

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

Gil N. Mileikowsky, M.D.,

Petitioner and 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

Defendants and Respondents.

No. B186238

Los Angeles County Superior  
Court No. BS091943

Honorable Dzintra Janavs, Judge  
Presiding

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**RESPONDENTS' PETITION FOR REHEARING**

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I. **REHEARING MAY BE GRANTED WHERE THERE ARE OMISSIONS OR MISSTATEMENTS OF MATERIAL FACT, OR MISTAKES OF LAW IN THE COURT OF APPEAL'S OPINION.**

West Hills Hospital Medical Center (the "Hospital") brings this petition under California Rule of Court ("CRC") 25(a)(1) to request that the Court of Appeal grant rehearing in the above-captioned case based upon inaccuracies of material facts and mistakes of law in the Court of Appeal's Opinion dated June 8, 2007.

The Court of Appeal may grant rehearing when, as here, a party has brought a petition for rehearing within fifteen (15) days of the filing of the decision and where the opinion was in error in some important respect, the correction of which may produce a different result or different reasoning. (See, e.g., CRC 25(b)(1)(A) and 8.500(c)(2); *In re Jessup's Estate*, 81 Cal. 408, 471 (1889).) These requirements are met here.

**II. REHEARING SHOULD BE GRANTED BECAUSE OF OMISSIONS AND MISSTATEMENTS OF MATERIAL FACT IN THE OPINION, THE CORRECTION OF WHICH IS LIKELY TO PRODUCE A DIFFERENT RESULT OR, AT A MINIMUM, REQUIRE DIFFERENT REASONING.**

- A. THE OPINION FAILS TO ACKNOWLEDGE THAT : (1) AT ALL RELEVANT TIMES, DR. MILEIKOWSKY HAD THE CEDARS DOCUMENTS IN HIS POSSESSION AND COULD HAVE COMPLIED WITH THE MEDICAL STAFF'S REQUESTS FOR THEM, AND (2) THE MEDICAL STAFF'S ATTEMPT TO OBTAIN THE CEDARS DOCUMENTS BASED ON DR. MILEIKOWSKY'S WRITTEN AUTHORIZATION HAD BEEN UNSUCCESSFUL BECAUSE CEDARS FAILED TO PROVIDE THE DOCUMENTS OR EVEN RESPOND.**

It is clear in the record, but not in the Opinion, that, at all relevant times, Dr. Mileikowsky was actually in possession of the requested documents concerning summary suspension and termination of his obstetric and gynecology privileges by Cedars-Sinai Medical Center ("Cedars" and the "Cedars Documents," respectively).<sup>1</sup>

The Court's Opinion correctly states (at pp. 22-23<sup>2</sup>) that the Hospital is entitled to inspect and copy the Cedars Documents in Dr. Mileikowsky's

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<sup>1</sup> The Cedars Documents include the Notice of Charges, findings of the Judicial Review Committee, Findings of the Board of Directors and copies of any transcripts of proceedings, exhibits and documentation concerning subsequent litigation concerning Cedars' decision to terminate Dr. Mileikowsky's staff privileges at Cedars. (CT13:002746-002747.)

<sup>2</sup> All page references are to the Court's filed, typewritten Opinion.

possession.<sup>3</sup> The next sentence (at the top of p. 23), in which the Court states that this duty of the applicant can be satisfied by merely providing a written authorization, is inconsistent if it is referring to circumstances where the documents are in the applicant's possession rather than being limited to circumstances where the applicant does not have the documents. In the present case this sentence suggests that the Court assumed that Dr. Mileikowsky did not have the Cedars Documents, although that assumption is incorrect.

The record proves that, at all relevant times, Dr. Mileikowsky had the Cedars Documents in his possession and could have complied with the Medical Staff's repeated requests to review or copy them, and the hearing officer's orders (pursuant to Medical Staff demands) to produce them for inspection and copying by the Medical Staff. (CT12:002480-002491.)<sup>4</sup> Any

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<sup>3</sup> *Business & Professions Code* §809.2(d) provides in pertinent part: "The peer review body [the Medical Staff] shall have the right to inspect and copy at the peer review body's expense any documentary information relevant to the charges which the licensee has in his or her possession or control as soon as practicable after receipt of the peer review body's request." Unless otherwise noted, all statutory citations are to the Business & Professions Code.

