

NO. S156986

IN THE SUPREME COURT OF CALIFORNIA

GIL N. MILEIKOWSKY, M.D.,

Plaintiff and Respondent,

v.

WEST HILLS HOSPITAL MEDICAL CENTER,

Respondent and Appellant.

**BRIEF AMICUS CURIAE OF
UNION OF AMERICAN PHYSICIANS AND DENTISTS IN
SUPPORT OF PLAINTIFF/RESPONDENT**

After a Decision by the Court of Appeal
Second Appellate District, Division Eight
Case No. B186238

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SUMMARY OF ARGUMENT

Dr. Mileikowsky had his hospital privileges revoked by a non-physician “hearing officer” because the doctor allegedly failed to cooperate with the Hospital’s discovery demands upon him. The hearing officer took the case away from the peer review panel to whom by law it belongs. California statutes require that physicians not lawyers be the judges of whether another physician will continue having staff privileges. Business & Professions Code section 809.05 provides clearly: “It is the policy of this state that peer review be performed by licentiates.” This is subject to few exceptions, none of which is applicable here. Bus. & Prof Code section 809.2 requires the hearing be held before one’s peers or a mutually-selected arbitrator, and prohibits a hearing officer from having any vote. Rather than having just one vote of many, here the Hearing Officer had the *sole* vote. Business and Professions Code section 2282(c) requires “that the medical staff shall be self-governing with respect to the professional work performed in the hospital.” Such self-governance cannot exist if lawyers engaged by Hospital management are free on their own to refuse to renew physicians’ staff privileges.

This Court has noted “Given the statutory and regulatory scheme, it is clear that applications for staff privileges are the province of the hospital’s medical staff committee. [cites] 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.” *Alexander v. Superior Ct.* (1993) 5 Cal. 4th 1218, 1224. Such allocation of responsibilities was violated here. The Legislature has designed a system to protect patients by requiring that hospitals have organized medical staffs which internally regulate the

practice of medicine. This system protects medicine from excessive interference from hospital managers often concerned more with hospital finances than with quality of care. Allowing medical staff members to decide who will continue in staff membership, with only limited review by hospital management, is a vital public policy which must be enforced here

STATEMENT OF THE CASE

Until 1999, Plaintiff Gil Mileikowsky, M.D., had privileges at almost all Southern California hospitals. Then following his suspension by Cedars-Sinai for interpersonal conflicts and his successful lawsuit in 1999 challenging such suspension, nearly all other area hospitals moved to terminate his privileges. *Mileikowsky v. Tenet* (2005) 128 Cal.App.4th 531, 537-30; *Mileikowsky v. West Hills* (2007) 151 Cal.App.4th 1249, 1256.

In this case, West Hills Hospital terminated his privileges for the stated reasons that he did not accurately report a suspension and termination at other hospitals. Pending hearing he was not allowed to practice at West Hills, even though no imminent danger to patient was involved. (*See* Bus. & Prof. Code §809.5). He invoked his statutory rights to a hearing on this decision before a Judicial Review Committee of other physicians on the Hospital's staff. He was not represented by counsel. The Hearing Officer terminated this proceeding because Dr. Mileikowsky purportedly violated his duty to provide the Hospital with documents on Cedars-Sinai's disciplinary proceedings against him. The Hearing Officer's order was then affirmed by the Hospital Board without any vote of the Judicial Review Committee.

ISSUES PRESENTED

(1) Does it violate the Business & Professions Code provisions on peer review for a non-physician hearing officer to terminate a physician's privileges on his own order, rather than by securing a vote of the physicians' peer review body?

(2) Is a physician's failure to provide discovery a permissible ground in itself for terminating the peer review process reviewing the physician's termination when the statute specifies a remedy of continuing the hearing?

ARGUMENT

I. THE PROCEDURE FOLLOWED HERE DID NOT COMPORT WITH THE STATUTORY REQUIREMENTS FOR THE DECISION-MAKING PROCESS ON STAFF PRIVILEGES

This case can be decided alone by the provisions of Business & Professions Code sections 809 *et seq.* Section 809.05 provides in pertinent part:

It is the policy of this state that peer review be performed by licentiates. This policy is subject to the following limitations:
(a) The governing bodies of acute care hospitals have a legitimate function in the peer review process. In all peer review matters, the governing body shall give great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner.

