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June 3, 2009

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

SUPREME COURT  
FILED  
JUN 2 - 2009  
Frederick K. Ohlrich Clerk  
Deputy

Dear Chief Justice George and Associate Justices:

Re: *Mileikowsky v. West Hills Hospital Medical Center*  
Supreme Court Case No. S156986

We represent Petitioner/Appellant Gil N. Mileikowsky, M.D. We write in response to a letter that the California Hospital Association (CHA) submitted to the Court on May 29, 2009.

We are uncertain as to the appropriate response to CHA's letter. The letter purports to be in support of Respondent/Defendant West Hills Hospital's Petition for Rehearing, or Alternatively, Request for Modification of Decision. CHA is a membership organization of which West Hills is a member. (<http://www.calhealth.org/public/mem/documents/MemberHosp0209.pdf>.) CHA's letter is in fact an entirely new petition for rehearing, about twice as long as West Hills' petition, raising numerous additional issues. CHA's new proposals are far from modest; it asks this Court at several points to overturn decades-old statutory and case law that the parties did not challenge in their merits briefs and that are not addressed in West Hills' petition.

CHA's new petition is not only well beyond its role as an *amicus* but also very untimely. It was submitted to the Court more than a month after the deadline for filing a petition for rehearing (the Court entered its decision in this case on April 6,

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2009). No one sought an extension of that deadline. However, if the Court does find it appropriate to consider the arguments raised in CHA's May 29, 2009 letter, we respectfully request that it also consider the following points in response.

**I. THE COURT'S DECISION IS CONSISTENT WITH HOSPITALS' DUTIES UNDER CALIFORNIA CODE OF REGULATIONS, TITLE 22, SECTION 70701**

The argument at page 2 of CHA's letter is almost a word-for-word repetition of the argument it presented in its *amicus* brief on the merits at pages 3 to 4. The point again seems to be simply that Title 22, Section 70701 of the California Code of Regulations obligates a hospital to require its medical staff to conduct peer review to ensure the competence of its members. The Court made precisely this point at page five of its opinion:

Every licensed hospital is required to have an organized medical staff responsible for the adequacy and quality of the medical care rendered to patients in the hospital. (Cal. Code Regs., tit. 22, § 70703, subd. (a); *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10.) The medical staff must adopt written bylaws "which provide formal procedures for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate." (Cal. Code Regs., tit. 22, § 70703, subd. (b); see Bus. & Prof. Code, § 2282.5; Cal. Code Regs., tit. 22, §§ 70701, 70703.)

CHA does not identify any way that the Court's decision should be modified in this regard.

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## II. THE COURT'S OPINION DOES NOT IMPACT HOSPITALS' INTEREST IN ENSURING THE CONSISTENT APPLICATION OF PEER REVIEW LAWS

### A. The Court's Opinion Accurately Summarizes a Hospital Governing Body's Role in Peer Review

Like West Hills in its Petition for Rehearing at pages 2 to 3, CHA notes (correctly) that the Legislature has empowered a hospital to act on peer review when its medical staff has failed and refused to do so, and then leaps (incorrectly) to the conclusion that hospitals must therefore have unbridled power to decide all peer review matters, with the statutorily-mandated hearing panel serving merely as a preliminary forum for gathering evidence upon which the governing body can act. (CHA letter at 3.) CHA therefore follows West Hills in objecting to language on page 18 of the Opinion, which correctly states that "decisions relating to clinical privileges are the province of a hospital's peer review bodies and not its governing body . . . ."

This matter is addressed in Dr. Mileikowsky's Answer to Petition for Rehearing at pages 1 to 4. As was pointed out there, the Legislature did not intend that the peer review body would be limited merely to deciding peer review matters "in the first instance." The Legislature decreed that "[i]t is the policy of this state that peer review be performed by licentiates." (Bus. & Prof. Code, § 809.05.) Thus, the peer review body is not simply a warm-up act for a governing body waiting in the wings to carry the process to its conclusion; the peer review body is the body that performs peer review.

