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NO. S156986

IN THE SUPREME COURT OF CALIFORNIA

GIL N. MILEIKOWSKY, M.D.,

Plaintiff and Appellant,

v.

WEST HILLS HOSPITAL MEDICAL CENTER et al.,

Defendants and Respondents.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF *AMICUS CURIAE* OF VAN HALL LAW OFFICES IN SUPPORT OF RESPONDENT/APPELLANT

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

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APPLICATION FOR LEAVE TO FILE AS AMICUS

Pursuant to Rule 8.520(f) of the California Rules of Court, the van Hall Law Office respectfully seeks leave to file this brief Amicus Curiae in support of Respondent/Appellant West Hills Hospital Medical Center.

I have been licensed to practice law in California since 1980. I have been a healthcare specialist for my entire legal career spanning 27 years and I have devoted a significant portion of my time to medical staff peer review matters. Representative clients of mine currently include Good Samaritan Hospital in Los Angeles, Catholic Healthcare West and several of its Southern California Hospitals, Adventist Health and three of its hospitals located in Central California, and Daughters of Charity and two of its hospitals in Los Angeles. I have been retained by other hospitals to serve as a hearing officer in medical staff peer review hearings and at the governing board's appellate review. I was retained to serve as a hearing officer in a medical staff proceeding involving Dr. Mileikowsky that is unrelated to the case before the court and that ended in 2004.

In the past, I advised the California Hospital Association on its model medical staff bylaws and more recently I have actively participated in a committee dedicated to improving the peer review hearing process.

For the reasons set forth above, the van Hall Law Office urges this court to grant its Request for Leave to file this amicus brief.

AMICUS CURIAE BRIEF

For the reasons set forth below, this Court should reverse the Decision of the Court of Appeal in this case.

LEGAL DISCUSSION

1. Medical Staff hearing procedures should be sufficiently flexible to allow hearing officers to promote a fair procedure that is not unduly burdensome.

Medical Staff peer review hearings have grown considerably more formal since California's courts first held in *Ascherman v. Saint Francis Memorial Hosp.* (1975) 45 Cal.App.3d 507, that private hospitals were required to provide fair procedure for physicians who were denied hospital privileges or whose hospital privileges were terminated. The courts have never insisted on the full panoply of rights required by due process, emphasizing that the hearing rights arose from fair procedure rather than due process. *Anton v. San Antonio Community Hospital* ((1977) 19 Cal.3d 802. Nevertheless, increasingly complex procedural protections have developed over the years from judicial decisions in various medical staff peer review cases, plus the enactment of California's medical staff peer review hearing law, Business and Professions Code § 809 *et seq.*

A private hospital, such as West Hills Hospital Medical Center, certainly is required to afford a doctor "minimal due process of law protection" before terminating his medical staff membership and clinical privileges. *Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 488-489, *citing Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 155-156. But, as has been said over and over:

> "This does not, however, compel adherence to formal proceedings or to any single mode of process. Instead it may be satisfied by any of a variety of procedures. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555.) The hospitals themselves have the primary responsibility for providing a fair procedure which ensures that an applicant receive adequate notice of the charges against him and a reasonable opportunity to respond. (Ibid.) *Rhee, supra.* at 489.

The courts have pointed out that the purpose of a medical staff hearing is to protect the public rather than punish the physician. For that reason:

> "A physician's right to pursue his livelihood free from arbitrary exclusionary practices must be balanced against other competing interests: the interest of members of the public in receiving quality medical care, and the duty of the hospital to its patients to provide competent staff physicians. (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 337-341.) Consequently, disciplinary procedures involving physicians have developed primarily from a protective rather than a punitive purpose. (*Cipriotti v. Board of*

> *Directors*, *supra*, 147 Cal.App.3d, at p. 157.) The hospital has 'a direct and independent responsibility to its patients of insuring the competency of its medical staff and the quality of medical care provided ....' (*Elam v. College Park Hospital*, *supra*, at p. 346.) Hospitals must be able to establish high standards of professional work and to maintain those standards through careful selection and review of staff. And they are required to do so by both state and federal law. (Cal. Code Regs., tit. 22, § 70701, subd. (a)(7) and § 70703, subds. (a) and (b); 42 C.F.R. § 482.22 (1987); *Hay v. Scripps Memorial Hospital* (1986) 183 Cal.App.3d 753, 756 .)" *Id.* at p.489.