(b) In those instances in which the peer review body's failure to investigate, or initiate disciplinary action, is contrary to the weight of the evidence, the governing body shall have the authority to direct the peer review body to initiate an investigation or a disciplinary action, but only after consultation with the peer review body. * * *

(c) In the event the peer review body fails to take action in response to a direction from the governing body, the governing body shall have the authority to take action against a licentiate. Such action

shall only be taken after written notice to the peer review body and shall fully comply with the procedures and rules applicable to peer review proceedings established by Sections 809.1 to 809.6 inclusive.

(d) A governing body and the medical staff shall act exclusively in the interest of maintaining and enhancing quality patient care. * * *

This Section sets forth specified exceptions to its initial rule that medical peers make privileging decisions, but none of those exceptions apply here. If the Legislature had intended another exception allowing non-licentiates to terminate privileges for improper behavior during a hearing, then the Legislature would have said so. Another exception cannot be judicially grafted onto this statute.

In companion statutes, the Legislature made it even clearer how limited the lay hearing officer's role would be. In Section 809.2, it provided:

If a licentiate timely requests a hearing concerning a final proposed action for which a report is required to be filed under Section 805, the following shall apply:

(a) The hearing shall be held, as determined by the peer review body, before a trier of fact, which shall be an arbitrator or arbitrators selected by a process mutually acceptable to the licentiate and the peer review body, or before a body of unbiased individuals who shall . . . not have acted an accuser, investigator, factfinder, or initial decisionmaker in the same matter, and *which shall include, where feasible, an individual practicing the same specialty as the licentiate.*

(b) *If a hearing officer is selected to preside at a hearing held before a panel, the hearing officer shall gain no direct financial benefit from the outcome, shall not act as a prosecuting officer or advocate, and shall not be entitled to vote.*

(Emphasis added).

Here, the decisionmaker was not a neutral arbitrator chosen in part by the physician, nor “an individual practicing the same specialty as the licentiate”, but rather was an attorney selected by the Hospital. This hearing officer was not supposed to be allowed to vote at all, let alone allowed to

take the decision out of the hands of the peer review panel.

II. THE STATUTORY REQUIREMENTS FOR PEER REVIEW AND MEDICAL STAFF SELF-GOVERNANCE MEAN THAT OUTSIDERS CANNOT DICTATE STAFF MEMBERSHIP DECISIONS

The Legislature has declared its grounds for discipline for a physician to practice in a hospital lacking a self-governing medical staff. Business and Professions Code section 2282 provides, in relevant part:

The regular practice of medicine in a licensed general or specialized hospital having five or more physicians and surgeons on the medical staff, which does not have rules established by the board of directors thereof to govern the operation of the hospital, which rules include, among other provisions, all the following, constitutes unprofessional conduct:

* * *

(c) provision that the medical staff shall be self-governing with respect to the professional work performed in the hospital; that the medical staff shall meet periodically and review and analyze at regular intervals their clinical experience; and the medical records of patients shall be the basis for such review and analysis

Similar requirements are contained in Cal. Code Regs. tit. 22 §70701 et seq.¹

“Given the statutory and regulatory scheme, it is clear that applications for staff privileges are the province of the hospital’s medical

¹ Note the legislature and agency both chose the broad term “professional work” to describe self-governance, not the narrower phrase “practice of medicine”. Professional work includes decisions about staff privileges. This statute would be mere surplusage if all it did was preclude non-physicians from making medical decisions about patients, because there are separate statutory prohibitions against hospital managers practicing medicine without a license. *See* Business and Professions Code sections 2052, 2400.

staff committee. [cites] 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. [cites].” *Alexander v. Superior Ct.* (1993) 5 Cal.4th 1218, 1224-25. The action against Plaintiff here is directly contrary to the understanding of the privileging statutes expressed by this Court in *Alexander*. The notion behind these statutes was to have a structure by which hospital doctors working in small committees supervised each other's practice of medicine rather than expecting attorneys or hospital boards to carry out that function:

[S]ince hospital governing boards are generally composed of laymen, the only effective method of assuring that only competent practitioners are allowed to use the hospital is to seek the advice of the experienced physicians using the hospital. The medical staff system developed by the professional associations has, therefore, been widely accepted simply because it presents an efficient method of obtaining this advice. . . .