On this issue, CHA places its reliance on *Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, in which the Court of Appeal deferred to the decision of a hospital governing body that differed from the decision of the hearing committee. CHA sees *Weinberg* as a wedge to undermine the Court's observations that "[t]he hospital's medical staff evaluates staff applications and credentials, appointments, reappointments, and assignments of clinical privileges," and that

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“although a hospital’s administrative governing body makes the ultimate decision about whether to grant or deny staff privileges, it does so based on the recommendation of its medical staff committee, giving great weight to the actions of peer review bodies . . .” (Opinion at 12-13 (citations and internal quotation marks omitted).) The quoted statements are long-standing principles of law. (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1224; Bus. & Prof. Code § 809.05(a).) If *Weinberg* can be read as contradicting them, it was wrongly decided.

In reality, the Court has no occasion here to address whether *Weinberg* was correctly decided, particularly since in that case the hospital governing body purported to “accept[] the hearing committee’s findings, insofar as these involved medical expertise,” and the appellate court was in no position to disagree because the “record on appeal does not contain the evidence before the Board.” (*Id.* at 1110, 1111 n. 2.) In the present case, the Court of Appeal below correctly noted that *Weinberg* provides no guidance for decision here:

It appears that the regulations of the medical staff in *Weinberg* . . . conferred on the board of directors the responsibility to make a “final decision in writing.” Whether this comports with section 809.4, subdivision (a)(1), which requires the peer review body convened under section 809.2 to hand down a “written *decision* . . . , including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the *decision* reached,” (italics added) is not a question that we need to decide.

(*Mileikowsky v. West Hills Hospital Medical Center* (2007) 64 Cal.Rptr.3d 888, 905.)

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**B. The Legislature Did Opt California Out of the Health Care Quality Improvement Act, and the Present Petition for Rehearing Presents No Occasion for this Court to Declare Otherwise**

Concerning the Health Care Quality Improvement Act (HCQIA) (42 U.S.C. §§ 11101 *et seq.*), CHA attacks language at page 7 footnote 4 of this Court's Opinion, which states:

HCQIA also includes provisions for peer review, but California elected to "opt out" of those provisions and instead adopt its own statutory peer review process . . . . (See Bus. & Prof. Code, § 809, subd. (a)(1), (9)(A) & (B).)

This summary is an accurate paraphrase of the cited statute. Nevertheless, CHA, parroting an argument that the Kaiser Foundation Health Plan and related entities made in their *amicus* brief on the merits at pages 10 to 12, maintains that California did not "opt out" of HCQIA. Kaiser's argument was addressed in Petitioner/Appellant Dr. Mileikowsky's Response to Amicus Briefs at pages 9 to 10.

As before, we note that the question of the extent to which California has distanced itself from HCQIA is not before the Court on this appeal. On the specific question of whether California opted out of HCQIA, the Legislature left no doubt – "California exercises its right to opt out of specified provisions of the Health Care Quality Improvement Act relating to professional review actions." (Bus. & Prof. Code § 809, subd. (a)(9)(A).)

The further question of the extent this act of opting out survives the subsequent amendment of the HCQIA cited in CHA's letter is an entirely different matter outside the issues of this appeal. However, it should be noted that CHA is mischaracterizing this amendment and its effect in an ambitious attempt to undermine the entirety of California's carefully crafted statutory peer review system.

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HCQIA sets forth peer review procedures that differ in several ways from California's. (See discussion in Answer Brief on the Merits at 32-35.) HCQIA does not forbid a state from setting up its own procedures, but it does provide that persons undertaking peer review within its minimum standards "shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action." (42 U.S.C. § 11111(a).) Through 1989, HCQIA contained a provision, then 42 U.S.C. section 11111(c)(2)(B), that allowed states to negate the immunity from state law granted by subsection (a). In particular, section 11111(c)(2)(B) then read: "STATE OPT-OUT. – Subsection (a) shall not apply to State laws in a State for actions commenced on or after October 14, 1989, if the State by legislation elects such treatment."

CHA, like Kaiser before it, makes much of the fact that in 1989 Congress removed the opt-out language of section 11111(c)(2)(B) quoted immediately above. However, the effect of removing that language is simply to limit a state's ability to negate the immunity from state law of participants in peer review proceedings. That is not an issue in this case.

