authority had *not* already announced a plan to rehire.

Yaqub makes no mention of a “plan” to rehire the hearing officer. Nevertheless, the Court of Appeal had little trouble perceiving the “potential for further appointments in the future,” which helped to “create a ‘possible temptation’ to favor the hospital.” (122 Cal.App.4th at 485.)

On this record, Mr. Harwell knew that he had been hired as Hearing Officer, and had been hired repeatedly for that job in the past, because the Staff’s attorney Mr. Lahana favored him. He stated candidly on the record:

I think in the 15 years that I have been doing this sort of thing I’ve bumped into Mr. Lahana seven times. The first, he represented the hospital; I represented the doctor. . . . And then there have been seven cases where I have been the hearing officer. In one I was asked to be the hearing officer by the doctor’s lawyer, not by Mr. Lahana. And then, in the other six, two of them were resolved before the hearing started In two of them Mr. Lahana’s client

prevailed, and in two of them Mr. Lahana's client did not prevail.

(RT 7/1/02 17:1-17, AR P001574.)

Mr. Harwell reiterated his understanding of the importance of staying in a litigant's good graces to get future work:

In this case, . . . I've thought about this a lot, and I've thought about this poor lawyer. He's very good at what he does, and he has asked me to be a hearing officer four times. And he's lost all four times, and he's just asked me to be a hearing officer for the fifth time. And I think it's because he recognizes . . . that I can't influence the decision.

(RT 7/1/02 25:24-25:7, AR P001581-82.)

Contrary to Mr. Harwell's suggestion, the fact that Mr. Lahana had lost in prior proceedings before him does not mean he did not favor Mr. Lahana's clients in those proceedings; it merely means that Mr. Lahana did not have a strong enough case to prevail, whatever Mr. Harwell did (particularly since hearing officers are not supposed to make or even recommend a decision). In the present case, Mr. Lahana struck gold in favoring Mr. Harwell with yet another appointment. Mr. Harwell did not simply "influence the decision" – he ruled in favor of Mr. Lahana's client unilaterally, ignoring his own repeated admonition that he had no such power.

Mr. Harwell could not and did not deny that his appointment created the appearance of bias condemned in *Haas* and *Yaqub*. Rather, he insisted repeatedly that bias did not matter because he had no power to make a dispositive decision – the precise power he soon wielded to terminate the proceedings. (6/27/02 letter, AR P003384-88; RT 7/1/02 9:18-21, AR P 001566; RT 7/1/02 20:15-18, AR P 001577; RT 7/1/02 23:10-17, AR P 001580; RT 7/1/02 24:11-13, AR P 001581; RT 7/1/02 25:5-10, AR P 001582 (all attached to Opening Brief).) Respondents attempt to crawl out from under Mr. Harwell’s glaringly false statements by asserting that he only said he had no power to make dispositive *substantive*, not *procedural*, rulings. (RB at 27, n. 25.) This is nonsense. Mr. Harwell made no such distinction, but if he had, it would have made no difference. A litigant who loses his case because of a biased procedural ruling is prejudiced just as much as a litigant who loses because of a biased substantive ruling.

Mr. Harwell’s appointment bore precisely the appearance of impropriety that the Supreme Court forcefully forbade in *Haas*, and that the Court of Appeal readily recognized in *Yaqub*. It is no less offensive to due process and fair procedure in this case. Since the Opening Brief was filed, the Supreme Court has noted (with reference to anti-SLAPP

legislation) that “hospital peer review proceedings constitute official proceedings authorized by law” (*Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 200.) In the last few months, it has, with specific reference to *Haas*, again emphasized that a financial conflict of interest necessarily violates due process, is not harmless error, and requires reversal. (*People v. Vasquez* (2006) 39 Cal.4th 47, 63-64.)

This conflict absolutely compels issuance of the writ.

2. The Administrative Appeal Did Not Vitiating the Improper Appointment of the Hearing Officer

Respondents argue that the administrative appeal process immunized the administrative proceedings from the *Haas/Yaqub* violation. (RB at 49-56.) For reasons thoroughly explained in the Opening Brief, this contention is wrong as a matter of law and of fact. (AOB at 39-42.)

Respondents do not really want to argue this point. Instead, they assert, Dr. Mileikowsky may not address it because it is a “challenge[] not raised in the trial court.” (RB at 48.)

This misrepresents the issues before this Court and the court below. Dr. Mileikowsky contends that the appointment of the Hearing

Officer violated the *Haas/Yaqub* rule, as he did before the Hearing Officer, the Board of Trustees, and the Superior Court. This challenge was unquestionably preserved for appeal, but Respondents argue in avoidance that the administrative appeal made the problem go away – even though, as is discussed below, the California Supreme Court has quite clearly held to the contrary. Dr. Mileikowsky objected below to the Governing Board proceedings on a variety of grounds. (Reply to Respondents’ Opposition at 8-11, CT18:003871-74.) His position on the *Haas/Yaqub* violation has not changed one iota.

Even if, contrary to fact, Dr. Mileikowsky were trying to proceed on a new theory, his contention would not be barred:

[I]t is settled that a change in theory is permitted on appeal when a question of law only is presented on the facts appearing in the record. The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.

(*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 (citations, quotation marks, and ellipses omitted).) Contentions concerning procedural matters in administrative proceedings present “a pure question of law.” (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 168.) In particular, the

question of whether an administrative appeal can cure the appearance of impropriety that disqualified the Hearing Officer is one of law, not fact.

Haas is absolutely clear: administrative appellate review does not cure the hearing officer's appearance of financial bias. (27 Cal.4th at 1034-35.) Respondents disagree; they contend that the reason the second hearing before the Board of Supervisors in *Haas* did not cure hearing officer bias was that the County Board of Supervisors did not perform an independent *de novo* review. (RB at 54, n. 51.) To the contrary, the Supreme Court noted that the County proceedings were pursuant to Government Code sections 27720 through 27728 (27 Cal.4th at 1020 n. 1), and Government Code section 27722 specifically allows the Board of Supervisors to "reject the recommendation and enter its own findings, conclusions, and decision after a review of the record."