The medical staff system works through a system of committees. For example, the credentials committee review applications for appointment or reappointment to the staff; the medical records committee supervises the required record keeping and periodically evaluates the quality of care given; and the tissue committee determines from preoperative and postoperative diagnoses and pathological reports whether unjustified surgery has been performed. On the basis of the reports of these and other committees the executive committee makes recommendations to the governing board the matter of granting, denying or limiting a doctor's privileges, i.e., the procedures the doctor is allowed undertake in the hospital.

“Hospital Staff Privileges: The Need for Legislation,” 17 *Stan. L. Rev.* 900, 903-904 (1965)

Staff committees cannot as a practical matter effectively monitor the

various doctors' practices if the committee can have its decisions usurped by attorneys selected by the Hospital as hearing officers. Also, decisionmakers chosen by a majority of one's peers will have more professional legitimacy, and therefore more respect and authority, than will a regime imposed from outside. Such committees become meaningless if the hospital board can simply use its attorney as a hearing officer to then make dispositive rulings based on procedural issues to strip physicians of their privileges, especially unfair in light of the common bylaws banning physicians from using counsel at these hearings.²

² In 30 Cal.Op.Cal.Atty.Gen. 13 (No. 57-69, July 16, 1957), the Attorney General decided a hospital board had no legal right to obtain copies of the minutes of the meetings of the hospital medical staff. The Attorney General discussed Health and Safety Code section 32128, which requires that the medical staff of a local hospital district "be self-governing with respect to the professional work performed in the hospital." At p. 15 the Attorney General noted:

Nowhere in this section is there any indication that the board should control the conduct or content of the medical staff meetings in any manner other than that set forth in said section. In fact, this section specifies that the staff shall be self-governing with respect to the professional work performed in the hospital. Thus the board cannot exercise any supervision or control over the professional work of the medical staff other than the promulgation of rules necessary to the operation of the hospital or in the best interests of the public health.

The hospitals' position in this case conflicts with the Attorney General's opinion, for there is no more effective means for administrators to control physicians' conduct than to have their attorney deny a physician privileges based on how the physician represented himself in the hearing process. Veto power over questions of staff membership based on conduct at a hearing goes way beyond "the promulgation of rules necessary to the operation of the hospital or in the best interests of the public health." *Id.* Opinions of the Attorney General are entitled to "great weight." *Tiffany v. Sierra Sands Unified School Dist.* (1980) 103 Cal.App.3d 218, 227.

III. TERMINATING SANCTIONS CANNOT BE GRANTED IN A MEDICAL DISCIPLINARY PROCEEDING

While the Court need not decide the question in this case because the prior issue is dispositive, it is extraordinarily-doubtful that a peer review proceeding to review a discharge can be terminated simply for failure to provide discovery. The statute provides a remedy for non-cooperation: a continuance. Bus. & Prof. §809.2(d). The courts should not infer additional remedies. *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 911 (“Thus one can infer that the Legislature, if it intends a stated remedy to be nonexclusive or cumulative, knows how to express such a concept, and its silence on the subject therefore indicates a contrary intent.”).

Any physician who refuses to cooperate and thus has his hearing continued only hurts himself, as he typically remains suspended until the conclusion of the peer review process.³ Moreover, the panel can draw an adverse inference against someone who refuses to provide information he has available to him. Thus discovery abuse is not such a serious problem that a hearing officer must have the power of terminating sanctions in order for the process to work at all.

The sanction imposed here was essentially a contempt sanction, but the caselaw holds such a sanction is impermissible absent a statutory grant of authority. This law was reviewed and applied in a decision holding that workers compensation hearing officers had no authority to issue contempt sanctions:

³ As the instant case demonstrates, such suspensions are not in practice limited to doctors posing a threat to patient health.