The Legislature's decision to opt out of HCQIA, however, was not directed at avoiding the immunity from state law that HCQIA creates. Indeed, Civil Code section 43.7, subdivision (b) grants comparable immunity from California law. Although the Legislature cited to the then-extent opt-out section 11111(c)(2)(B), the statutes it enacted demonstrated that it more broadly wanted to, and did, create its own system of peer review procedures better adapted to conditions in California:

The Legislature thus finds and declares that the laws of this state pertaining to the peer review of healing arts practitioners shall apply in lieu of Chapter 117 (commencing with Section 11101) of Title 42 of the United States Code, because the laws of this state provide a more careful articulation of the protections for both those undertaking peer review activity and those subject to review, and better integrate public and private systems of peer review.

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(Bus. & Prof. Code § 809, subd. (a)(9)(A).)

CHA ignores the fact that the 1989 amendment to HCQIA addressed only the narrow question of whether peer review participants are immunized from state damage actions, and the fact that the Legislature acted more broadly to create peer review procedures adapted to California. Instead, it insists that the amendment to HCQIA undermines this Court's correct observation that "California elected to . . . adopt its own statutory peer review process, to provide a more careful articulation of the protections for those undertaking peer review activity and those subject to review, and to better integrate public and private systems of peer review." (Opinion at 7, n. 4.)

Both before and after the 1989 amendments, HCQIA undoubtedly allowed the states to "opt out" of the HCQIA procedures in this broader sense. Indeed, Congressman Waxman, in the floor remarks on which CHA so heavily relies, observed:

Two other questions have also been raised that are not addressed by these amendments but I believe are clearly answered in the act.

One is whether State law may control procedural matters not addressed in or in conflict with the act, including establishment of minimum procedural standards for professional review actions that exceed the requirements contained in the act.

...

In general, Mr. Speaker, I have always believed that State laws will apply with respect to procedural matters not dealt with in the Federal law.

(Remarks of Rep. Waxman, 135 Cong.Rec. E4137-02 (1989).)



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CHA is attempting a back-handed assault on California's statutory peer review procedures. That is not an issue properly raised on rehearing here.

### **III. THE COURT'S DECISION ACCURATELY APPLIED THE PEER REVIEW LAWS IN SUPPORT OF THE GOALS OF PEER REVIEW**

#### **A. The Court's Decision Properly Holds that a Denial of Privileges Should Be Based on the Quality of a Physician's Care**

At pages 4 to 6 of its letter, CHA rehashes the argument that West Hills made at pages 3 to 6 of its rehearing petition – that a hospital should be allowed to deny a physician privileges merely because he or she is argumentative or has difficulty getting along with hospital staff, even if the behavior does not affect the quality of care the physician is able to provide to patients. This argument is addressed at pages 4 to 10 of Dr. Mileikowsky's Answer to Petition for Rehearing and further addressed in detail in the April 27, 2009 letter to the Court of the California Medical Association (CMA) opposing the petition. It is not clear that any more remains to be said on this issue, but CHA has taken on the role of presenting yet more argument.

Dr. Mileikowsky agrees with CHA that the Court's decision should reflect the fact that in this regard "existing law has not changed" (CHA letter at 5), and that the law was correctly stated in *Miller v. National Medical Hospital* (1980) 27 Cal.3d 614 – particularly in *Miller's* interpretation of *Rosner v. Eden Township Hospital Dist.* (1962) 58 Cal.2d 592. The problem is that CHA actually wants this Court to change that law.

The Court's decision, citing *Miller* and *Rosner*, says that "it . . . 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, when those traits do not relate to the quality of medical care the physician is able to provide." (Opinion at 11-12.) This is precisely the "existing law." *Miller* holds that a bylaw allowing the exclusion of a physician on the ground of his "ability to work with others" must be interpreted to allow exclusion only on a showing that his



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behavior “present[s] 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.” (27 Cal.3d at 629.)

It is impossible to say today whether a future case might require a refinement of the *Miller* and *Rosner* rules. This case, on rehearing, is not such an occasion.

**B. This Case Provides No Basis for Overturning the *Anton* and *Sahlolbei* Decisions**

CHA asks the Court to view rehearing in this case as an occasion to overturn *sua sponte* both *Sahlolbei v. Providence Healthcare* (2004) 112 Cal.App.4th 1137 – a court of appeal decision not even mentioned in the decision – and, *sub silentio*, its own decision in *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802. Even if these earlier decisions had been challenged in this appeal, there would be no sound basis for overturning them.