Section 10.3-2(b) of the Medical Staff Bylaws provides in pertinent part: "Both the member and the Medical Staff shall have the right to inspect and copy, at their own expense and as soon as is practicable, any documentary information in the possession or under the control of the other which is relevant to the charge against the member." (CT4:000693.) The Medical Staff Bylaws (CT4:000655-000696) are referred to throughout as the "Bylaws."

<sup>4</sup> On a number of occasions Dr. Mileikowsky was requested by the Medical Staff to produce the Cedars Documents, initially for review by Medical Staff committees considering his application for privileges (*see e.g.*,



suggestion that the Cedars Documents were not in Dr. Mileikowsky's possession is also inconsistent with the factual findings of the hearing officer, the Governing Board and the Trial Court. (CT17:003489-003508, CT18:003814-003817 and CT19:003986-003989.)

Although the opinion states, contrary to the express language of §805.2(d) and Bylaws §10.3-2(b), (both of which are set out verbatim in note 3, above), that Dr. Mileikowsky could satisfy his duty to allow the Medical Staff to inspect and copy relevant peer review documents he possessed merely by providing his written authorization for the Medical Staff to seek the documents from a third party hospital such as Cedars (Opinion at p. 23), the opinion fails to acknowledge that the Medical Staff had already, unsuccessfully, sought the peer review documents from Cedars based on Dr. Mileikowsky's authorization.<sup>5</sup> (See ROB, pp. 7, 17 fns. 7, 15.)

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CT12:002447-002448) and later for inspection and copying by the Medical Staff for use in the Judicial Review Committee hearing (see e.g., CT13:002746-002747, CT17:003570, CT17:003579, CT13:002762-002764).

Dr. Mileikowsky never claimed that he did not have the Cedars Documents in his possession. Rather, Dr. Mileikowsky declined to produce them claiming that Cedars had not given him permission to do so. As previously explained, Dr. Mileikowsky's excuse for failing to produce the documents is untenable. (See Respondent's Opening Brief ("ROB") at p. 38, fn 37.)

<sup>5</sup> Instead of producing the Cedars Documents in his possession, Dr. Mileikowsky executed an authorization to Cedars to release the Cedars Documents to the West Hills Medical Staff (the "Authorization"). (CT12:002491.) The Authorization was delivered to Cedars by the Medical Staff, but Cedars did not respond. (CT12:002411, CT12:002512 and

While Dr. Mileikowsky could have discharged his duty by having Cedars produce the requested documents in response to his Authorization, if that were preferable to providing the copies in his possession for inspection and copying. But the duty cannot be discharged by an authorization that fails to procure the documents when the documents are in the applicant's possession. This is because the applicant is under a duty to provide the Medical Staff with copies of documents in the applicant's possession under the express mandate of both §809.2(d) and Bylaws §10.3-2(b) (CT4:000693). Only where the applicant is **not** in possession of the documents might providing the signed authorization be sufficient when it fails to procure the documents. In that case the applicant is not required by §809.2(d) and the Bylaws to produce the documents for inspection and copying by the Medical Staff, so the duty established by those sections is not breached when the third party fails to provide the requested documents.

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CT18:003809-003813 at 003812-003813.) Dr. Mileikowsky was notified that the Authorization had been delivered to Cedars and that Cedars did not respond, and that it was Dr. Mileikowsky's responsibility to produce the documents. (CT12:002512.) Dr. Mileikowsky also was advised in writing that the Medical Staff would not recommend that privileges be granted without first reviewing the Cedars Documents. (CT12:002447-002448 at 002447.) Nonetheless, Dr. Mileikowsky took no further action to obtain the Cedars Documents for the Medical Staff and did not himself provide them to the Medical Staff.

