Arent Fox

May 28, 2009

Sarah G. Benator
Attorney
213.443.7518 DIRECT
213.629.7401 FAX
benator.sarah@arentfox.com

VIA FEDERAL EXPRESS

Reference Number
030155.00001

Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-3600

Re: ***Mileikowsky, M.D. v. West Hills Hospital Medical Center, et al.***
Supreme Court Case No. S156986

Letter Supporting 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 George and Associate Justices:

This law firm represents the California Hospital Association ("CHA"). The Supreme Court of California previously accepted CHA as an *amicus curie* and allowed it to file a brief on the merits in the matter of *Mileikowsky v. West Hills Hospital Medical Center,* Supreme Court Case No. S156986. CHA is a nonprofit organization dedicated to representing the interests of hospitals and health systems in California. CHA has nearly 450 hospital and health system members, including general acute care hospitals, children's hospitals, rural hospitals, psychiatric hospitals, academic medical centers, county hospitals, investor-owned hospitals, and multi-hospital health systems. These members furnish vital health care services to millions of our states' citizens. CHA also represents more than 100 affiliate, associate, and personal members. CHA provides its members with state and federal representation in the legislative, judicial, and regulatory arenas, in an effort to improve health care quality, access and coverage; promote health care reform and integration; achieve adequate health care funding; improve and update laws and regulations; and maintain public trust in healthcare.

This letter is submitted in support of the Petition for Rehearing, or Alternatively, Request for Modification of Decision in the matter of *Mileikowsky v. West Hills Hospital Medical Center,* Supreme Court Case No. S156986 (the "Petition"), filed by West Hills Hospital Medical Center ("Respondent"). CHA's members have a vital interest in the subsequent interpretation

and application of *Mileikowsky v. West Hills Hospital Medical Center* (the "Opinion") to (1) ensure that an accurate, effective and fair peer review process is maintained for all parties, and, more importantly, (2) prevent patient harm and enhance quality patient care to all patients.

I. CALIFORNIA CODE OF REGULATIONS, TITLE 22, SECTION 70701 OBLIGATES CALIFORNIA HOSPITALS TO ENSURE THE COMPETENCE OF EVERY MEMBER OF THE MEDICAL STAFF.

The importance of fair and efficient medical staff peer review to the provision of high-quality health care in California hospitals cannot be overstated. As a condition of licensure, hospitals are required to participate in the state's regulation of physician conduct for the public's benefit. California regulations mandate that every hospital's governing body require the hospital's medical staff to establish controls designed to ensure the maintenance and achievement of high standards of professional and ethical practices of all of the members of the medical staff. (Cal. Code Regs., tit 22, § 70701 subd. (a)(7).) The medical staff must ensure that all of its members "demonstrate their ability to perform surgical and/or other procedures competently and to the satisfaction of an appropriate committee or committees of the [medical] staff. . ." (*Id.*) This duty is perpetual: Medical staff members must demonstrate such competence upon filing an initial application with the medical staff and at least every two years thereafter *(Id.*), and review of competency continues throughout the members' tenure on the medical staff.

State agencies responsible for enforcing the laws related to peer review and protection of the public hold hospitals accountable for adequately and aggressively screening a licentiate's competence and quality of care when he or she first applies for privileges and membership, and on an ongoing basis throughout the physician's tenure on the medical staff. Balancing these regulatory duties with the stringent legal obligation to provide a fair peer review process requires hospitals to devote considerable resources in time and money to ensure that they "get it right"– there is very little margin for error.

II. CHA MEMBERS HAVE A VITAL INTEREST IN ENSURING THE CONSISTENT APPLICATION OF ALL PEER REVIEW LAWS IN ORDER TO MEET THEIR OBLIGATION OF PROVIDING ACCURATE, EFFECTIVE AND FAIR PEER REVIEW.

A. Medical Staffs Make Recommendations to the Hospital Governing Body on Matters of Medical Practice, but the Hospital Governing Body Has the Final Decision and Ultimate Accountability.