The Court in its decision correctly summarized *Anton*:

We held in *Anton* . . . that a physician with staff privileges had a right to reappointment until the governing authorities determined after a fair hearing that the physician did not meet the reasonable standards of the hospital. (*Id.* at pp. 824-825.)

(Opinion at 15 n. 7.) It then, in response to issues raised in the present case, clarified the *Anton* holding: “[O]ur remarks should not be construed to suggest a hospital is required to renew or extend an existing appointment when the proceedings are delayed by the physician’s obstructive conduct.” (*Ibid.*)

*Sahlolbei* was a straightforward application of *Anton*. There, the hospital denied the physician reappointment without first giving him a fair hearing, and the Court of Appeal cited *Anton* to conclude that he had a right to reappointment until the authorities determined after a fair hearing that he did not meet the reasonable

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standards of the hospital – “that a physician [must] be afforded the right to a hearing before action proposed to be taken against him or her is implemented.” (112 Cal.App.4th at 1150.) It further held that a superior court could enforce that right with a preliminary injunction in appropriate circumstances (including the usual equitable considerations such as balancing of harms, likelihood of prevailing on the merits, and irreparable injury). (*Id.* at 1155-60.)

CHA now asks the Court to wipe *Sahlolbei* off the books, which is to say it wants the Court to wipe *Anton* off the books. It demands the right to deny a physician reappointment without a hearing even where there is no imminent danger justifying a summary suspension of the physician and even where the delay in bringing the matter to hearing is not the fault of the physician. (CHA letter at 7.) That is to say, CHA demands that hospitals be given the right to deny a physician reappointment and then to refuse to give him a prompt hearing to win his or her privileges back. This is precisely the scenario *Anton* was designed to prevent, and CHA presents no basis for overturning this black-letter principle of law.

**C. The Court’s Decision Does Not Prevent a Peer Review Body from Gathering the Information It Requires for Its Determinations**

Finally, CHA asks the Court to “revise its dicta on pages 16 and 17 of the Opinion,” without ever identifying the “dicta” to which it objects. (CHA letter at 8.) At those pages of the decision, the Court questioned, in the specific circumstances of this case, “West Hills’s assertion that it could not proceed without evidence only Dr. Mileikowsky could provide.” (Opinion at 16.) The Court then carefully compared the charges West Hills had brought against Dr. Mileikowsky to the evidence available to West Hills and the evidence West Hills said it needed, determining that “[t]here seems little reason to conclude Dr. Mileikowsky’s refusal to provide information would have prevented West Hills from making its case . . .” (*Ibid.*) This establishes no rule of law applicable in other matters, other than that a court should actually look at the circumstances of a case before deciding what evidence is necessary.

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For the most part, CHA simply urges the non-controversial contentions that peer review bodies must gather the evidence needed to do their job and that physicians must cooperate in that effort. (CHA letter at 7-8.) Nothing in the decision suggests otherwise. Nevertheless, CHA wants the Court to dictate as an iron-clad rule that in all cases “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 . . . .” (*Id.* at 8.) The Court cannot on the facts of this case decide for every future case what evidence is necessary for a hospital to prove its charges, or what circumstances might constrain a physician’s responses to discovery. It should not accept CHA’s invitation to do so.

#### IV. CONCLUSION

CHA’s untimely new petition for rehearing asks the Court to stray well beyond the boundaries of the present case to make new law in ways that an association of hospitals would consider favorable to its members’ interests. This case was correctly decided, and CHA does not really suggest otherwise. If the Court chooses not to ignore CHA’s letter entirely, it should deny CHA’s numerous requests to rewrite the laws affecting peer review, because those requests have nothing to do with the issues decided on this appeal and because they lack substantive merit.

Sincerely yours,



Charles M. Kagay

cc: see attached proof of service

**DECLARATION OF SERVICE BY MAIL**

**RE: MILEIKOWSKY v. WEST HILLS HOSPITAL MEDICAL CENTER**  
Supreme Court of California # S156986

I, Charles Rockroad, 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 June 3, 2009 I served a true copy of the following document(s):

June 3, 2009 Letter Brief to CA Supreme Court

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:

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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 June 3, 2009 at San Francisco, California.

Charles Rockroad  
(Typed name)

  
(Signature)