While court commissioners and referees have been authorized in some jurisdictions to punish disobedience of their orders as contempts, it has been held that, in the absence of express authority, such officers have no such power (17 C.J.S. Contempt §53; 17 Am Jur. 2d Contempt §117). It has been held in California that nonjudicial officers have no power to punish for contempt unless specially so authorized by law. (*People v. Schwarz*, 78 Cal. App. 561, 570, 12 Cal. Jur. 2d Contempt, §39). Our research has disclosed no California case in which a subordinate officers, court commissioner or referee has been permitted to summarily exercise the power of contempt.

Marcus v. WCAB (1973) 35 Cal. App.3d 598, 605.

Accord, Morton v. WCAB (1987) 193 Cal. App. 3d 924, 927 (“Generally, administrative agencies are not empowered to adjudge contempt unless such power is expressly conferred by statute. [cite]”); *People v. Kainoki* (1992) Cal.App. 4th Supp. 8, 12-15.⁴

IV. STRONG POLICY CONSIDERATIONS ALSO SUPPORT THE DECISION BELOW

The Legislature and those designing the peer review system further expressed hostility to attorneys dictating the course of staff privileging in Bus. & Prof. Code section 809.3(c), which prohibits peer review prosecutors from being represented by counsel if the licentiate is not so represented. Contrary to this policy, the position urged by the Hospitals here would give total control over the process to the lawyer serving as hearing officer.

⁴ Because of this unbroken string of court decisions, the Legislature amended the Administrative Procedures Act to give administrative agencies the power to *initiate* contempt proceedings, but giving Superior Court judges alone the power to issue contempt sanctions. Gov. Code §§11455.10-11455.20. Only agency heads may initiate such proceedings. *Parris v. Zolin* (1996) 12 Cal.4th 839.

While sometimes difficult for lawyers to appreciate, imposition of the standards of lawyers must be avoided when the procedure is designed for non-lawyers. The situation here is analogous to labor arbitration. *See e.g., Steelworkers v. Warrior & Gulf* (1960) 363 U.S. 574, 581 (“The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.”).

The Hospitals and their hearing officers argue that physician panel members should be protected against the prejudicial information involved in resolving discovery abuse questions. This is an absurd “protection” analogous to the discredited system of “protection” which “protected” women from abuse in the workplace by excluding women from the workplace entirely. *Frontiero v. Richardson* (U.S. 1973) 411 U.S. 677, 684, 93 S.Ct. 1764 (“such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”). Panel members are not being “protected” by having cases taken entirely away from them.

As for the competence of panel members to decide these questions, doctors obviously have more education and experience with factfinding than do ordinary jurors.⁵ Indeed, the questions normally presented on

⁵ *See, e.g.*, U.S. Department of Labor, Occupational Outlook Handbook, “Physicians and Surgeons” at www.dol.gov: “Formal education and training requirements for physicians are among the most demanding of any occupation—4 years of undergraduate school, 4 years of medical school, and 3 to 8 years of internship and residency, depending on the specialty selected. * * * Premedical students must complete undergraduate work in physics, biology, mathematics, English, and inorganic and organic chemistry. * * * Acceptance to medical school is highly competitive. Applicants must submit transcripts, scores from the Medical College

issues of discovery abuse— is the doctor telling the truth when he makes excuses for not having produced requested documents? Has he been making a reasonable effort to produce them? – those are questions very similar to ones the panel must resolve on the merits (are the doctor’s excuses for his professional conduct truthful? Was his conduct reasonable according to community standards of professional practice?). Indeed, most physicians in their practice must regularly confront the question whether people are lying to them—for example, when seeking drugs, or when

Admission Test, and letters of recommendation. Schools also consider an applicant’s character, personality, leadership qualities, and participation in extracurricular activities. Most schools require an interview with members of the admissions committee.