To comport with California Business and Professions Code §809.05 ("Section 809.05"), California Code of Regulations §70701, and settled case law, CHA supports the Respondent's request that the Court clarify its language on page 18 of the Opinion, which states that "decisions relating to clinical privileges are the province of a hospital's peer review bodies and not its governing body. . ." This statement in the Opinion appears to negate the hospital governing body's important, legally mandated role in the peer review process.

CHA recognizes that the role of the medical staff in peer review is crucial: The organized medical staff is responsible to the hospital's governing body for the adequacy and quality of patient care. The hospital, however, is ultimately responsible for ensuring the competence of each medical staff member. (Cal. Code Regs., tit. 22, § 70703 subd. (a).) It is the governing body that ultimately grants or denies appointment to the medical staff and clinical privileges, or that terminates appointments and privileges. Although it very rarely happens, under Section 809.05, the governing body is authorized to grant, deny, or terminate medical staff appointments and/or clinical privileges over the objection of the medical staff. Section 809.05, (in subd. (b), (c), and (d)) states that hospital governing bodies have a legitimate function in the peer review process. Specifically, the governing body, in the interest of patient safety and in consult with the peer review body, has full authority to initiate action against a physician in the event that the peer review body fails to take action or fails to investigate contrary to the weight of the evidence. Courts have deferred to a governing body's decision, even when that decision contradicted the medical staff's recommendation, and concluded that a governing body's authority "encompasses final responsibility for its medical staff and care, and thus its decisions within this domain are entitled to deference." (*Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal. App.4th 1098, 1109). Any other interpretation could jeopardize a governing body's ability to perform its peer review duties, thereby risking patient harm and, conjunctively, increasing hospital liability. (See *Elam v. College Park Hospital* (1982) 132 Cal. App. 3d 332.)

Therefore, CHA respectfully requests that the Court clarify its language on page 18 of the Opinion to make clear that decisions relating to clinical privileges are the province of the hospital's governing body.

B. California Did Not "Opt Out" of the Health Care Quality Improvement Act ("HCQIA") – The "Opt Out" Provision in HCQIA was Eliminated by Congress in 1989.

CHA respectfully asks the Court to clarify footnote 4 on page 7 of the Opinion which states that California elected to "opt out" of HCQIA and adopt its own statutory peer review process. We recognize that California Business and Professions Code § 809 subd. (a)(1) ("Section 809") confusingly suggests that HCQIA gave states the opportunity to "opt-out" of some provisions of the federal act; however, events subsequent to this provision's enactment have rendered it incorrect. For the Court to cite the "opt out" provision as authoritative perpetuates ongoing misunderstanding of the history and interpretation of California's statutory peer review laws.

In 1989, the Honorable Henry A. Waxman explained in remarks to the United States House of Representatives that the "opt out" provisions in HCQIA were "widely misunderstood and thought by some to be broader than was intended." (Remarks of Rep. Waxman, 135 Cong. Rec. E4137-02 (1989).) In light of public confusion, Congress simply repealed the "opt out" provisions in HCQIA. (42 U.S.C. § 11111(c)(2) *amended by* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6103 (e)(6)(A), 103 Stat. 2106, 2208 (1989).) Accordingly, Section 809's statement that California has opted out of HCQIA is now without effect. To promote accuracy in the interpretation and application of HCQIA and California's peer review statutes, we respectfully ask the Court to review footnote 4 of page 7 in the Opinion and clarify that California cannot "opt out" of HCQIA, as such "opt out" provisions were eliminated in 1989.

III. CHA MEMBERS HAVE A GREAT INTEREST IN PROMOTING THE ACCURATE APPLICATION OF ALL PEER REVIEW LAWS IN ORDER TO SUPPORT PEER REVIEW'S PRIMARY GOAL – PREVENTING PATIENT HARM.

A. Hospitals Should Be Permitted to Deny Privileges to a Licentiate Based on Disruptive Conduct Which Has an Adverse Effect on the Quality of Care Provided to Any Patient, Regardless of the Licentiate's Clinical Competency.