In *Haas*, the Supreme Court held that independent review cannot cure a hearing officer's appearance of bias. It soundly rejected the contention that a cure is effected "when the Board *independently* reviews the administrative record and decides whether to accept or reject the officer's recommendation." (27 Cal.4th at 1034 (emphasis added).) It quoted the United States Supreme Court's "leading case on point" to the effect that a hearing officer's financial interest cannot be corrected

“on appeal and trial *de novo*.” (27 Cal.4th at 1034, quoting *Ward v. Village of Monroeville* (1972) 409 U.S. 57, 61-62.) It specifically disavowed earlier dictum in *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 794, that “the opportunity for *independent* review weighed against adopting” a rule disqualifying a hearing officer. (27 Cal.4th at 1034-35 (emphasis added).)

Respondents also try to distinguish *Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435 on this point, and their discussion is, at best, confused. (RB at 54 n. 51.) Fortunately, the Supreme Court articulated precisely what *Hackethal* says: that the Court of Appeal properly found bias even though “a state medical association argued that its own *independent* review of a licensing matter cured any prejudice due to the involvement of biased adjudicators at a lower level.” (27 Cal.4th at 1035 (emphasis added).)

Ironically, Respondents base their defense of Mr. Harwell’s decision upon the review by an appellate body also presided over by a conflicted hearing officer. Mr. Helton, the Hearing Officer at the administrative appeal, had the same *Haas/Yaqub* problem as Mr.

Harwell, and Dr. Mileikowsky objected below. (6/24/03 letter at 4, CT4:00735; 7/14/03 letter at 4, CT4:00754.)⁷

Respondents say that the administrative appeal cured the Hearing Officer's appearance of bias. To rule in their favor, this Court would have to defy a clear and vigorous contrary holding of the Supreme Court.

3. Effect of Overlapping Conflicts

The Hearing Officers' *Haas/Yaqub* conflicts are just the most prominent of the multiple conflicts of interest that plagued Dr. Mileikowsky's administrative proceeding. (AOB at 22-23.) Mr. Lahana, the attorney for the prosecuting body at West Hills, again selected Mr. Harwell as hearing officer, even though (or perhaps because) Mr. Harwell was simultaneously the hearing officer in proceedings against Dr. Mileikowsky at Century City Hospital, the very proceedings Dr. Mileikowsky was accused of not disclosing to West Hills. With Mr. Harwell in place, Mr. Lahana's client, the West Hills Medical Staff, charged Dr. Mileikowsky with failing to make adequate disclosure of the Cedars-Sinai proceedings, where Mr. Lahana had been

⁷Respondents criticize as inaccurate the AOB's citation to Mr. Helton's website at P003882-83. (RB 49 n. 45.) The citation is correct.

the hearing officer – notwithstanding Cedars-Sinai’s previously established refusal to allow Dr. Mileikowsky to disclose the documents from that proceeding. Dr. Mileikowsky caused Mr. Harwell to lose his remunerative engagement as hearing officer at Century City; Mr. Harwell summarily dismissed Dr. Mileikowsky’s West Hills proceeding 15 days later. Prosecution and adjudication of Dr. Mileikowsky has become a cottage industry for a tightly-knit group of attorneys.

The tag-team approach to prosecuting and adjudicating Dr. Mileikowsky led inevitably to the *Haas/Yaqub* conflict and other problems that fatally tainted the proceedings below. Reversal is required to return a measure of integrity to the peer review process.

C. The Hearing Officer’s Unauthorized and Erroneous Summary Termination of the Administrative Proceeding Compels Issuance of the Writ

1. The Hearing Officer Acted Without Authority in Terminating the Administrative Proceeding

a. A Hearing Officer Appointed Pursuant to Section 809.2 Should Not Be Granted the Power to Dismiss a Proceeding Summarily

Respondents assert there is legal authority giving a Business and Professions Code section 809.2 hearing officer the unilateral power to

terminate a section 809.2 hearing. (RB at 27-31.) They do not, however, identify that authority.⁸

Respondents point first to section 809.2(d)'s statement that the presiding officer "may impose any safeguards the protection of the peer review process and justice requires," language repeated in the Hospital's Bylaws. Respondents fail to explain how a hearing officer's power to dismiss a proceeding unilaterally for a discovery default is "required" for the protection of the peer review process and justice. The peer review panel is perfectly able and empowered to decide whether a given discovery default is of sufficient import to terminate the proceeding. The hearing officer, who has no role in deciding the ultimate issues in the proceeding and no power to say what weight will be given to any evidence, is particularly ill-suited to decide whether a particular

⁸Respondents claim that Dr. Mileikowsky at one point asked the Hearing Officer to enter terminating sanctions against the MEC, suggesting this means the Hearing Officer must have had that power. (RB at 13, 27 n. 25.) In the cited correspondence, Dr. Mileikowsky, a *pro per* litigant fighting for his professional life, asked the Hearing Officer to issue a ruling that the Hospital either had to produce the requested discovery or "face terminating sanctions and dismissal . . ." (7/15/02 letter at 4-5, P000171-72.) He stated no position on whether the Hearing Officer had the power to impose such sanctions unilaterally, or whether the question would have to be referred to a JRC. In any event, he would not be judicially estopped from asserting a contrary position here, because his position was not accepted and did not benefit him. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 137.)

discovery default threatens the peer review process, or justice. Contrary to Respondent's suggestion (RB at 29, n. 27), Dr. Mileikowsky did not, in agreeing to be bound by the Bylaws, agree that peer review could be wrested from physicians by a lay hearing officer.

Respondents also rely on *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531⁹. Appellant's Opening Brief demonstrated, in detail, that this decision was erroneous and should not be followed here. (AOB at 44-48.) Respondents claim to disagree but fail to articulate a single point of disagreement with the Opening Brief's analysis. (RB at 29.) Respondents appear to concede, by their silence, that *Tenet* cannot be accepted as authority for the Hearing Officer's dismissal of Dr. Mileikowsky's administrative proceeding.

