

S156986

(2nd Civil No. B186238)

**IN THE
SUPREME COURT OF CALIFORNIA**

GIL N. MILEIKOWSKY, M.D.
Plaintiff/Appellant,

v.

WEST HILLS HOSPITAL MEDICAL CENTER, et al.,
Defendants/Respondents.

**APPLICATION OF CATHOLIC HEALTHCARE WEST AND
TENET HEALTHCARE CORPORATION TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS
WEST HILLS HOSPITAL MEDICAL CENTER, *ET AL.*;
PROPOSED *AMICUS* BRIEF**

On Review of a Decision Rendered
By the California Court of Appeal,
Second Appellate District, Division Eight

MANATT, PHELPS & PHILLIPS, LLP
BARRY S. LANDSBERG (SBN 117284)
TERRI D. KEVILLE (SBN 162492)
11355 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (310) 312-4000
Attorneys for Amici Curiae

**CATHOLIC HEALTHCARE WEST and TENET HEALTHCARE
CORPORATION**

INTRODUCTION

Hospital peer review of unqualified, under-performing, or dysfunctional physicians is a time-consuming and thankless task performed largely by unpaid volunteer physicians. Hospital medical staffs must shoulder this burden because peer review is the statutorily established system for ensuring that patients consistently receive appropriate medical care in California hospitals. If judicial interpretation of the peer review scheme makes it even more onerous for participants than it is already, it will not function as it should. This Court acknowledged that reality when it held that hospital peer review proceedings are “official proceedings” protected by California’s anti-SLAPP statute. *Kibler v. Northern Inyo County Local Hospital District*, 39 Cal. 4th 192, 201 (2006).

Hospital governing bodies are responsible for overseeing a peer review system that demands a tremendous commitment of time and effort from many doctors whose participation is not only voluntary and typically unpaid, but often unappreciated. A hospital’s governing body has the ultimate authority to decide who can practice in the hospital and what specific clinical privileges each practitioner can exercise. In most cases, however, the board must do so on the basis of recommendations from the medical staff. Therefore, the medical staff must evaluate and make recommendations about the qualifications of every applicant and medical staff member (existing staff members must be reviewed continuously and

considered for reappointment at least every two years). Although state and federal law impose a broad mandate to conduct peer review, there is *no* requirement for *individual* doctors to participate.

The Court of Appeal in this case imposed a new and unwarranted requirement that is certain to discourage physicians from participating in peer review. According to the Court of Appeal, in addition to deciding medical issues, physician hearing panels also must struggle with legal/procedural rulings that properly ought to be made by hearing officers. Further, unless they take on that task and determine that procedural misconduct warrants termination of the proceedings, they must commit to serving indefinitely, since the only permissible consequence of failure to produce documents, witness lists, etc. is an endless series of continuances. Under the Court of Appeal's decision, the least expert and least willing participants – the affected physician's professional peers – must make toothless rulings about discovery misconduct and other disobedience that they cannot enforce. The decision makes no sense, as a matter of law or policy. It also conflicts with the Second District Court of Appeal's decision involving the same doctor, *Mileikowsky v. Tenet HealthSystem*, 128 Cal. App. 4th 531 (2005), which wisely recognized that the hearing officer in a peer review proceeding *does* have authority to rule that the hearing should be terminated based on the subject physician's repeated misconduct during the hearing process.

The peer review regime devised by the Court of Appeal in this case also may compromise the fairness of the hearing process. If physician triers of fact are forced to confront and decide issues arising from a party's failure to cooperate in the process – issues from which hearing panel members typically have been shielded by attorney hearing officers – the panel members' exposure to allegations of procedural misconduct may jaundice their views of the merits.

Moreover, fairness must be a two-way street. Denying peer review hearing officers the power to deal effectively with obstruction and delay by physicians who are the subjects of hearings is unfair to hospitals and their medical executive committees (who typically formulate the actions or recommendations that become the subjects of peer review hearings). How can a medical staff put on its case and keep the physician hearing panel members from jumping ship if the only “sanction” for a physician's refusal to produce relevant documents in his possession is continuance, *i.e.*, delay? As the Court of Appeal in *Mileikowsky v. Tenet HealthSystem* noted, a dispute over whether one party will “allow discovery to be completed result[s] in squandering the resources of the administrative tribunal and unfairness to the other litigants.” 128 Cal. App. 4th at 561.

The California Legislature and courts, including this Court, repeatedly have declared that candid, effective hospital peer review is crucial to the public welfare and worthy of protection. “Hospital peer

review, in the words of the Legislature, ‘is essential to preserving the highest standards of medical practice’ throughout California. (Bus. & Prof. Code, § 809, subd. (a)(3)).” *Kibler, supra*, 39 Cal. 4th at 199. The appellate decision in this case threatens effective peer review without providing any benefit whatever to doctors who are the subjects of peer review hearings, because physician peer reviewers are ill-equipped to assume the additional burden of deciding document disputes, waiver issues, and other procedural matters. Such questions should be decided by hearing officers, who must be empowered to “impose *any* safeguards the protection of the peer review process and justice requires” (Cal. Bus. & Prof. Code § 809.2(d) (emphasis added)) – subject to the ultimate authority of the hospital’s governing body to affirm or reverse such rulings on appeal.

Pursuant to the California Rules of Court, Rule 29.1(f), Catholic Healthcare West (CHW) and Tenet Healthcare Corporation (Tenet) hereby respectfully request leave to file the attached brief of *amicus curiae* in support of Defendants/Respondents West Hills Hospital Medical Center, *et al.* This application is made timely within thirty days after the filing of the reply brief on the merits.