The courts have been unwilling to impose stringent due process protections on the private hospitals. In *Rhee*, *supra*, the court explained:

> "We do not wish to denigrate the importance of due process rights; however, it must be emphasized that this is not a criminal setting, where the confrontation is between the state and the person facing sanctions. Here the rights of the patients to rely upon competent medical treatment are directly affected, and must always be kept in mind. An analogy between a surgeon and an airline pilot is not inapt: a hospital which closes its eyes to questionable competence and resolves all doubts in favor of the doctor does so at the peril of the public.
>
> "The appropriate standard to bring to bear on judicial review of hospital disciplinary procedures is therefore this: courts must not interfere to set aside decisions regarding hospital staff privileges unless it can be shown that a procedure is 'substantively irrational or

the California hospital industry, as reflected in the Model Medical Staff Bylaws of both the California Hospital Association and the California Medical Association, to provide for the appointment of a hearing officer, who generally is an attorney at law, and to give him or her broad authority and responsibility to rule on all procedural issues and to move the hearing process along in an orderly and efficient manner.

Since California courts have given hospitals the right, in the first instance, to fashion their own rules, it is theoretically possible that a hospital could choose to adopt its own internal rule that allowed only a hearing panel to terminate a hearing because of a doctor's procedural deficiencies. However, no such rule was in effect in this case, and it would be rare to find such a bylaws provision given the prevailing standard in the industry.

Further, the hearing officer typically is given absolute discretion to take whatever action seems warranted if either side is not proceeding in an efficient and expeditious manner. Both the California Hospital Association ("CHA") and the California Medical Association ("CMA) publish model medical staff bylaws that are used by in most California hospitals as a starting point for developing their own medical staff bylaws. The CMA Model Medical Staff Bylaws Section 7.4-3, states:

> "The hearing officer shall endeavor to assure that all participants in the hearing have a reasonable opportunity to be heard and to present

relevant oral and documentary evidence in an efficient and expeditious manner, and that proper decorum is maintained. The hearing officer shall be entitled to determine the order of or procedure for presenting evidence and argument during the hearing and shall have the authority and discretion to make all rulings on questions which pertain to matters of law, procedure or the admissibility of evidence. If the hearing officer determines that either side in a hearing is not proceeding in an efficient and expeditious manner, the hearing officer may take such discretionary action as seems warranted by the circumstances."

The CHA Model Medical Staff Bylaws has a virtually identical provision.

It makes sense that the hearing officer would be given full discretion to take whatever action he or she deems warranted, which would by its very nature include the option of terminating the hearing for a refusal to proceed in an efficient manner. Indeed, in order to maintain decorum and run an orderly hearing process, the hearing officer needs to have the discretion to sanction a party who refuses to abide by the rulings. It makes no sense to require the hearing officer to present to a hearing panel of physicians the history of the procedural deficiencies to obtain a ruling from the physicians on whether the procedural abuse justifies termination since medical training provides no insight whatsoever on administrative hearing procedural issues.

This is not an issue of limited concern to just one hospital (West Hills Hospital Medical Center) and one doctor (Dr. Mileikowsky). The

issue of what sanctions a hearing officer may impose for abuse of the process arises very frequently in the medical staff peer review process. In order to protect the viability of the hearing process, which is particularly important in light of the public interest in protecting peer review, I urge the Court to accept this case and reverse the Court of Appeals decision which would seriously hamper effective peer review.

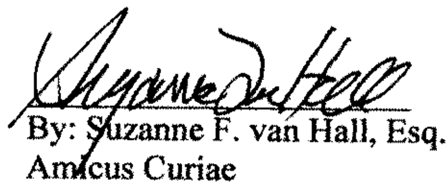
CONCLUSION

For all of the above-noted reasons, I urge this Court to reverse the Court of Appeal's decision in this case.

Dated: August 29, 2008

Respectfully submitted,

VAN HALL LAW OFFICE
SUZANNE F. VAN HALL



By: Suzanne F. van Hall, Esq.
Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, the text of this brief consists of 2,139 words as counted by the Microsoft Office Word 97-2002 word-processing program used to generate the brief.

Dated: August 29, 2008

Suzanne F. van Hall (SBN 94549)
Van Hall Law Office
Amicus Curiae

PROOF OF SERVICE [C.C.P. § 1013a]

I, **Suzanne F. van Hall**, declare as follows:

I am employed in the County of Jefferson, State of Colorado and over the age of eighteen years. I am not a party to the within action. I am employed by van Hall Law Offices, and my business address is 31692 Horseshoe Drive, Evergreen, Colorado, 80439. On **August 29, 2008**, I served a true and correct copy of the within document entitled **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF *AMICUS CURIAE*** on the parties in the action by overnight delivery service for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as follows:

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