Finally, Respondents claim that "other courts" have accorded hearing officers the power to terminate a hearing. (RB at 29-31.) They cite two cases making the unsurprising point that administrative law judges (who have radically more power than a section 809.2 hearing officer) have discretion in conducting the hearings before them. Neither

⁹Appellant's Opening Brief calls this case "*Tenet*" for short, and Respondent's Brief calls it "*Mileikowsky II*." In this Reply, we will continue to call it "*Tenet*."

suggests that such officers have the power to terminate an administrative proceeding because of a discovery default:

- *Cella v. United States* (7th Cir. 1954) 208 F.2d 783, 789 – ALJ had the power to order the taking of the testimony of multiple witnesses at one sitting;
- *Mendoza v. Merit Systems Protection Bd.* (Fed. Cir. 1992) 966 F.2d 650, 653 – ALJ properly granted dismissal of an untimely claim, as required by law.

Respondents supplement this meager authority with a handful of cases in which a court recognized that an administrative agency as a whole, or a court, had the power to carry out its duties:

- *California Drive-In Restaurant Ass’n v. Clark* (1943) 22 Cal.2d 287, 303 – Industrial Welfare Commission had the power to set regulations governing the minimum wage;
- *Laurelle v. Bush* (1911) 17 Cal.App. 409, 416 – police commissioners had the discretion to decide whether to issue a license for a motion picture business;
- *Shoults v. Alderson* (1921) 55 Cal.App. 527, 531 – Board of Medical Examiners had the power to continue a hearing and to penalize practitioner for falsely claiming to be an M.D.;

- *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967 – courts have broad procedural powers, which might or might not include the power to establish jury instructions by general order.

These cases do not address the legal issues presented in this appeal. Respondents cannot identify a single case holding that a hearing officer, with powers limited as in section 809.2, may issue terminating sanctions for a discovery default. As in *Tenet*, Respondents would have this Court accord the Hearing Officer a power that is not recognized in any statute or other decision.

b. Even Under *Tenet*, the Hearing Officer Had No Authority to Terminate the Proceeding

The Opening Brief noted *Tenet*'s holding that the imposition of terminating sanctions by a section 809.5 hearing officer should only arise in "egregious circumstances" following "an extensive record of misbehavior." (AOB at 52, citing *Tenet*, 128 Cal.App.4th at 562.) Respondents disagree; they say (without explanation) that *Tenet* does not require "severe and repetitive incidents of misconduct before terminating sanctions are applied." (RB at 45.) In fact, *Tenet* goes to great lengths to emphasize that terminating sanctions are justified only by multiple disruptive transgressions over an extended period of time.

(128 Cal.App.4th at 562-566.) “[C]ourts are reluctant to approve imposition of the ultimate sanction unless it is clear from the record that the transgressing party left no viable alternative.” (*Id.* at 564.)

Respondents argue (without record citations) that termination was justified here by the “egregious circumstances” of Dr. Mileikowsky sending lengthy faxes, declining to produce the Cedars-Sinai documents, and “many months of delay” (apparently another reference to the Cedars-Sinai document dispute).¹⁰ (RB at 46.) But the undeniable fact is that the Hearing Officer imposed terminating sanctions here for one reason only: Dr. Mileikowsky’s inability to produce the Cedars-Sinai documents in the face of Cedars-Sinai’s prohibitory directive. (Order Terminating Hearing at 1, 11, AR P003509, AR P003519.) “[C]ourts are reluctant to approve imposition of the ultimate sanction unless it is clear from the record that the transgressing party left no viable alternative.” (*Tenet*, 128 Cal.App.4th at 564.) This is not such a case.

¹⁰The unsubstantiated but frequently repeated charge that Dr. Mileikowsky was trying to delay the administrative proceedings makes absolutely no sense. West Hills had suspended his privileges, and he could not get them back until the proceedings concluded. (6/17/02 letter, AR P003348.)

Clearly, under *Tenet*, this case did not present “egregious circumstances” following “an extensive record of misbehavior,” and did not warrant “imposition of the ultimate sanction.”

2. Dr. Mileikowsky’s Alleged Refusal to Produce Certain Documents Did Not Merit a Terminating Sanction

a. A Terminating Sanction Was Not Available Because the Alleged Failure to Produce Documents Did Not Cause Prejudice

Respondents do not disagree that the Hearing Officer failed to identify prejudice from Dr. Mileikowsky’s inability to produce the Cedars-Sinai documents, but they try to fill that gap on their own. (RB at 38-41.) They say that withholding the Cedars-Sinai documents “impaired the ability of the JRC to conduct a proper peer review.” (RB at 39.) However, the Hearing Officer’s peremptory termination of the proceeding foreclosed a JRC – the only body empowered to say what was needed to conduct proper peer review – from considering the question.

Respondents urge that terminating sanctions have been ordered in court cases where the default was even less prejudicial than it was here. (RB at 41-43.) Principally they refer to *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, which they say represented a less prejudicial

failure because the party produced some but not all of the documents requested. Dr. Mileikowsky also produced many documents (see, 7/16/02 letter at 1, P003412), but the MEC continued to press for the specific documents it knew he had been forbidden to produce.

The real question is how important the documents were to the proceeding. In *Lang*, the documents were a company's financial records, where the allegation was misappropriation and commingling of company funds – plaintiffs could not prove such claims without the documents. In Respondents' other authorities, the withheld discovery was pivotal to the other parties' case (*Williams v. Travelers Ins. Co.* (1975) 49 Cal.App.3d 805, 811 (party "refus[ed] to answer interrogatories that went to the heart of his claim"), or the decision did not disclose the nature of the withheld information. (*Calvert Fire Ins. Co. v. Cropper* (1983) 141 Cal.App.3d 901; *Cornwall v. Santa Monica Dairy Co.* (1977) 66 Cal.App.3d 250.)