**INTEREST OF *AMICI CURIAE*
CATHOLIC HEALTHCARE WEST AND
TENET HEALTHCARE, INC.**

CHW is California’s largest not-for-profit hospital owner/operator, with more than 30 California hospitals. CHW is comprised of numerous

Catholic orders (*i.e.*, groups of nuns) that serve as its sponsoring organizations. CHW's mission, among others, is "deliver[ing] compassionate, high quality, affordable health care services," "serving and advocating for . . . the poor and disenfranchised," and "partnering with others in the community to improve the quality of life." In CHW's network of hospitals (which includes several in Arizona and Nevada in addition to the California facilities), nearly 9,500 physicians and approximately 50,000 employees provide quality healthcare services during more than *four million patient visits* annually. Each year, CHW provides hundreds of millions of dollars worth of community benefit and free care for the poor (close to \$1 billion in 2007),¹ in addition to the healthcare services for which CHW is reimbursed.

Tenet Healthcare Corporation ("Tenet") is an investor-owned hospital system that, through its subsidiaries, owns and operates over forty acute-care hospitals in twelve different states. Tenet California, a region of Tenet, comprises fifteen acute-care hospitals in California with approximately 2,600 licensed beds and numerous related health care services. The region includes major urban and community hospitals that serve large and diverse populations in Southern, Northern and Central California. Tenet provides charity care to patients who are financially

¹ For more information about CHW, *see* CHW's website: http://www.chwhealth.org/stellent/websites/get_page_cache.asp?ssDocName=MSYS_M030441.

unable to pay for the health care services they receive, and also sponsors the Tenet Healthcare Foundation, a charitable foundation dedicated to improving the communities served by Tenet hospitals. Nationwide, Tenet's hospitals provided over \$637 million in charity care (based on gross charges) during 2007, and paid over \$123 million in local taxes that go toward the improvement of local infrastructure and community programs. Tenet's hospitals aim to provide the best possible care to every patient who comes through their doors, with a clear focus on quality and service. Tenet's Commitment to Quality initiative includes Physician Excellence as one of its key components, and one of its goals is to enhance physician leadership and medical staff governance.²

Between them, CHW and Tenet serve millions of California patients and their families and communities each year. Their hospitals operate 24 hours a day, 7 days a week, 365 days a year, providing vital healthcare services to the citizens of this state in times of acute illness and emergency. Thus, CHW and Tenet are essential healthcare resources for the citizens of California, and they have a compelling interest in judicial decisions that affect the ability of their hospitals and medical staffs to conduct peer review effectively and efficiently.

² For more information about Tenet, see Tenets' website: <http://www.tenethealth.com>.

CHW appeared and argued as an *amicus* in this Court in *Kibler v. Northern Inyo County Local Hospital District*, 39 Cal. 4th 192 (2006) (“*Kibler*”), where the Court held that hospital peer review proceedings are “official proceedings” under California’s anti-SLAPP statute. *See Kibler* at 201 (referring to CHW’s *amicus* brief). A Tenet hospital generated the prior Second District (Division 4) decision that is the source of decisional conflict on review in this Court, *Mileikowsky v. Tenet HealthSystem, supra*.

CHW and Tenet know firsthand that in a large hospital with hundreds of doctors on its medical staff, inevitably some of them will experience professional problems. (And, of course, some physicians at smaller hospitals have difficulties, too.) Therefore, at any given time, CHW and Tenet have multiple ongoing peer review proceedings. They cannot fulfill their missions to provide high-quality healthcare services to Californians, and to promote physician excellence and patient safety, if ill-informed judicial decisions hamstring their efforts by making peer review substantially more difficult and time-consuming.

Yet, that is precisely what will happen if – as the Court of Appeal ruled in this case – multiple continuances are the only consequence when a physician who is the subject of peer review repeatedly fails to submit documents, witness lists, etc., as and when required. It is absolutely critical for peer review hearing officers to have the power to control the hearing process, and even to impose terminating sanctions where warranted. The

Court of appeal got this right in the earlier case, *Mileikowsky v. Tenet HealthSystem*, but missed the mark in the decision on review.

It is essential for hearing officers to have this power not only because someone must be authorized to control the hearing process, but also because experienced peer review hearing officers have the requisite knowledge of the applicable law. Physician peer reviewers do not have that knowledge, nor do they want to be saddled with the increased burdens of considering and ruling on procedural/legal issues in addition to deciding complex questions about the medical standard of care, or about the effects of disruptive physician behavior on the delivery of patient care by others. CHW, Tenet, their hospitals, and their medical staffs have the utmost interest in this decision, because it affects their ability to conduct effective peer review for the benefit of the patients they serve.

NEED FOR FURTHER BRIEFING


Amici curiae CHW and Tenet are familiar with the issues before this Court and the scope of their presentation. CHW and Tenet believe that further briefing is necessary to elucidate matters not fully addressed by the parties' briefs – specifically, the perspective of two of the largest hospital systems in California on the realities of hospital peer review, and the crucial importance of allowing expert peer review hearing officers to make procedural rulings, subject to the ultimate decision-making authority of each hospital's governing body.

For the reasons we explain, a peer review hearing officer's authority must encompass the power to make all necessary procedural rulings, including rulings that may end the proceedings, to protect the peer review process and thereby protect the public.

Dated: August 28, 2008

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP
BARRY S. LANDSBERG
TERRI D. KEVILLE

By: 
Attorneys for Amicus Curiae
CATHOLIC HEALTHCARE WEST and
TENET HEALTHCARE CORPORATION