**B. THE MEDICAL STAFF, WHICH IS DEFINED BY § 809.1 TO BE THE PEER REVIEW BODY, AND NOT THE HEARING OFFICER, DETERMINED THAT THE CEDARS DOCUMENTS WERE IMPORTANT.**

The Opinion is based upon the incorrect assumption that the decision regarding the importance of the Cedars Documents “is not based upon facts found by the [peer review] body that is charged with the responsibility of determining this issue in the first instance” and that “the record in the case before us reflects only the decision of a single person, a lawyer by training and profession.” (Opinion at p. 22.) The Opinion suggests that if the decisions regarding the importance of the Cedars Documents were made by a “peer review body” of physicians, the Court would have reached a different result.

The record demonstrates that, “in the first instance,” the importance of the Cedars Documents was determined *by the peer review body of physicians* (the Medical Staff), and not by the hearing officer. The sequence of events is set forth below.

1. **MEDICAL STAFF COMMITTEES ACTING AS PEER REVIEW BODIES, *NOT THE HEARING OFFICER*, DETERMINED THAT THE CEDARS DOCUMENTS WERE CRITICAL IN DECIDING WHETHER TO RECOMMEND TO THE GOVERNING BOARD THAT PRIVILEGES SOUGHT BY DR. MILEIKOWSKY BE GRANTED.**

During both oral argument and in the Opinion, the Court of Appeal voiced concern that the hearing officer, who is an attorney, made the determination that the Cedars Documents were necessary to the determination of whether Dr. Mileikowsky should receive his requested privileges in obstetrics and gynecology. The Opinion is based upon an incorrect understanding of the processes followed with respect to Dr. Mileikowsky's request for privileges.

The initial decision to recommend that Dr. Mileikowsky's request for privileges be denied, for which the subject Judicial Review Committee ("JRC") appeal hearing was requested, was made by committees of physicians acting for the Medical Staff, which is referred to in §809.1 as the "peer review body."<sup>6</sup> The process, outlined in the Medical Staff Bylaws, involved peer

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<sup>6</sup> See, e.g., Bylaws §§ 6.4-3, 6.4-4 and 6.4-5 at CT4:000672; Recommendations of Department of Obstetrics and Gynecology and Credentials Committee to MEC that privileges be denied, CT12:002515; Notice of Charges at CT12:002540-002544; MEC Minutes Approving Denial, and CT12:002537-002539 at 002538; Amended Notice of Charges, CT13:002758-002760; MEC Minutes Approving Amendment, CT13:002757.

review of Dr. Mileikowsky's application by physicians – the Obstetrics and Gynecology Department of the Medical Staff, the Credentials Committee of the Medical Staff and the Medical Executive Committee of the Medical Staff (which consist of physicians who are the elected officers of the Medical Staff, the Medical Staff Committee Chairmen and the Medical Staff Department Chairmen) each recommended Dr. Mileikowsky be denied privileges.<sup>7</sup>

**2. PHYSICIANS OF THE MEDICAL STAFF, NOT THE HEARING OFFICER, DETERMINED THAT THE CEDARS DOCUMENTS WERE CRITICAL TO THE PRESENTATION OF THE MEDICAL STAFF'S POSITION AT THE JRC HEARING.**

The Notice of Charges, dated April 24, 2002 (CT12:002540-002544), and amendment to the Notice of Charges, dated August 21, 2002 (CT13:002758-002760), were issued on behalf of the Medical Executive Committee, acting as a peer review body. As part of the JRC hearing process, Dr. Jonathan S. Matthew and Dr. Jerome D. Vener, physicians acting on behalf of the Medical Executive Committee Staff of the Medical Staff (peer review body), requested inspection and copying of the Cedars Documents from Dr. Mileikowsky beginning November 29, 2000 (CT12:002447-002448), and continuing until July 22, 2002 (CT17:003570). The issue of Dr. Mileikowsky's refusal to permit such inspection and copying of documents in

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<sup>7</sup> See *id.*

his possession was taken up by the hearing officer on July 16, 2002. (CT17:003488-003508 at 003491.) This was *after* the Medical Staff, acting as the peer review body, determined that review of the Cedars Documents was necessary to any determination on Dr. Mileikowsky's qualification to hold staff privileges, and *after* the Medical Staff determined that it needed the Cedars Documents to present its case for the denial of privileges to the JRC.