Here, the Cedars-Sinai documents were so peripheral that the denial of Dr. Mileikowsky's 2001 reappointment application did not even mention Cedars-Sinai Hospital. (4/24/02 letter, P003330-34.) Cedars-Sinai became an issue in the 2002-03 administrative proceeding only because the MEC later tacked on the charge that he had not

provided certain Cedars-Sinai documents to the Hospital – a charge the documents themselves would not have illuminated. In contrast, in his 1999 West Hills reappointment application, Dr. Mileikowsky explicitly disclosed the Cedars-Sinai proceedings (Addendum to Application, AR P3230 (attached)), and provided authorization for Cedars-Sinai to release any documents. (8/11/99 Authorization AR CH00138 (attached); 8/13/99 letter, AR CH00141.) West Hills then routinely granted his reappointment without a request for any Cedars-Sinai documents (9/99 Delineation of Privileges with approval signatures, AR CH00143-44 (attached)), illustrating just how much importance the MEC actually attached to the documents. Not until three years later, in 2002, *after* Mr. Lahana became aware of Dr. Mileikowsky's inability to produce the Cedars-Sinai documents (11/29/00 letter at 2, AR P003234), and *after* the denial of the 2001 application (4/24/02 letter, AR P003330-33), the MEC began to press for the documents, hoping (correctly) that his failure to comply would precipitate a showdown that would avoid the peer review proceeding.

b. A Terminating Sanction Was Not Available Because Dr. Mileikowsky Offered Alternative Sources for the Information Demanded

Dr. Mileikowsky offered numerous alternative sources for the Cedars-Sinai information – including signed releases directed to Cedars-Sinai; medical records from Cedars-Sinai, authorization for disclosure by Mr. Lahana (the Cedars-Sinai hearing officer, who claimed to be legally barred from disclosing what he insisted Dr. Mileikowsky must disclose); oral and written responses; and production of patient charts. (12/5/00 letter at 1,4-5, AR P003259, P003262-63; 11/20/00 letter at 2-3, AR P003235-36; 12/11/00 letter at 2, AR P003271.) Appellant’s Opening Brief discussed the legal requirement that requesting parties in similar situations must exhaust such alternatives (AOB at 59-60) – a discussion Respondents ignore.

But the Medical Staff did not really want the Cedars-Sinai documents; it wanted to keep Dr. Mileikowsky from proceeding, and it saw the Cedars-Sinai documents as an easy avenue to that end. Contrast, for example, Mr. Lahana’s insistence that Dr. Mileikowsky and only Dr. Mileikowsky must produce the Cedars-Sinai documents (knowing full well that he could not do so), with the simple manner in

which Mr. Lahana used Dr. Mileikowsky's signed release to obtain any needed documents from Century City Hospital. (1/10/02 letter, AR CH01980-81 (attached); 1/16/02 letter, AR CH01982 (attached).) Dr. Mileikowsky signed two releases for the Cedars-Sinai documents, as Cedars-Sinai's attorney had proposed. (8/11/99 Authorization, AR CH00138 (attached); 12/5/00 Authorization, AR P003269 (attached); 4/16/99 letter at 2, AR P003241.) But Mr. Lahana was not interested because he did not want the documents; he wanted a way to get Dr. Mileikowsky out of the hospital.

Unfortunately, the Medical Staff's hand-picked hearing officer readily acceded to its wishes and identified the Cedars-Sinai documents as his sole ground for dismissal, citing *Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592. Respondents defend this course by urging that "petitioner's claim that he can suppress the Cedars-Sinai documents under *Webman* is dishonest." (RB at 46, citing AOB at pp. 60 to 61.)

In fact, Dr. Mileikowsky has never argued that he can "suppress the Cedars-Sinai documents under *Webman*." He argues that *Webman* provides no guidance in the present case, because it is the diametric opposite – that "Dr. Webman lost his privileges because he *wilfully*

refused to do precisely what Dr. Mileikowsky *repeatedly agreed to do.*”

(AOB at 60-61.)

Respondents do not appear to dispute any of the identified distinctions from *Webman*, and do not say what in the Opening Brief’s discussion of *Webman* they disagree with, let alone find “dishonest.” Mr. Harwell erred in dismissing Dr. Mileikowsky’s proceeding when he, unlike Dr. Webman, offered numerous alternative sources for the information being sought.

c. A Terminating Sanction Was Not Available Because the Alleged Refusal to Produce Documents Was Not Wilful

Respondents concede that terminating sanctions are available only for a wilful discovery default, but they proceed on the notion that “wilful” simply means “knowingly.” (RB at 35-36.) To the contrary, wilfulness does not include failures to give discovery where the party has been restrained from making discovery.

California courts look to the United States Supreme Court decision *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers* (1958) 357 U.S. 197 to define the parameters of wilfulness in failure to make discovery. (See, *Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 707; *Kahn v. Kahn* (1977)

68 Cal.App.3d 372, 385.) In *Societe Internationale*, a party refused to produce documents in its possession because it said to do so would violate Swiss law. In these circumstances, the default was knowing, but terminating sanctions were not appropriate because the failure to produce was not wilful:

[Petitioner] asserts only its inability to comply because of foreign law. . . . [W]e think that [Federal] Rule [of Civil Procedure] 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and *not to willfulness*, bad faith, or any fault of petitioner.

(357 U.S. at 212 (emphasis added).)

Dr. Mileikowsky did not surrender certain Cedars-Sinai documents because Cedars-Sinai refused to authorize the release. Dr. Mileikowsky was understandably deferential to the commandments of that hospital; he was not eager to have “failure to preserve medical confidentiality” added to the growing and arbitrary list of “charges” being heaped on him. By no stretch of the language can Dr. Mileikowsky be deemed “wilful” in failing to produce documents he was not allowed to disclose.

d. A Terminating Sanction Was Not Available Because the Hearing Officer Did Not Properly Consider Lesser Sanctions

The Hearing Officer erred in imposing terminating sanctions without considering lesser sanctions. Respondents try to avoid the issue by asserting that Dr. Mileikowsky supposedly “failed to raise it below.” (RB at 43.) This is incorrect; he did raise the issue below. (Appellate Hearing Brief at 25, CT3:000486; Memo in Support of Petition at 8-10, CT4:777-79.)