In support of the Petition, CHA respectfully asks the Court to clarify its dicta on pages 11-12 of the Opinion, which states that it is "settled" that a physician may not be denied privileges merely because he or she is argumentative or has difficulty getting along with hospital staff unless the behavior affects the quality of care he or she is able to provide to patients. CHA recognizes that the question before the Court did not concern the grounds on which a denial of

privileges may be predicated. However, because the Court's dicta often carries weight before courts in the future – especially when the Court declares something to be "settled" law – CHA believes clarification of this point is necessary for patient protection.

Neither the Petition nor CHA asks this Court to decide an issue of law that was not before it in this matter. Rather, we ask the Court to clarify its language to make clear that existing law has not changed: that California hospitals may deny or terminate medical staff membership and/or privileges when behavior adversely affects (or may adversely effect) hospital patients, regardless of the physician's own clinical competence or technical skill. Public policy and settled case law already support the denial or termination of a licentiate's privileges based on a licentiate's unprofessional conduct in certain instances. For example, the Court found in *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, that denial of privileges of an otherwise competent physician is permissible when it is shown that the physician's ability to work with others in the hospital poses a "realistic and specific threat to the quality of medical care to be afforded patients at the institution." (*Miller, supra*, 27 Cal.3d at 632.)

CHA members have had experiences with physicians who verbally abuse hospital staff. For example, when a nurse telephones a physician to inform the physician about patient needs or to clarify orders, the physician may inappropriately berate the nurse for calling. As a result, nursing staff may be reluctant to call the physician for fear of abuse. This creates a real threat to the quality of care provided to patients. In other instances, a physician's behavior may so disrupt the operation of a clinical department that all patients in that unit are at risk. Accordingly, it is logical that the Court's finding in *Miller* was not limited to the physician's own clinical competency, but rather, was expansive enough to include the adverse effect a physician's behavior may have on the quality of care provided to all patients in the hospital. Indeed, based on *Miller*, CHA members have upheld (after the fair hearing process concluded) recommendations by their medical staffs to terminate physicians' membership and privileges because their extreme behavior adversely affected patients at the institution – *even though the physician's behavior may not have affected his or her own clinical ability to provide care to patients*.

As the Court aptly notes on page 5 of the Opinion, the primary purpose of the peer review process is "to protect the health and welfare of the people of California by excluding through the peer review mechanism 'those healing arts practitioners who provide substandard care or who engage in professional misconduct ....'" Consistent with this public policy-codifying statute, courts have upheld suspensions of physicians based solely on the physician's misconduct, exclusive of any consideration of the physician's competency in providing care to patients. (See *Miller v. National Medical Hospital of Monterey Park* (1981) 124 Cal.App.3d 81) (holding that a hospital's decision to suspend a physician based solely on his conviction of crime of conspiracy

to murder his wife was rational and reasonable as the conviction was substantially related to the qualifications, functions and duties of a physician.)

Consistent with public policy and case law, hospitals already have the authority to discipline, limit or terminate privileges for physicians whose unprofessional conduct adversely affects care provided to patients, or is otherwise substantially related to the qualifications, functions and duties of a physician. Without this authority, and as discussed in the Petition, hospitals may be in the untenable position of having to maintain privileges for medically competent physicians who sexually harass staff, are combative, or who commit fraud. Keeping such physicians on staff clearly compromises patient safety and potentially increases the hospital's exposure to liability under criminal, civil and employment laws. (See, e.g., *Elam, supra,* 132 Cal. App. 3d at 346.) Yet, the Court's dicta raises a question about the hospital's authority to act in these situations.

In response to the California Medical Association's letter to the Court, dated April 27, 2009 (the "CMA Letter"), we respectfully disagree with CMA's characterization of the Respondent's position on this issue. The CMA Letter mischaracterizes Respondent's position as stating that disciplinary action may be brought against a physician based on how others provide care. This misstatement provides the entire premise for the arguments set forth in the CMA Letter. The Respondent and CHA do not support the premise that physicians may be disciplined for the manner in which third parties provide care. Nor are the Respondent and CHA asking this Court to "decide" an issue that was not before it. Rather, the Respondent and CHA support the position which is set forth already in California's peer review statutes, public policy and settled law: physicians may be disciplined for their unprofessional conduct and that conduct's potential or resulting adverse effects on any hospital patient. CHA, in support of the Petition, therefore asks this Court to clarify its dicta to be consistent with this public policy and the settled law.