**3. THE HEARING OFFICER MADE ONLY PROCEDURAL DECISIONS ABOUT THE MEDICAL STAFF'S RIGHTS TO INSPECT AND COPY THE CEDARS DOCUMENTS AND ABOUT HOW TO SAFEGUARD A FAIR HEARING PROCESS.**

Although the Opinion suggests that the hearing officer made a medical judgment about the Cedars Documents, the record shows that he did not. The hearing officer first determined that the Cedars Documents were in Dr. Mileikowsky's possession and the Medical Staff was entitled under both §809.2(d) and Bylaws §10.3-2(b) (CT4:000655-000696 at 000693) to inspect and copy them. (CT17:003488-003508 at 003493-003494.)

After Dr. Mileikowsky refused to permit inspection and copying of the Cedars Documents pursuant to §809.2, the hearing officer determined that Dr. Mileikowsky's self-help refusal prevented a fair peer review hearing by depriving the Medical Staff of its rights under §809.2 and §809.3. (*Id.* at

003495-003496.) In evaluating the impact of Dr. Mileikowsky's refusal, the hearing officer determined that the Medical Staff's rights under §809.3 included having the opportunity to use the Cedars Documents in the JRC hearing to support its position that privileges be denied and to meet the burdens of proof and persuasion set forth in §809.3 and the Bylaws. (*Id.*) He determined that Dr. Mileikowsky had placed the Medical Staff at a disadvantage by withholding the Cedars Documents because it could not (a) introduce evidence concerning Dr. Mileikowsky's lack of competence; or (b) rebut whatever explanation Dr. Mileikowsky might offer for Cedars' termination of his privileges. (*Id.*)

The hearing officer went no further than to determine that the level playing field which §§ 809.2 and 809.3 established for the Medical Staff and Dr. Mileikowsky had been tilted by Dr. Mileikowsky's refusal to share the Cedars Documents with the Medical Staff in Dr. Mileikowsky's favor and that a fair hearing process could not be achieved without the Medical Staff having the opportunity to inspect, copy and use the Cedars Documents, including for cross-examination. (*Id.* at 003493-003496.)

The decision the hearing officer then faced was how to safeguard the fairness of the JRC hearing portion of the peer review process and how to protect the rights that both the Medical Staff and Dr. Mileikowsky have under

§809.3. Although the Court focuses on the rights of Dr. Mileikowsky under §809.3, the Medical Staff also has rights thereunder which were vitiated by Dr. Mileikowsky's conduct. (Compare Opinion at pp. 21-22 with CT17:003488-003508 at 003495-003496.)

The record demonstrates that the decision to terminate the hearing when Dr. Mileikowsky refused to permit inspection and copying of Cedars Documents in Dr. Mileikowsky's possession was a decision about the procedures mandated by §§ 809.2 and 809.3 and maintaining the procedural fairness required by law, not a medical decision about the ultimate impact the Cedars Documents might have in the eyes of the JRC. (CT17:003488-003508 at 003495-003496.)

**4. THE DECISION TO DENY DR. MILEIKOWSKY STAFF PRIVILEGES WAS MADE BY THE GOVERNING BOARD, AS SUCH DECISIONS ALWAYS ARE, BASED ON MAINTAINING THE FAIRNESS AND INTEGRITY OF THE PEER REVIEW PROCESS.**

The Opinion fails to recognize that the hearing officer's decision was a recommendation to the Governing Board, not the decision. This is true not only because the hearing officer's decision was appealed from and decided on by the Governing Board after taking additional evidence, but because the final decision to grant or deny privileges can only be made by a hospital governing



board, not physician peer review bodies. *See Weinberg v. Cedars-Sinai Med. Ctr.*, 119 Cal.App.4th 1098 (2004); §809.05(a).<sup>8</sup>