Respondents’ assertion that the consideration of lesser sanctions was unnecessary echos the larger fallacy behind the proceeding below – that peer review can properly be conducted by lawyers and judges instead of physicians. Respondents say there was no need to ask a JRC about the correct disposition of Dr. Mileikowsky’s application in the face of evidence or issue preclusion sanctions, because “it is proper to deny privileges” for a failure to provide information. (RB at 44.) The question, though, is not whether a JRC *could* properly decide to deny privileges for failure to present peripheral documents, but whether in this case it *would* do so. This question cannot be answered here because the Hearing Officer decided it himself without giving a JRC the chance to do so.

The Hearing Officer's decision that Dr. Mileikowsky would necessarily lose if a preclusion sanction was applied was equivalent to a grant of non-suit. This is a power that even California administrative law judges do not enjoy (AOB at 67-68) – another point Respondents do not address.

D. West Hills' Improper Termination of Dr. Mileikowsky's Clinical Privileges Before Resolution of the Administrative Proceeding Compels Issuance of a Preliminary Injunction

The Opening Brief established that West Hills acted illegally in stripping Dr. Mileikowsky of his gynecological privileges before the administrative proceedings concluded. (AOB at 69-71.) It further established that, if a writ of mandate is granted, he is legally entitled to the continuation of his gynecological privileges unless and until they are taken from him by proper statutory procedures. (*Ibid.*) Respondents do not appear to disagree.

Respondents do urge that the writ (and presumably also an injunction) should be denied on the ground that the trial court, like Mr. Harwell, undertook peer review in the place of a physician panel; they cite a catch-all summary of the trial court order upholding the denial of privileges on the ground that the trial court would find Dr.

Mileikowsky's application inadequate. (RB at 56.) They also say the trial court found Dr. Mileikowsky guilty of "laches" for waiting until the administrative hearing was over before filing his petition – as the doctrine of exhaustion of remedies absolutely required him to do. (*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 469.) They further suggest that Dr. Mileikowsky should be punished for not having undergone peer review since 2001, when he was booted out of the Hospital, as if this were an option he had chosen. (RB at 57.) None of these arguments can defeat the injunction claim.

E. The Non-Mandate Causes of Action Must Be Reinstated

The Opening Brief established that, if the denial of the requested writ of mandate is reversed, Dr. Mileikowsky's non-mandate causes of action must also be reinstated. (AOB at 72.) Respondents do not appear to disagree.


IV. CONCLUSION

Review of a hospital's credentialing action by a physician's peers is a statutory right; an unbiased hearing officer is a constitutional right.

Neither was afforded to Dr. Mileikowsky. For this simple reason alone, reversal and issuance of a writ are required.

DATED: January 18, 2007

SPIEGEL LIAO & KAGAY, LLP

By 

Charles M. Kagay
Attorneys for
Petitioner/Appellant

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ADDENDUM TO APPLICATION OF GIL N. MILEIKOWSKY, M.D.

Supplement to Response to Questions Concerning Disciplinary Actions:

1. On February 2, 1999, the Medical Staff Office of Encino-Tarzana Medical Center notified of "voluntary resignation" for failure timely to reapply. Reapplication materials were never properly sent and never received. The "voluntary resignation" is disputed and the subject of further proceedings.

2. On January 22, 1998, without notice or hearing, and without appropriate justification, the Vice President for Medical Affairs of Cedars-Sinai Medical Center summarily suspended Dr. Mileikowsky's privileges. That action is the subject of review/appeal proceedings before a Judicial Review Committee, now in progress.

JUN 24 1999



CEDARS-SINAI MEDICAL CENTER

8/11/99 1998

Office of Medical Staff Services
Cedars-Sinai Medical Center
8700 Beverly Boulevard, Room 2211
Los Angeles, California 90048

As a member of the Medical Staff, I hereby authorize Cedars-Sinai Medical Center ("Medical Center"), its agents, employees, representatives and Medical Staff to release to other hospitals and their medical staffs, other health care providers, health care service plans and other third party payors, health insurers, and any other requesting party, and their agents, employees and representatives (collectively, "Requesting Institution"), any and all information regarding my professional background and character, including without limitation, credentialing information, and other documentation requested by the Requesting Institution, in accordance with the evaluation of my qualifications for employment or medical staff membership and privileges at the Requesting Institution.

I am informed and acknowledge that federal and state laws provide privacy protections to certain individuals and entities for their acts and/or communications in connection with the provision of such information to all persons and entities engaged in quality assessment, peer review and credentialing activities, and for purposes of evaluating the qualifications of healthcare providers, to the extent that those acts and/or communications are protected by federal or state law.

In addition to the provisions of any other release previously or hereafter signed by me, I specifically and irrevocably authorize the Medical Center, its officers, employees, agents, representatives, service providers, and its Medical Staff, and their representatives, from any and all claims and liabilities that might be incurred or asserted in connection with the dissemination, provision and/or receipt of any such information.

The foregoing shall remain in full force and effect for a period of two (2) years from the date and forth below, is given for adequate consideration, and is irrevocable. I agree that the foregoing does not obligate the Medical Center, its agents, employees, representatives and Medical Staff to release any information.

By: *[Signature]*
Approved

8/11/99
Date

Name: GIL MILEIKOWSKY
(Please Print Name)

Signature and Title

Copyright © 1998, The CSM, Los Angeles, California 90048-2728
8700 Beverly Boulevard, Los Angeles, California 90048-1998
Phone: (310) 224-1998

R 001508

West Hills Hospital and Medical Center

DELINEATION OF PRIVILEGES DEPARTMENT OF OBSTETRICS & GYNECOLOGY GYNECOLOGY

APPLICANTS NAME: GIL, MILEIKOWSKY, R.D. *[Signature]*
Please Print Signature

I understand that the completion of this form, at the present time, does not preclude me from requesting additional privileges at a later date. I also understand that in conjunction with privileges granted certain consultations are required and/or suggested when unexpected complications develop, failure to respond as expected occurs, or unfamiliar features arise.