Students spend most of the first 2 years of medical school in laboratories and classrooms, taking courses such as anatomy, biochemistry, physiology, pharmacology, psychology, microbiology, pathology, medical ethics, and laws governing medicine. They also learn to take medical histories, examine patients, and diagnose illnesses. During their last 2 years, students work with patients under the supervision of experienced physicians in hospitals and clinics, learning acute, chronic, preventive, and rehabilitative care. Through rotations in internal medicine, family practice, obstetrics and gynecology, pediatrics, psychiatry, and surgery, they gain experience in the diagnosis and treatment of illness.

Following medical school, almost all M.D.s enter a residency—graduate medical education in a specialty that takes the form of paid on-the-job training, usually in a hospital. Most D.O.s serve a 12-month rotating internship after graduation and before entering a residency, which may last 2 to 6 years.”

denying having engaged in various behaviors (alcohol use, etc.).⁶

Discovery in peer review proceedings is designed to benefit the panel in arriving at the truth. Such panel is fully capable of drawing the common-sense adverse inference against a physician who is hiding information by refusing to comply with reasonable discovery requests. One does not need to know the Evidence Code to know that if someone is hiding information, they more than likely have got something to hide.

The basic charge against Plaintiff now is not significantly different from the charge of interpersonal difficulties unrelated to patient care which this Court has held may not be used as grounds for denial of even an initial grant of staff membership:

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.

Miller v. Eisenhower Med. Ctr. (1980) 27 Cal.3d 614, 632.

Since the *Miller* decision, the changes in our healthcare system have only increased the likelihood of even the most mild-mannered physician ending up in conflict with others: physicians are carrying greater workloads, for less compensation, and with much more oversight from those managing the world of managed care. Interpersonal conflicts in such a system do not inherently threaten patient care. Indeed, the ability of doctors to freely

⁶ Psychologists who have studied various professionals’ ability to detect lying report physicians’ ability in this regard is no worse than judges’ ability. See Ekman P, O’Sullivan M, “Who can catch a liar?” *Am. Psychologist* (1991);46: 913–20; Vrij A.; *Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice* (Chichester: Wiley, 2001).

disagree with each other (and with other providers or management) generally serves to prevent errors in patient care.

Medical staffs can deal with problems like the one here by taking steps far less drastic than termination. Termination is the most drastic remedy available to medical staffs for taking disciplinary action against physicians – *and the remedy most disruptive of regular physician-patient relationships*. Termination should only be utilized in the most extreme circumstances, and usually not unless other measures have been tried and failed. Such measures may include, for example:

- Requiring the physician complete further training to address any perceived shortcomings (e.g. *Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286, 1292 (hospital appeal board recommended that physician accused of verbally abusing and threatening nurse be required to complete behavioral modification course before being placed back on staff); *Applebaum v. Bd. Dirs.* (1980) 104 Cal.App.3d 640, 653 (hospital executive committee recommended that physician's obstetrical privileges be suspended until he had completed further training satisfactory to the executive committee and served a probationary period in which he would transfer primary care of any nonroutine delivery to another member of the obstetrics staff).

- Placing a physician on probation for a certain number of procedures or period of time (e.g. *Mir v. Charter Suburban Hospital* (1994) 27 Cal.App.4th 1471, 1476 (judicial review committee recommended that board-certified cardiovascular and thoracic surgeon be placed on probation for his next ten major abdominal or thoracic surgeries and his next six endoscopies performed at the hospital).

- Delaying any recommended suspension of privileges to

accommodate the continuity and quality of care received by the physician's patients (e.g. *Applebaum*, 104 Cal.App.3d at 652-53 (hospital committees recommended that obstetrician's privileges be suspended after he had completed the care of pregnant patients and delivered them under the supervision of other physicians in the obstetrics department); and

- Suspending the physician's staff privileges for a limited period of time (rather than permanently), as the statutory scheme plainly contemplates. *See* Bus. & Prof. Code §805(b)(3) (805 report to Medical Board regarding summary suspension of staff privileges required only "if the summary suspension remains in effect for a period in excess of 14 days").