It is the Governing Board's decision that was challenged by Dr. Mileikowsky's Petition for Writ of Mandate. The record shows that the Governing Board decision was made based on the Medical Staff's right under §809.2 and the Bylaws (§10.3-2(b) at CT4:000655-000696 at 000693) to inspect and copy the Cedars Documents in Dr. Mileikowsky's possession, Dr. Mileikowsky's refusal to permit same, the impact of Dr. Mileikowsky's refusal on the Medical Staff's right to a fair peer review hearing in which the Medical Staff, not just Dr. Mileikowsky, could exercise rights and meet its responsibilities under §809.3 in a meaningful way. In adopting the hearing officer's decision as its own, the Governing Board reached the same conclusion as the hearing officer that there was no mechanism short of terminating the JRC hearing that would safeguard a fair hearing process and eliminate the unfair advantage Dr. Mileikowsky obtained and the disadvantage imposed on the Medical Staff by Dr. Mileikowsky's refusal to permit inspection and copying of the Cedars Documents. (CT18:003814-003817.)

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<sup>8</sup> §809.1(b) defines the final proposed action "as the final decision or recommendation of the peer review body [Medical Staff]," and §§ 809.2, 809.3 and 809.4 make clear that the JRC hearing is a "hearing concerning a final proposed action."

In making this decision The Governing Board was discharging its responsibility to assure patient safety by insisting that the physicians conducting peer review, including the JRC, review available evidence (the Cedars Documents) concerning the loss or revocation of privileges at Cedars, given the dearth of information at the Hospital regarding Dr. Mileikowsky's competence. The Governing Board made an assessment of the Hospital's legal responsibility and how to avoid the risk of liability for failing to meet that responsibility.

**C. THE COURT'S OPINION CONFUSES THE ACTIONS OF THE MEDICAL STAFF WITH THOSE OF THE HOSPITAL. THEY ARE, IN FACT, DISTINCT ENTITIES.**

Although the unpublished portion of the Opinion recognizes that the self governing medical staff of a hospital is a separate and distinct entity from the hospital itself and that the hospital acts separately from its medical staff through its employees, officers and/or governing board, the Opinion repeatedly mislabels actions of the Medical Staff as actions of the Hospital.<sup>9</sup> The distinction is important here because not only are the Hospital and Medical Staff distinct entities, but because this case involves both actions by the

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<sup>9</sup> Specifically, references in the Opinion to the "Hospital" should be to the "Medical Staff" in the last paragraph of page 2, last two paragraphs of page 3, last two paragraphs of page 4, throughout page 5 and in the fourth full paragraph on page 8.

Medical Staff and actions by the Hospital (such as conducting the hearing and the decision of the Governing Body). Such factual inaccuracies in the Opinion should be corrected.

**III. REHEARING SHOULD BE GRANTED BECAUSE OF MISTAKES OF LAW IN THE OPINION, THE CORRECTION OF WHICH IS LIKELY TO PRODUCE A DIFFERENT RESULT OR, AT A MINIMUM, REQUIRE DIFFERENT REASONING.**

**A. THE OPINION APPEARS TO MISTAKE THE LAW REGARDING DR. MILEIKOWSKY'S BURDEN OF PRODUCING THE DOCUMENTS AND INFORMATION ON WHICH HIS APPLICATION FOR PRIVILEGES MAY BE JUDGED.**

Every applicant for medical staff privileges and re-applicant for the extension of Medical Staff privileges for another term bears the burden of producing the evidence necessary for the peer review committees to evaluate his current competence. (See Bylaws §§ 6.4-1 at CT4:000671, 6.5-3 at CT4:000676 and 10.3-9(a) at CT4:000695-000696; *Oskooi v. Fountain Valley Reg'l Hosp. and Med. Ctr.*, 42 Cal.App.4th 233, 244 (1996); *Webman v. Little Co. of Mary Hosp.*, 39 Cal.App.4th 592, 600-603 (1995).) The Opinion appears to deviate from this rule, as well as §809.2(2) and Bylaws §10.3-2 discussed above, by suggesting that providing an authorization to release information to a third party is sufficient to meet the duty to produce documents and information actually in the applicant's possession when the authorization

fails to procure the documents and information in the applicant's possession. If the Court is suggesting that once an executed authorization is delivered it becomes the responsibility of the Medical Staff to obtain records from other hospitals, that too would be incorrect. Bylaws §6.5-3 (CT4:000676) places that burden on the applicant (Dr. Mileikowsky) where, as here, there is a failure of a third party (Cedars) to provide requested information. (*See Oskooi*, 42 Cal.App.4th at 249, fn 4 (concurring opinion).)

