California Medical Association
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April 27, 2009

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

Re: *Mileikowsky, M.D. v. West Hills Hospital Medical Center, et al.*
(Supreme Court No. S156986) (Appellate Court No. 8D Civil No. B186238)

Letter Opposing Petition for Rehearing or, Alternatively, Request for Modification of Decision in Mileikowsky, M.D. v. West Hills Hospital Medical Center, et al.

Dear Chief Justice Ronald M. George and Associate Justices:

The California Medical Association ("CMA") has reviewed the Petition for Rehearing or, Alternatively, Request for Modification of Decision filed by Defendants and Respondents, and respectfully urges that it be denied. CMA is a nonprofit, incorporated professional association of more than 30,000 physicians practicing in the State of California. CMA's membership includes most of the California physicians who are engaged in the private practice of medicine, in all specialties. CMA's primary purposes are: ". . . to promote the science and art of medicine, the care and well-being of patients, the protection of the public health, and the betterment of the medical profession." CMA filed an amicus curiae brief with this Court in this case.

CMA fully supports this Court's opinion dated April 6, 2009, as it properly recognizes that fairness in the peer review system is essential to protect the public from both (1) "practitioners who provide substandard care," and (2) arbitrary disruptions in the patient-physician relationship. Defendants and Respondents ("Respondents"), in their Petition, quarrel with aspects of the opinion that protect the integrity of the peer review system, and suggest that the opinion be modified in a manner that condones precisely what this Court sought to avoid—unfairness. Furthermore, the language sought appears to be an attempt to overrule prior Supreme Court precedent. These efforts are inappropriate and

should be rejected, particularly in the absence of a factual record and full briefing to support them.

For example, Respondents seek a far-reaching pronouncement that has the potential to result in arbitrary exclusions of physicians charged with "disruptive" behavior. They object to the language on pages 11-12 of the opinion that states: "it also is settled that a physician may not be denied staff privileges merely because he or she is argumentative or has difficulty getting along with other physicians or hospital staff, which those traits do not relate to the quality of medical care *the physician* is able to provide." (Emphasis added.) They ask instead that, in the absence of a factual record on this point, the Court modify its opinion to allow for disciplinary action against a physician based on how others provide care allegedly due to that physician's behavior. There are at least three profound problems with this suggestion.

First, the statement does not accurately reflect existing law. For the proposition that peer review bodies may take disciplinary action against physicians for the alleged impact of their behavior on others, the Petition relies, both incorrectly and incompletely, upon *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614. In *Miller*, the California Supreme Court prohibited the exclusion of a physician from a medical staff based solely on his failure to adequately demonstrate, as required by a medical staff bylaw provision, his "ability to work with others." The court viewed this bylaw requirement, standing alone, as posing a danger of "arbitrary and irrational application and the concomitant danger that such a bylaw may be used as a subterfuge where considerations having no relevance to fitness are present." (*Miller, supra*, 27 Cal.3d at 629.)

Contrary to Respondent's statements, *Miller* limits disciplinary action against a physician to where it is shown that the physician whose behavior is at issue poses a "real and substantial danger" to the quality of care provided **by that physician** to patients. *Miller* does not address whether discipline can be based upon quality problems posed by others where those problems were allegedly caused by the "behavior" of the physician under review. The omission from Respondent's argument—the remainder of this Court's Fn. 16, demonstrates that the Court was focused on the care provided by the physician whose behavior was at issue- not third parties:

> "The absence of a compatible team working together *could* impair **the doctor's** performance and consequently undermine the effectiveness of the treatment given the patient." (*Silver v. Castle Memorial Hospital* (1972) 53 Hawaii 475, 479 [497 P.2d 564], fn. Omitted, italics and emphasis added.)

Second, *Miller* does not support the broad statement suggested because of the necessary vagueness of its application and the potential for abuse. As the *Miller* court stated:

> "We are not prepared to say that an applicant's ability to work with other medical personnel in the hospital setting may not have a clear effect on the level of patient care provided. [Citation omitted.] What we do say, however, is that in order to avoid the danger of *arbitrary and irrational application and the concomitant danger that such a bylaw may be used 'as a subterfuge where considerations having no relevance to fitness are present'* [Citing *Rosner v. Eden Township Hospital Dist.*] it must be read to demand a showing, in cases of rejection on this ground, that an applicant's inability to 'work with others' in the hospital setting is such as to present a real and substantial danger that patients treated by him might receive other than a 'high quality of medical care' at the facility if he were admitted to membership." (*Miller, supra*, 27 Cal.3d at 629, emphasis added.)

Further, according to the *Miller* court, the fact a physician may be considered abrasive to others does not alone justify exclusion. As the court stated:

> The fact that a physician seeking admission to staff membership is shown to manifest characteristics of personality which other staff members or administrators find personally disagreeable or annoying is not in itself enough, in our view, to justify rejection under the subject bylaw provision. **An otherwise competent physician, although considered "controversial," outspoken, abrasive, hypercritical, or otherwise personally offensive by some of his hospital colleagues, may nevertheless have the ability to function as a valuable member of the hospital community and should not be denied the opportunity to do so as a result of personal animosities or resentments alone.** To permit such application of the bylaw in question would, in the words of *Rosner*, pose a substantial danger of application as a subterfuge where considerations having no relevance to fitness are present. Rejection on this basis can be permitted, therefore, only when it can be shown that the applicant's ability to work with others in the hospital setting is limited in a manner which would pose a realistic and specific threat to the quality of medical care to be afforded patients at the institution. (Emphasis added.)

(*Id.* at 632.)

Unhappy with this Court's decision, Respondents seek rulings from this Court that neither reflect current law nor reflect the record below. While the California Medical

Association in no way condones disruptive behavior that jeopardizes patient care, it is extremely concerned about the possibility of a physician being labeled as "disruptive" as a result of alleged violations of onerous, overbroad or sham "codes of conduct" that, or are intended to, squelch medical advocacy, target competitors, or otherwise have no nexus to improving patient care. Indeed, CMA is aware of efforts to define "disruptive" in a manner that targets physicians inappropriately. For example, a number of medical staff bylaws in California provide that corrective action may be taken for conduct that is "disruptive of hospital operations." See, e.g., *2008 Model Medical Staff Bylaws of the California Hospital Association*, section 13.1-3(e) (Investigation for possible formal corrective action may be initiated when conduct may be reasonably likely to be "disruptive of Medical Staff or hospital operations"). The vagueness inherent in this language may be used to further anticompetitive goals or to chill criticism that is aimed at improving care.

Particularly given that the facts briefed and considered below involved a discovery dispute, not the type of behavior described in the Petition for Rehearing, the California Medical Association respectfully requests that the Petition be denied.

Dated: April 27, 2009

Respectfully submitted,

By: _____

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