B. Hospitals Cannot Safeguard Against Patient Harm by Relying on the Expiration of Privileges for a Physician Who Provides Substandard Care.

CHA respectfully asks the Court to review and clarify its dicta on pages 14 and 15 of the Opinion. The Court writes on page 14 that "[e]ven when there is no summary suspension, a physician generally would wish to have the hearing held as soon as possible, if only to resolve uncertainty about his or her status at the hospital." On page 15, the Court notes that expiration of a physician's staff privileges in the absence of reappointment protects the hospital against the risk that a physician whose practice is substandard will continue to provide care to the hospital's patients. CHA respectfully notes that the Court's statements are inconsistent with current case law and do not accurately reflect the incentives in peer review hearings.

Specifically, under *Sahlolbei v. Providence Healthcare*, (2004) 112 Cal.App.4th 1137, the court held that a physician whose staff privileges expired after the medical staff recommended that his membership not be renewed, but before the hearing on that recommendation concluded, was entitled to a preliminary injunction reinstating the physician's staff privileges pending the hearing's conclusion. Therefore, under current law, if a medical staff has recommended the termination or non-renewal of a physician's privileges, and that physician's privileges are set to expire prior to the hearing's conclusion, the hospital is required, in most instances, to reappoint that physician pending the outcome of the hearing.

Thus, unless this court disapproves *Sahlolbei*, the actual state of the law is the reverse of the Court's description on page 15. Because the physician is entitled to maintain his or her privileges during the pendency of the hearing, the physician often is economically incentivized to *delay* his or her hearing. After all, the hearing's conclusion may bring the termination of the physician's medical staff membership, as well as a report of the action to the Medical Board of California. As long as the hearing continues, the physician may practice at the hospital and will not not be reported to the Medical Board of California.

In situations in which there is a risk of patient harm from a physician (but such risk does not rise to the level of imminent danger justifying a summary suspension under California Business and Professions Code Section 809.5), a hospital cannot rely on expiration of the physician's privileges as a safeguard against patient harm. CHA members are continually faced with the challenge of providing fair and efficient peer review hearings in an environment in which a physician is economically motivated to delay. Concurrently, the hospitals must continually mitigate against potential and actual patient harm as a result of such physician's care.

In footnote 7 of the Opinion, the Court states that its holding in *Anton v. San Antonio Community Hosp.,* (1977) 19 Cal.3d 802, "should not be construed to suggest that a hospital is required to renew or extend an existing appointment when the proceedings are delayed by the physician's obstructive conduct." Yet, proving such delay, especially in light of the Court's ultimate holding in the Opinion, may be difficult in most circumstances. Therefore, we respectfully ask the Court to clarify its dicta on pages 14 and 15 of the Opinion to either expressly disapprove *Sahlolbei*, or to acknowledge that unless a physician is under a summary restriction, physicians have an incentive to delay their peer review hearings.

C. To Protect Patients, It Is Crucial for Hospitals to Seek and Obtain Information on Peer Review Proceedings at Other Hospitals.

CHA emphasizes the Respondent's position that hospitals have a legal duty to investigate the details of peer review proceedings at other hospitals. Hospitals often learn that such adverse

actions exist through reports that the other facilities file with the Medical Board of California, pursuant to California Business and Professions Code Section 805 ("Section 805 report"). Under settled law, CHA members have a legal duty to their patients to investigate disclosures of adverse action at another hospital against applicants for membership and privileges or against current medical staff members. (See *Webman v, Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 600.) Accordingly, CHA members must obtain information about other hospitals' peer review efforts to meet their legal duties and to maintain the integrity and accuracy of the peer review process. The Section 805 report's summary nature, however, does not provide sufficient information for a hospital to evaluate fully the bases of the adverse action.