I further understand that as a member of the Medical Staff, I shall, in an emergency, be authorized to treat any medical disease and/or perform any medical or surgical procedures indicated. An emergency, for these purposes, is defined as any situation in which any delay in administering treatment would result in serious harm to the patient or an immediate threat to the life of the patient.

PROCEDURES	RECOMMEN- DATION		PROCEDURES	RECOMMEN- DATION		PROCEDURES	RECOMMEN- DATION	
	REQUEST TO PERFORM SURGERY	REQUEST TO ASSIST AT SURGERY		REQUEST TO PERFORM SURGERY	REQUEST TO ASSIST AT SURGERY		REQUEST TO PERFORM SURGERY	REQUEST TO ASSIST AT SURGERY
GENERAL GYNECOLOGY			PROCEDURES			PROCEDURES		
Hysterectomy - Abdominal with or without adhesion	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Uterine fibroid polyp	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Ovarian biopsy	<input checked="" type="checkbox"/>	
Tam	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Incidental hernia repair	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Vaginal green biopsy	<input checked="" type="checkbox"/>	
Gonorrhea	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Colporrhaphy repair	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Culdocentesis	<input checked="" type="checkbox"/>	
Uterine myomectomy	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Excision of pelvic abscess	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
Uterine hysterectomy	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Abdominal	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	LIMITED GYNECOLOGY		
Uterine suspension	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Vaginal	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	PAO Diagnostic	<input checked="" type="checkbox"/>	
Uterotomy - exploratory	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Hypogastric artery repair	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	D&C - pregnancy termination	<input checked="" type="checkbox"/>	
Uterotomy - partial	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Pre-ECG hysterectomy	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	1&2 Benign excision	<input checked="" type="checkbox"/>	
Schillingomy	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Plastic reconstruction of vagina	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Aspiration cytology	<input checked="" type="checkbox"/>	
Cervicomy	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Plastic reconstruction of vagina with total perineal repair	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Biopsy of cervix	<input checked="" type="checkbox"/>	
Ovarian cystectomy	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>				Biopsy of vagina	<input checked="" type="checkbox"/>	
Wedge resection of ovary	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>				Biopsy of cervix	<input checked="" type="checkbox"/>	
Hysterectomy - vaginal	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>				Biopsy of endocervix	<input checked="" type="checkbox"/>	
Repair of cysto-urethrope	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>				Conization of cervix	<input checked="" type="checkbox"/>	
Repair of salpingo	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>				Excision of vaginal wall cyst	<input checked="" type="checkbox"/>	
Repair of rectovag	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>				Excision of Zoster virus cyst	<input checked="" type="checkbox"/>	
Paravaginal - Paravaginal	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>				Excision of urethral caruncle	<input checked="" type="checkbox"/>	
Marsupial - Marsupial	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	FERTILITY			Excision of urethral caruncle	<input checked="" type="checkbox"/>	
PL (perineal-urethral) suspension	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Schillingomy	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Cervicomy	<input checked="" type="checkbox"/>	
LeFort's vaginal repair Tracheostomy	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Schillingomy	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Tupaculum or excision of urethral caruncle	<input checked="" type="checkbox"/>	
Repair surgical neck bladder, bowel	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Tubal reconstruction	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Hysterectomy - hysterectomy	<input checked="" type="checkbox"/>	
Repair vulvovaginal fistula	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Tubo-ovarian resection with uterus	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Paravaginal	<input checked="" type="checkbox"/>	
Repair vulvovaginal fistula	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Excision	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Cervicomy	<input checked="" type="checkbox"/>	
Closure of vaginal fistula	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Excision	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
Aponeurotomy (in conjunction with obstetrical/gynecological surgery)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Excision	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			

R 002307

PROCEDURES	PRIVILEGE REQUESTED			RECOMMENDATION			PROCEDURES	PRIVILEGE REQUESTED			RECOMMENDATION		
	REQUEST TO PERFORM SURGERY	REQUEST TO ASSESS PRIVILEGES	NO PRIVILEGES	REQUEST TO PERFORM SURGERY	REQUEST TO ASSESS PRIVILEGES	NO PRIVILEGES		REQUEST TO PERFORM SURGERY	REQUEST TO ASSESS PRIVILEGES	NO PRIVILEGES	REQUEST TO PERFORM SURGERY	REQUEST TO ASSESS PRIVILEGES	NO PRIVILEGES
Colposcopy	✓	✓					14D breast ablation	✓	✓				
hysteroscopy	✓	✓											
uterine ablation	✓	✓					GYNECOLOGIC ONCOLOGY						
Stimulated vaginoplasty	✓	✓					Radical hysterectomy (total)						
Repair of incompetent cervix	✓	✓					Radical hysterectomy (partial)						
Repair of incompetent cervix	✓	✓					Vulvectomy - simple	✓	✓				
Hydrotic mole excision	✓	✓					Vulvectomy - radical with groin dissection						
Removal of foreign body from vagina or uterus	✓	✓					Vulvectomy - radical with groin dissection & hydrodissection						
Cervical conization	✓	✓					Conization - anterior						

Fill in appropriate boxes which document as to training & experience. Refer to Rules and Regulations for pre-established criteria for granting these privileges

COMMENTS:

- 1) Multiple LASER (CO₂, YAG...) laser privileges granted separately
- 2) Pelviscopy / Operative laparoscopy

Action OB/GYN Dept: approved

Action Medical Executive Committee: approved

Action Board of Trustees: approved

Richard J. [Signature]
 Date 9/17/99
 Chief
 [Signature]
 Date 9/28/99
 Secretary
 [Signature]
 Date 9/29/99

App: 9/83

R 002308

CH 00144



CEDARS-SINAI MEDICAL CENTER

Office of Medical Staff Services
Cedars-Sinai Medical Center
8700 Beverly Boulevard, Room 2211
Los Angeles, California 90048

_____ 1999

As a member of the Medical Staff, I hereby authorize Cedars-Sinai Medical Center ("Medical Center"), its agents, employees, representatives and Medical Staff to release to other hospitals and their medical staffs, other health care providers, health care service plans and other third party payers, liability insurers, and any other requesting party, and their agents, employees, and representatives (collectively, "Requesting Institution"), any and all information regarding my professional competence and character, including without limitation, credentialing information, and other documentation requested by the Requesting Institution, in connection with the evaluation of my qualifications for employment or medical staff membership and privileges at the Requesting Institution.