There is good reason for this rule. Medical Staffs must process hundreds of physician applications and it would place an undue burden on their staff and resources if they were to be made responsible for obtaining information from other hospitals beyond initiating a request to the third party. (*See id.*) The burden is on the applicant to provide the information necessary to review him, and where, as here, there is very little information available at the Hospital because Dr. Mileikowsky practiced primarily at other facilities, that burden extends to obtaining for the Medical Staff the information necessary to conduct peer review. Nothing in §809.3 alters the applicant's burden of producing the information available to him. Rather, the rules set forth in §809.3(b) and Bylaws §10.3-9 (CT4:00695-00696) concerning the Medical Staff's and the Dr. Mileikowsky's respective burdens of producing evidence, proof and persuasion at a JRC hearing go hand in hand with, and are

predicated on, the applicant having the burden of producing the information available to him in the first instance.

**B. THE OPINION FAILS TO CONSIDER THE HOSPITAL'S DUTY TO REVIEW AVAILABLE MATERIALS REGARDING LOSS OF PRIVILEGES AT OTHER HOSPITALS TO EVALUATE PHYSICIAN COMPETENCE AND THE HOSPITAL'S RISK OF LIABILITY FOR FAILING TO DO SO IN PEER REVIEW.**

**1. The Hospital Has a Duty to Inquire about the Reason Dr. Mileikowsky's Privileges at Cedars Were Revoked.**

Nowhere does the Opinion mention the obligations of the Hospital to protect the public safety and the risk the Hospital faces if Dr. Mileikowsky were granted privileges without the Medical Staff properly evaluating why Dr. Mileikowsky's privileges at Cedars were terminated. In connection with the granting of any privileges, a "governing body and the medical staff shall act exclusively in the interest of maintaining and enhancing quality patient care." §809.05(d). Failure to do so results in liability to patients under *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332, 347-348 (1982) (holding that a "Hospital owes generally a duty to insure the competency of its medical staff and to evaluate the quality of medical treatment rendered on its premises" and imposing liability on a hospital for the misdeeds or negligence of a doctor if it granted staff privileges when it should not have done so). Moreover, as the

Trial Court recognized, *Bell v. Sharp Cabrillo Hosp.*, 212 Cal.App.3d 1034, 1048 (1989), holds specifically that, in evaluating a physician's fitness to practice, a hospital cannot simply ignore another hospital's termination of a physician's privileges. (CT19:003986-003989 at 003988.)

The Medical Staff, the JRC and the Governing Board of the Hospital were all under a duty to inquire into the circumstances surrounding Dr. Mileikowsky's loss of privileges at several other hospitals, including Cedars.<sup>10</sup>

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<sup>10</sup> Reports required by §805(b) filed by Cedars-Sinai (CT12:002449-002466 at 002460) and Encino-Tarzana Regional Medical Center (CT5:000891-000899) each reported summary suspension, and Cedars reported revocation, of Dr. Mileikowsky's medical staff privileges. Collectively, the two reports mention at least five cases of incompetent medical care and various incidents of disruptive behavior that endangered patients, including improper delivery of one infant and the botched circumcision of another, and for disruptive behavior. Dr. Mileikowsky had previously advised the Medical Staff only that his privileges at Cedars had been suspended and that he was contesting the suspension. Dr. Mileikowsky misrepresented that his privileges at Encino-Tarzana were voluntarily surrendered, and concealed the fact they were suspended with a recommendation that they be revoked. Dr. Mileikowsky failed to disclose the curtailment of his privileges at Century City Hospital and a recommendation that they be revoked. (CT12:002401-002419.) Dr. Mileikowsky failed to explain the action against his privileges at Century City Hospital. (CT1:00155-00157.) No mention was made on Dr. Mileikowsky's Application why he no longer held staff privileges at Valley Presbyterian Hospital as he had in 1999. (CT12:002400.) Although Bylaws §6.3(g) required Dr. Mileikowsky to have notified the Medical Staff of each suspension, revocation or other restriction of his privileges by another healthcare facility within ten days (CT4:000670-000671), Dr. Mileikowsky had not complied.

