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

As principal of the Ware Law Group, I have represented the interests of physicians, hospitals and hospital medical staffs in California for over twenty years. Before forming the Ware Law Group, for a period of seven years I represented the interests of approximately 33,000 physician members of the California Medical Association (CMA). During that time, as in-house legal counsel to the association and its members, including the Organized Medical Staff Section of CMA (the function of which was to address issues unique to hospital medical staffs), I was responsible for legal analysis and assistance with respect to all matters related to physician peer review.

Before and after my tenure with the CMA, altogether for a period of over fourteen years, I and my firm affiliates (including the Ware Law Group) have represented the medical staffs of approximately thirty hospitals and clinics throughout California. Our practice continues to focus on all aspects of medical peer review, including the broad range of issues attendant to the peer review hearing process. I have served as the medical staff's legal counsel in many California peer review hearings and as hearing officer in a significant number of other such hearings and appeals. Thus, both I and my firm have a strong interest in clarification of California law regarding the authority of peer review hearing officers and in seeing that the split of authority on this issue within the Court of Appeal is resolved.

For the reasons set forth above, the Ware Law Group 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. The hearing officer plays a vital role in ensuring fairness and efficiency in the medical peer review process.

Business & Professions Code Section 809 expresses the Legislature's intent underlying the statutory scheme provided to encourage medical peer review for the public's protection while, at the same time, provide fair process to individuals who are the subject of adverse peer review actions and recommendations. Two of the many important goals expressed by the Legislature are (1) that peer review should be fairly conducted in order to preserve the highest medical standards, and (2) that health care peer review should be performed efficiently. (Bus. & Profs. Code § 809(a)(3), (7).)

Just as other forms of adjudication are generally performed by judges and lawyers, who have the legal training for this function, so too are peer review hearings presided over by hearing officers who are generally experienced lawyers, who are uniquely situated to facilitate the hearing process in order to ensure both fairness to the parties and efficiency.

With respect to fairness concerns, fairness to the physician must be balanced against the need to ensure a process that is viable and efficient for all concerned. In our experience during a recent hearing lasting over three

years, for example, the subject physician (who was in pro per) wrote an average of 1.5 letters every three days to the hearing officer and/or opposing party – sometimes up to six often lengthy letters in one day – raising detailed procedural issues. Resolution of these matters consumed an enormous amount of time outside of the hearing sessions themselves and sessions were often delayed pending resolution of the procedural matters. The process became so prolonged that one hearing officer quit and the replacement hearing officer felt compelled to revisit many of the matters that were previously resolved by the first. A hearing panel member also quit in protest against the length of service he was being asked to provide.

Such delays in commencement and completion of these hearings are common. Because hearing panels are almost always comprised of physicians and other busy healthcare practitioners with full office schedules and hospital duties, the hearings of necessity mostly occur at night. The panel members must finish their office schedules and perform necessary hospital rounds before the hearings can even begin. The hearings sessions, which generally last for three to four hours, take them away from administrative work, patients and their families. They may have on-call duties to the Emergency Department over the night and then a full patient schedule at their offices and in the hospital on the next day.

In these hearings, there is no compulsory service obligation similar to jury duty requirements. Thus, panel members are often reluctant volunteers. They provide extraordinary service in this capacity. However, due to the associated burdens, they will generally agree to service no more often than one time per week or every other week. Additional delays occur due to absences for attendance at professional conferences and family obligations. Depending upon the complexity of the issues to be decided, hearing panel

service can last well over a year – and in our experience, often lasts for two to three years. Appeals to hospital boards can add an additional two to six months to the overall process.

The failure of a party repeatedly to comply with discovery or other process rulings has frequently, in our experience, resulted in additional delays of often many months.

Also, as there is no subpoena power in these matters nor any right to take depositions, the longer the delays, the harder it becomes to ensure witness availability, and memories are likely to fade. In the dynamic healthcare profession, individuals frequently change jobs and nurses or others may have changed hospitals and locales by the time the substantive portion of the hearing gets underway. As witness service is burdensome under the most convenient of circumstances, it is almost impossible to secure testimony from even key witnesses, once they have left the hospital.

To avoid what could become an imminent and complete break-down of the peer review hearing process, it is essential that hearing officers have authority to implement appropriate safeguards designed to move the process forward fairly, but also as expeditiously as possible.

If this *West Hills* decision is upheld, many hearing officers may be hesitant to perform their expected quasi-judicial functions, fearing that they may be limited to granting continuances when either side refuses to comply with reasonable directives that are necessary to a fair hearing of the issues. They may fail to take necessary steps to control the process, even when those

steps are clearly contemplated by provisions of the Medical Staff Bylaws.[1] Such a result would provide no incentive whatsoever for compliance by an offending party. Of greater concern, we fear that the granting of serial continuances will exacerbate the rampant problems already caused by the delays inherent in a hearing process that depends heavily on the participation of reluctant volunteer panel members.

2. Patient Protection is Better Served When the Hearing Officer Has Broad Authority to Control the Process.

Paramount among the Legislative goals expressed in Business & Professions Code § 809 is protection of the public health and welfare, by facilitating a process through which practitioners who engage in substandard care or professional misconduct may be excluded and reported to the appropriate state licensing boards who have responsibility to regulate licensees for the public's protection. (§ 809(a)(5),(6).)