I am informed and acknowledge that federal and state laws provide immunity protections to certain individuals and entities for their acts and/or communications in connection with the provision of such information to all persons and entities engaged in quality assessment, peer review and credentialing activities, and for purposes of evaluating the qualifications of healthcare providers, to the extent that those acts and/or communications are protected by federal or state law.

In addition to the provisions of any other release previously or thereafter signed by me, I specifically and without qualification release the Medical Center, its directors, officers, agents, employees, representatives, servants, and its Medical Staff, and their representatives, from any and all claims and liabilities that might be incurred or asserted in connection with the communication, provision and/or review of any such information.

The foregoing shall remain in full force and effect for a period of two (2) years from the date set forth below, in given for adequate consideration, and is irrevocable. I agree that the foregoing does not obligate the Medical Center, its agents, employees, representatives and Medical Staff to release any information.

Dr. *Gil Milikowsky*
(signature)

12/5/00
Date

Name: GIL MILIKOWSKY, MD.
(Please print name)

Physician/Assistant and Name, MD

CEDARS-SINAI MEDICAL CENTER
8700 BEVERLY BLVD., LOS ANGELES, CALIFORNIA 90048-1600
OVERLAND (310) 841-3000

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JAMES R. LAHANA
ATTORNEY AT LAW
3155 CEDAR VALLEY DRIVE, SUITE 208
WESTLAKE VILLAGE, CALIFORNIA 91362

TELEPHONE (818) 735-8800
FACSIMILE (818) 735-8804

January 10, 2002

Via Facsimile

Mark T. Kawa, Esq.
Ervin, Cohen & Jessup LLP
Ninth Floor
9401 Wilshire Boulevard
Beverly Hills, CA 90212-2974

Re: *West Hills Regional Medical Center/Gil Mileikowsky, M.D.*

Dear Mr. Kawa:

Enclosed please find the most recent amended *Authorization for Disclosure of Information Release from Liability and Indemnification Agreement* signed by Dr. Mileikowsky. If this release is acceptable, West Hills Regional Medical Center would appreciate a written response from Century City Hospital concerning the status of Dr. Mileikowsky's Medical Staff membership and clinical privileges and whether Dr. Mileikowsky has been the subject of any disciplinary action which is either final or pending. If any such action has been taken, or is pending, copies of specific information including, but not limited to, any notice of charges, responses or any other supporting documents are hereby requested.

If you have any questions, please do not hesitate to call me.

Sincerely,


James R. Lahana

IRL/cma: WestHills/Mileikowsky/Kawa

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Century City
Hospital
Tenet Healthsystem

**AUTHORIZATION FOR DISCLOSURE OF INFORMATION
RELEASE FROM LIABILITY AND INDEMNIFICATION AGREEMENT**

1. I hereby authorize Century City Hospital, its Medical Staff and the members, employees, attorneys, agents, and representatives of Century City Hospital and/or its Medical Staff (hereinafter collectively and individually referred to as "Century City") to disclose information and documents concerning me to West Hills Hospital & Medical Center Medical Staff (hereinafter referred to as "West Hills") Medical staff as needed to evaluate Dr. Mileikowsky's application for reappointment and O.B. privileges at West Hills Hospital, and any further proceedings or actions arising from the consideration of the application. This authorization extends to all information concerning me, including, but not limited to, any focused review or investigations, allegations which are the subject of such reviews or investigations, and any corrective action or discipline, whether recommended or taken by Century City before or after the date of this release.

2. I agree to waive any legal claims I might otherwise have against Century City for providing information to West Hills. I agree to release and hold Century City harmless from any and all liability arising out of or in connection with the disclosure of any authorization to West Hills, even though the information ultimately may be determined to be incomplete or incorrect. Specifically, I hereby covenant not to sue and release Century City from any and all, known or unknown, foreseen or unforeseen claims, debts, liabilities, demands, costs, expenses, obligations, attorneys fees, actions and causes of action of every nature and description which may arise out of or be related to the disclosure of information and documents by Century City to West Hills.

3. I hereby waive and relinquish the rights and benefits of California Civil Code Section 1542 which states:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release; which if known by him must have materially affected his settlement with the debtor."

I accept and assume the risk that I may later discover that the facts differ from my current understanding of the facts, but I agree that the foregoing shall remain effective and shall not be subject to termination or rescission by virtue of any such differences in facts.

4. I agree to indemnify and hold Century City harmless against any loss or liability arising out of any actions based upon any claim, demand, or cause of action released herein.


DR. MILEIKOWSKY, M.D.

Date: 1/9/02

Law Offices

ERVIN, COHEN & JESSUP LLP

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9401 Wilshire Boulevard, Ninth Floor
 Beverly Hills, California 90212-2974
 310.273.6333 v Fax 310.859.2325
 www.ecjlaw.com

January 16, 2002

Writer's Direct Dial/E-Mail:
 310.281.6377

Our File No.