Here, despite Plaintiff's tenure, it appears the Hospital abruptly imposed the most severe sanction available to it, without ever utilizing (or even considering) the other, less drastic tools available to it. Because of its extreme nature, the Hospital's action here warrants particular scrutiny. The instant case is in many ways stronger than the physician's claim in *Miller*, who was not complaining of termination, but merely of not being allowed to join a hospital's staff for the first time. Deprivation of existing staff privileges has long been deemed by California law to represent the loss of a fundamental property right. *See, e.g., Anton v. San Antonio Comm. Hosp.* (1977) 19 Cal.3d 802; *Potvin v. Met. Life Ins. Co.* (2000) 22 Cal.4th 1060, 1076-78.

The charge of the physician being "disruptive" is the latest boilerplate charge used by hospital corporations wishing to stifle physician dissent. *See, e.g., Clark v. Columbia/HCA* (Nev. 2001) 25 P.3d 215 (finding hospital which terminated physician's privileges for being "disruptive" not immune from liability as management's motive appeared

to be retaliatory); *Sahlolbel v. Providence Healthcare* (2003) 112 Cal.App.4th 1137 (termination for being “disruptive” reversed by preliminary injunction due to a lack of prior administrative hearing).

This is now being coupled with hospitals repeatedly terminating peer review proceedings for alleged discovery abuse, as occurred again recently in *Lee v. Blue Shield* (2007) 154 Cal. App.4th 1369. Of course, hospital management can help create such a situation by bombarding the suspended physician with discovery requests. Once cut off from much of his livelihood via suspension—which numerous hospitals impose against any practitioner suspended initially by just one hospital—it will be a rare physician who has either the money to pay counsel to deal with numerous discovery requests, or the time to deal on his own with all these requests.⁷ These new techniques of “railroading” physicians by hospital administrators are contrary to California law and to the goals of these laws: to serve the public good. The words of the New Jersey Supreme Court are appropriate reminders of the proper role of hospital management *vis-a-vis* hospital medical staff:

⁷ If a hospital deems the suspension or termination as being for “medical disciplinary cause” within the meaning of Bus. & Prof. Code §805, that means it must be reported to the Medical Board of California (the State licensing agency), put on the national practitioner databank, and automatically gets reported to every facility at which the physician might wish to practice. Bus. & Prof. Code §805.5. The fact of such discipline is also posted on the Medical Board’s website open to the public (Bus. & Prof. Code §2027), and thus readily available to every insurer, who often exclude from their panels anyone with discipline posted. Accordingly, any discipline by a single hospital, even totally-unjust discipline, will typically wreck a physician’s career, thus making it impossible for him or her as a practical matter to respond to massive discovery requests from all the various hospitals which suspend privileges in response to any suspension elsewhere.

Hospital officials are properly vested with large measures of managing discretion and to the extent that they exert their efforts toward the elevation of hospital standards and higher medical care, they will receive broad judicial support. But they must never lose sight of the fact that the hospitals are operated not for private ends but for the benefit of the public, and that *their existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public.*

Greisman v. Newcomb Hospital (N.J. 1963) 192 A.2d 817, 825 (emphasis added).

CONCLUSION

This case is actually quite simple: by statute, Plaintiff's peers must be given a chance to actually vote on whether he should be stripped of his privileges. His peers were not allowed to so vote, and thus Petitioner is entitled to relief. Division 8 of the Fourth District Court of Appeal correctly recognized this, and should be affirmed.

Dated: June __, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for *Amicus Curiae* hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the brief of *Amicus Curiae* Union of American Physicians and Dentists is produced using 13-point Roman type including footnotes and contains approximately words 3,626, which is less than the total words permitted by the rules of the Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: June ____, 2008

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**PROOF OF SERVICE
STATE OF CALIFORNIA, CITY AND COUNTY
OF SAN FRANCISCO**

I am employed in the city and county of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 595 Market Street, Suite 1400, San Francisco, California 94105.

On June 16, 2008, I served the document(s) described as **BRIEF AMICUS CURIAE OF UNION OF AMERICAN PHYSICIANS AND DENTISTS IN SUPPORT OF PLAINTIFF/RESPONDENT** in his action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

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[X] (BY MAIL) I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with

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I declare under penalty of perjury, under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on this 16th day of June, 2008 at San Francisco, California.

Joyce A. Archain