Except in cases where there is proof of a danger of imminent harm, e.g. in cases where a surgeon is found inebriated and about to operate, protective corrective actions and reports to the licensing authorities can occur only following the conclusion of the hearing and any appeal. (Business and Professions Code § 809.5.) Thus, even if a physician or other practitioner were found ultimately to present substandard care or professional

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[1] In this regard, it must be noted that all provisions of Medical Staff Bylaws are binding upon the parties, so long as such provisions do not conflict with the provisions of Business and Professions Code § 809, *et seq.*, or other preemptive law. *Janda v. Madera Community Hospital* (1998) 16 F.Supp.2d 1181(1998), 1185-1186; *Accord. O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 810.

misconduct adversely affecting the delivery of patient care, the corrective action finally imposed to protect the public is often delayed **by years** as a matter of course. All incentives are aligned for such a practitioner to delay implementation of corrective action, and continue practicing at the institution, as long as possible. The public safety remains at stake until final resolution of the matter.

3. Fairness issues, including those related to document discovery and exchange, are uniquely legal in nature and should not be resolved by a fact-finding lay panel.

In *Rosenblit v. Superior Court* (1991) 231 Cal. App.3d 1434, 1442-44, the California Court of Appeal held that, while there may be foundational questions of fact involved, the ultimate question of whether there has been a fair peer review hearing is a question of law (which must therefore be reviewed on appeal under an independent judgment standard).

Peer review hearing panels generally are comprised of medical professionals with essential understanding of the clinical and professional conduct issues at stake. They are well equipped to hear evidence and reach conclusions concerning clinical care and professional conduct that may adversely impact the delivery of that care. They are not, however, trained or well equipped to address questions or reach conclusions pertaining to the rights of the parties (under the statute, Bylaws and cases), the discovery and exchange of documents, or any sanctions that may lawfully be imposed upon either party for failure to cooperate with the process. To ask the panel members to review and decide such issues not only places them in a very awkward position, but could also result in unfair (maybe even unintended) consequences to a party, having major legal significance.

Indeed, while jurors are often asked to decide difficult factual questions, they are not competent to decide what is "fair." That is a function of the law and of the courts:

> The tradition and heredity of the flexible equitable powers of the modern trial judge derive from the role of the trained and experienced chancellor and depend upon skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury. *A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 473 (issue of promissory estoppel to avoid injustice is for the court to determine, not the jury).

See also *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6-8 (same); *Stark v. Coker* (1942) 20 Cal.2d 839, 846.

The same concept holds true for physicians serving on peer review committees: they can and should resolve factual issues concerning the subject physician's competence to exercise clinical privileges. They should *not* attempt to resolve legal issues concerning how the proceedings should be conducted. That is the job of the hearing officer.

4. Involvement of the panel members in procedural disputes implicating party rights would be unduly burdensome, would likely cause confusion, and could result in unwarranted bias against a party.

In our experience, as noted above, the hearing panel members are heavily burdened by the realities of serving on the panel, in light of their already extremely taxing professional responsibilities. To expect them to participate in important decisions respecting party rights would add tremendously to this burden.

It would also tend to cause confusion, as these highly intelligent and diligent professionals would likely want to master the process issues presented to them, but could misconstrue technical legal points involving evidence, discovery, party rights, etc. The very reason why hearings are almost always conducted by attorneys in the role of hearing officer is to shield the panel from such burdens, but also to avoid diversion of their attention to procedural matters that generally require legal training and experience for proper resolution. Also, understandably, some panel members might be reluctant to assume this role, fearing liability for any mistakes in judgment as to these matters.

Finally, it may be anticipated that panel members who are asked to review and decide important process questions would develop biases for or against a party for its conduct with regard to procedural matters. Such biases could then influence the panel members improperly with respect to the substantive issues under review, potentially resulting in an unjust decision.

CONCLUSION

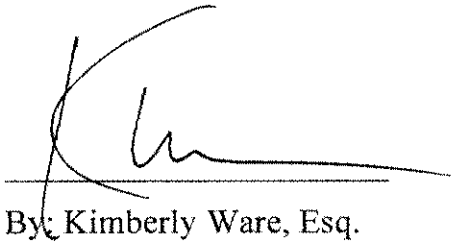
For all of the above-noted reasons, we urge this Court to reverse the Court of Appeal's decision in this case.

Dated: August 26, 2008

Respectfully submitted,

WARE LAW GROUP

KIMBERLY WARE



By: Kimberly Ware, 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 1,719 words as counted by the Microsoft Office Word 2003 word-processing program used to generate the brief.

Dated: August 26, 2008

Kimberly Ware (SBN 121799)
Ware Law Group
Amicus Curiae

PROOF OF SERVICE [C.C.P. § 1013a]

I, **J.D. Mitchell**, declare as follows:

I am employed in the County of Alameda, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Ware Law Group, and my business address is 1500 Park Avenue, Suite 212, Emeryville, California 94608-3531. On **August 28, 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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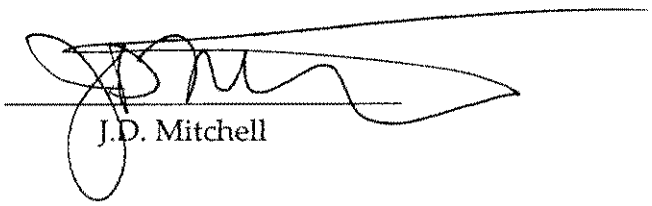
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **August 28, 2008**, at Emeryville, California.



J.D. Mitchell