Therefore, hospitals often must rely on an applicant or member to provide the information necessary to evaluate the matter. An applicant is legally required to cooperate with such efforts and to provide the information the hospital requests. If the applicant does not do so, the hospital can deny membership and privileges. (*Webman, supra,* 39 Cal.App.4th at 602-603.) Without this authority, every CHA member could be in the untenable position of having to grant or maintain privileges to physicians who have had an adverse action at another hospital, but who simply refuse to share that information with the investigating hospital. This is antithetical to public policy and patient protection.

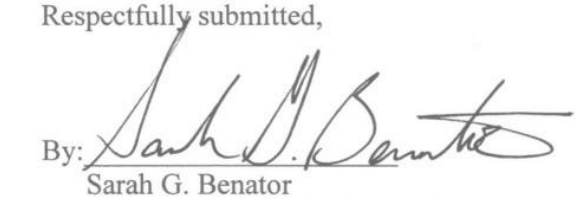
The legislature recognized the applicant's duty when it codified the burdens of proof in peer review hearings. For most peer review actions, the peer review body has the burden of proof at the hearing to establish that its actions and recommendations are reasonable and warranted by a preponderance of the evidence. This burden is switched for initial applicants who are denied membership or privileges: the initial applicants bear the burden of proof at the hearing to persuade the trier of fact by a preponderance of the evidence of their qualifications by producing all information which allows for adequate review, evaluation and resolution of reasonable doubts concerning the applicant's current qualifications for staff privileges. (Cal. Bus. & Prof. Code § 809.3 subd. (b)(2).)

Collaboration and the exchange of information are important to maintain quality care and to protect patients. Accordingly, we respectfully ask the Court to revise its dicta on pages 16 and 17 of the Opinion to clarify that, upon the hospital's request, a physician applicant has an obligation to provide information to the hospital about peer review matters involving that physician at another facility so that the hospital can meet its duty to patients.

Arent Fox

For the above reasons, this Court should grant Respondent's Petition for Rehearing, or Alternatively, Request for Modification of Decision.

Respectfully submitted,

By: 

Sarah G. Benator
Attorney for California Hospital Association

cc: See attached proof of service

LA/156250.4

PROOF OF SERVICE

The undersigned declares:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is Arent Fox LLP, 555 W. 5th Street, 48th Floor, Los Angeles, California 90013.

On May 28, 2009, I served true copies of the foregoing on interested parties in this action as follows:

May 28, 2009 Letter To Chief Justice Ronald M. George Re Supporting Petition For Rehearing, Or Alternatively, Request For Modification Of Decision

☐ (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 Los Angeles, 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.

SEE ATTACHED SERVICE LIST

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

Executed on May 28, 2009 at Los Angeles, California.

Armida Flores

LA/157535.1

SERVICE LIST

David S. Ettinger H. Thomas Watson Horvitz & Levy LLP 15760 Ventura Blvd., 18th Floor Encino, CA 91436-3000	Attorneys for West Hills Medical Center
Ron S. Kaufman Nina B. Ries Fenigstein & Kaufman, P.C. 1900 Avenue of the Stars, Suite 2300 Los Angeles, CA 90067-4314	Attorneys for West Hills Medical Center
Paul Hittelman Law Offices of Paul M. Hittelman 11999 San Vicente Blvd., Suite 2300 Los Angeles, CA 90049	Attorneys for Gil N. Mileikowsky, M.D.
Charles M. Kagay Spiegel Liao & Kagay LLP 388 Market Street, Suite 900 San Francisco, CA 94105	Attorneys for Gil N. Mileikowsky, M.D.
Honorable Dzintra Janavs Los Angeles Superior Court 111 N. Hill Street Los Angeles, CA 90012-3117	BS091943
California Court of Appeal Second Appellate District, Division Eight 300 S. Spring Street, 2nd Floor, N. Tower Los Angeles, CA 90013-1213	B186238
Chief Justice and Justices of the Supreme Court California Supreme Court 350 McAllister Street, Room 1295 San Francisco, CA 94102-3600	*Original + 8 copies*