Petitioner's failure to disclose these adverse actions to the Medical Staff in writing within ten days violated Bylaws §6.3(g). (CT4:000670-000671; *see also Unterthiner v. Desert Hosp. Dist. of Palm Springs*, 33 Cal.3d 285 (1983) (holding that lying on an application for medical staff privileges is sufficient evidence of untrustworthiness and interference with the peer review process to warrant denial or revocation of medical staff privileges).) Dr. Mileikowsky's

This duty of inquiry was particularly important to reviewing Dr. Mileikowsky's competence and fitness to practice because Dr. Mileikowsky rarely used his courtesy privileges at the Hospital, and the Hospital was therefore in possession of little information of its own on which to evaluate Dr. Mileikowsky.<sup>11</sup> For that reason, it was particularly important that Dr. Mileikowsky provide documents and information about what transpired at other hospitals when he was requested to do so by the Medical Staff.

**2. Dr. Mileikowsky's Authorization for Cedars to Release the Cedars Documents Cannot Satisfy Dr. Mileikowsky's Obligation to Provide Documents In Dr. Mileikowsky's Possession Because Cedars Did Not Produce the Documents Which Were in Dr. Mileikowsky's Possession.**

The Opinion states at page 23 that if documents are in possession of a third party, an authorization for the release of the documents for inspection and copying will suffice. This statement is not applicable where, as here, the documents were not made available by the third party but could be produced by Dr. Mileikowsky himself. As explained above at §§ II(A) and III(A), if applied in such circumstances, holding delivery of the authorization sufficient

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application could also be denied because it was incomplete. (*See Oskooi*, 42 Cal.App.4th 233 (holding that the omission of information on an application for privileges justifies denial).)

<sup>11</sup> Courtesy privileges are for physicians who use the Hospital only occasionally. (Bylaws §4.3-1, CT4:000664.)

where the requested documents were not delivered in response would be inconsistent with the express language of §809.2(d) and the Bylaws.

Moreover, since the Medical Staff does not have the power to compel the third party to produce a requested document,<sup>12</sup> simply delivering the Authorization also does not meet the applicant's burden of producing information to evaluate his qualifications. At a minimum, the applicant's burden to produce documents and information to evaluate his qualifications requires that the applicant follow up and demonstrate that information sought is truly unavailable before the Medical Staff, JRC and Governing Board can be put in the unenviable position of trying to discharge their responsibility to protect patient safety without the opportunity to review and consider the requested information. Nothing in §§809.2 and 809.3 suggests, much less requires, a different rule.

In this case, although Cedars did not produce the Cedars Documents even after the Medical Staff delivered to it the Authorization, Dr. Mileikowsky *had* these documents in his possession and could have produced them for inspection and copying. (CT17:003488-003508 at 003490.) Dr. Mileikowsky was, in fact, *ordered* to do so by the hearing officer, but refused. (*Id.*; Opinion

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<sup>12</sup> There is no subpoena power granted in connection with peer review, and §809.2 and §809.3 do not provide any mechanism to compel production from third parties; only from the applicant and the Medical Staff.



at pp. 3-6.) Under these unusual circumstances, the Governing Board was free to determine that Dr. Mileikowsky's privileges be denied based on Dr. Mileikowsky's refusal to produce the Cedars Documents not only to protect the rights of the Medical Staff and to safeguard the fairness of the peer review process, but also based on the Governing Board's own evaluation of whether the Hospital could properly discharge its duty to protect patient safety by granting privileges without any peer review body first reviewing relevant information in Dr. Mileikowsky's possession regarding Cedars' termination of Dr. Mileikowsky's privileges.<sup>13</sup> The responsibility and duty to make this legal compliance and risk assessment decision rests with the Governing Board, not with the JRC.