James R. Lahana, Esq.
 31255 Cedar Valley Drive, Suite 206
 Westlake Village, CA 91362

Re: Century City Hospital/Gil Mileikowsky

Dear Mr. Lahana:

This letter is in response to your January 10, 2002 letter requesting information regarding Dr. Gil Mileikowsky. Dr. Mileikowsky has only temporary privileges to practice at Century City Hospital. Dr. Mileikowsky was deemed voluntarily resigned from the Century City Hospital Medical Staff for failure to complete medical records. The Medical Executive Committee subsequently recommended on November 7, 2000, to deny Dr. Mileikowsky reinstatement to the Medical Staff. Dr. Mileikowsky requested a formal hearing and an administrative review has commenced, but to date there has only been one hearing which addressed procedural issues. The matter has not proceeded because Dr. Mileikowsky has requested a continuance based on his involvement in another administrative hearing process at another facility.

Please find the November 7, 2000 letter and First Amended Notice of Charges attached hereto.

Very truly yours,

Mark T. Kawa

MTK:jcm

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7300 Medical Center Drive
West Hills, California 91307
818.676.4000
Web: www.columbia-hca.com

APPLICATION FOR REAPPOINTMENT TO THE MEDICAL STAFF 2001 TO 2003.

Please complete this form in its entirety. Terms such as "same as last" may not be used. Failure to complete this form in total may result in a delay in processing your Reappointment Application.

Name Gil Mileikowsky, M.D. Specialty OB/GYN

Primary Office Address 5363 Balboa Blvd #245 Telephone (818) 982-1888

Secondary Office Address ENCINO - CA - 91316 FAX # (818) 982-1994
Telephone _____

Associates _____ Soc. Sec. # 33 66 88 384

My present Staff category is Courtesy I request reappointment to the following Staff category Active _____ Courtesy I do not wish to reapply _____

Specialty Board Certification

I am certified by the following American specialty boards

OB/GYN Certification Date 12/91

Certification Date _____
Certification Date _____

I have been recertified by the following American Specialty Boards

Recertification Date _____
Recertification Date _____

Hospital Affiliations

Please list all hospitals where you have held privileges during the past two years

1 - Century City Hospital
2 - TARZANA Hospital

Current Academic Appointments

I currently hold academic appointments at the following institutions

Current Medical Licensure (Attach copy of current California pocket license)

In addition to California, during the past two years I have been licensed to practice medicine in the following states:

CALIFORNIA (on file), TEXAS, BELGIUM

Continuing Medical Education

During the past two years, I have completed None hours of Category I continuing medical education. By completing and signing this form, I certify that these hours relate, at least in part directly to my specialty and field of practice. (copies of CME forms from other hospitals, professional associations, or other organizations should be attached) *See ACOG cognates + 35 CME Credits recently at 50th Annual Meeting of ACOG*

Awards & Recognitions

During the past two years I have received the following awards or other recognitions from professional health care societies, institutions or organizations.

Disciplinary Actions

During the past two years, have any of the following been, or are they in the process of being denied, revoked, suspended, reduced, limited, placed on probation, not renewed, voluntarily or involuntarily relinquished or withdrawn, or failed to proceed with an application for any of the following? If yes, please provide full explanation on a separate sheet.

- Medical License in any state Yes No
- Other professional registration/license Yes No
- DEA/controlled substance registration Yes No
- Membership on any hospital medical staff Yes No
- Clinical privileges Yes No
- Prerogatives/rights on any medical staff? *I don't understand* Yes No
- Other institutional affiliation or status thereat Yes No
- Professional society membership or fellowship/Board Cert. Yes No
- Any other type of professional sanction Yes No
- Felony criminal charges. If yes, please provide full explanation on separate sheet, including resolution of charges. Yes No

Health Status

Please note that all responses to this question will be kept entirely confidential and any explanations will be reviewed by the Physicians Wellbeing Committee for evaluation as to significance.

Are you aware of, or have you been advised that you presently have a physical or mental condition or impairment, temporary or permanent, which by its nature, or as a result of its treatment, might interfere with your ability to practice in the area where privileges are sought. This would include, but is not limited to, a period of disability for illness or injury; treatment for any neuropsychiatric condition, or substance/alcohol abuse; development of syncope, tremor or significant uncorrected impairment in vision; new onset of cardiac or respiratory problems; use of any medications that would cause loss of concentration, change of motor skills or vision, or affect your ability to perform your professional duties.

 YES

 NO

If yes, please provide an explanation on a separate sheet and forward to the attention of the Physicians' Wellbeing Committee in a separate envelope marked confidential.

DECLARATION OF SERVICE BY MAIL

RE: MILEIKOWSKY v WEST HILLS HOSPITAL MEDICAL CENTER, et al
Los Angeles County - Superior Court No. BS091943
Court of Appeal, 2nd Appellate District, Div. 8, No. B186238

I, John Howard, declare that I am over 18 years of age, employed in the county of San Francisco, and not a party to the within action; my business address is 388 Market Street, Suite 900, San Francisco, California 94111. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service.

On January 19, 2007, I served a true copy of the following document(s):

APPELLANT'S REPLY BRIEF

on all the party or parties named below, in this action, by placing a true copy thereof in a sealed envelope, for collection and mailing with the United States Postal Service where it would be deposited for first class delivery, postage fully prepaid, in the United States Postal Service that same day in the ordinary course of business, addressed as follows:

Ron S. Kaufman
Nina B. Ries
Fenigstein & Kaufman
1900 Avenue of the Stars, Suite 2300
Los Angeles, CA 90067-4313
(Attorneys for Respondents)

Clerk of the Supreme Court
State of California
350 McAllister Street, Room 1295
San Francisco, CA 94102
(4 Copies)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 19, 2007 at San Francisco, California.


John Howard
(Printed Name)

/s/ John Howard
(Signature)

CERTIFICATE OF WORD COUNT
(California Rules of Court, rule 14(c)(1))

The text of this brief consists of 6998 words as counted by the Corel WordPerfect version 12 word-processing program used to generate the brief.

DATE: January 18, 2007



Charles M. Kagay
Attorney for Petitioner/Appellant

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