**C. FINALLY, THE OPINION INCORRECTLY ASSUMES THAT ALL DECISIONS ARE MADE BY PEER REVIEW PANELS WHEN SUCH PANELS RECOMMEND DECISIONS WHICH ARE ULTIMATELY MADE BY THE HOSPITAL GOVERNING BOARD.**

Decisions regarding the grant or denial of privileges are ultimately made by the Governing Board of the Hospital. (*See Weinberg*, 119 Cal.App.4th at 1109-10; *Hongsathavij v. Queen of Angels/Hollywood*

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<sup>13</sup> The Governing Board could disregard or overrule any contrary recommendation if one were made by a JRC because this was an assessment of how to safely discharge the Hospital's legal duty under *Elam* and avoid the risk of liability, not an evaluation of Dr. Mileikowsky's medical competence. (*See Weinberg*, 119 Cal.App.4th 1098.)

*Presbyterian Med. Ctr.*, 62 Cal.App.4th 1123, 1135-1137 (1998); §809.4(b).<sup>14</sup>

The peer review panel of medical doctors makes recommendations, which are either approved or disapproved by the Governing Board. (*Id.*) While the Governing Board is to give great weight to the medical expertise of peer review bodies, where, as here, the decisions made are about compliance with statutes and Bylaws, proper and fair hearing procedures and assessing legal risks and the best way to comply with legal duties, Governing Boards should be free to make such decision without requiring input from a judicial review committee. (*See* §809.5(a).)

The Court's opinion as to the limitations on the Hearing Officer's powers, with which Respondent respectfully disagrees, does not compel reversal because, for the reasons explained above, the Governing Board itself has the power and authority to determine that privileges will not be granted to Dr. Mileikowsky unless the Medical Staff and JRC have been permitted to see and use the Cedars Documents in assessing Dr. Mileikowsky's competence.

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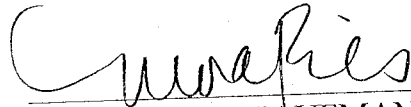
<sup>14</sup> On April 24, 2002, the Medical Staff notified Dr. Mileikowsky of its recommendation that privileges be denied for a number of reasons, including "misrepresentation and/or omissions of information contained in your reapplication for Medical Staff membership, as well as your failure to persuade the Medical Staff by a preponderance of the evidence of your qualifications for these privileges." (Notice of Charges, CT12:002540-002544.) Although that recommendation was made by a panel of doctors, the ultimate decision confirming the peer review board's recommendation was made by the Governing Board.

IV. CONCLUSION.

For the foregoing reasons, the petition for rehearing should be granted.

DATED: June 21, 2007

FENIGSTEIN & KAUFMAN  
a Professional Corporation



By: RON S. KAUFMAN  
NINA B. RIES

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Hospital & Medical Center and  
Medical Staff of West Hills  
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# **CERTIFICATE OF WORD COUNT**

**(Cal. Rules of Court, rule 14(c)(1))**

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DATED: June 21, 2007

FENIGSTEIN & KAUFMAN  
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## PROOF OF SERVICE

I declare that:

I am employed in the County of Los Angeles, State of California. I am over 18 years of age and not a party to the within action. My business address is 1900 Avenue of the Stars, Suite 2300, Los Angeles, CA 90067-4314.

On June 21, 2007, a document described as **RESPONDENTS' PETITION FOR REHEARING** was served on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

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Judge of the Los Angeles County  
Superior Court  
c/o Clerk of the Los Angeles  
County Superior Court  
111 North Hill Street  
Los Angeles, CA 90012

On the above date, I caused such envelope(s) to be deposited with postage thereon fully prepaid in the United States Mail at Los Angeles, California, by sealing and placing such envelope(s) for collection and mailing at my place of business, following ordinary business practices. I am readily familiar with the practice of my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence is customarily deposited in the United States Mail at Los Angeles, California on that same day in the ordinary course of business.

Also on the above date, I caused service of **RESPONDENTS' PETITION FOR REHEARING** on Mr. Hittelman and Mr. Kagay by e-mail at the following addresses:

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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 Proof of Service is executed on June 21, 2007, at Los Angeles, California.

  
\_\_\_\_\_  
Marie Ramirez