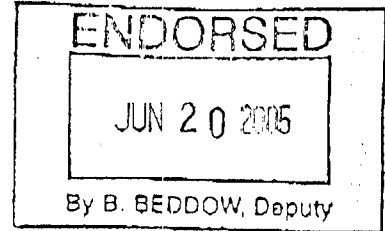


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10 GIL NATHAN MILEIKOWSKY, M.D.



11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SACRAMENTO

13 FILED BY FAX

14 GIL NATHAN MILEIKOWSKY, M.D.,

CASE NO: 04CS00969

15 Petitioner,

PETITIONER'S NOTICE OF MOTION
AND MOTION FOR ATTORNEYS'
FEES, COSTS AND EXPENSES UNDER
THE PRIVATE ATTORNEY GENERAL
STATUTE (Code of Civil Procedure
Section 1021.5); POINTS AND
AUTHORITIES; DECLARATION OF
GIL N. MILEIKOWSKY, M.D.

16 vs.

17 MEDICAL BOARD OF CALIFORNIA

18 Respondent

DATE: July 22, 2005
TIME: 11:00 A. M.
DEPT: 25

[Filed concurrently with the Declarations
of Russell Iungerich; Roger Jon Diamond;
Paul M. Hittelman; Lawrence R. Huntoon,
M.D., PhD, FAAN; Dr. Robert Weinmann;
Barbara Hensleigh; C. William Hinnant,
Jr. M.D, J.D., and Dr. Deane Hillsman]

19 To the Honorable Raymond M. Cadei, Judge of the Superior Court and to Respondent
20 and its attorneys of record:

21 PLEASE TAKE NOTICE that on July 22, 2005 at 11:00 a.m. or as soon thereafter
22 as the matter can be heard, in Department 25 of the above-entitled court, located at 720 9th
23 Street, Sacramento, CA 95814-1398, Petitioner Gil N. Mileikowsky, M.D. will move the
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25
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27
28

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9 Attorneys for Petitioner
10 GIL NATHAN MILEIKOWSKY, M.D.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SACRAMENTO**

13 GIL NATHAN MILEIKOWSKY, M.D.,

14 Petitioner,

15 vs.

16 MEDICAL BOARD OF CALIFORNIA

17 Respondent

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1 court for an order awarding \$152,377.40 for attorneys' fees, costs and litigation expenses
2 pursuant to the Private Attorney General Statute, Code of Civil Procedure Section 1021.5, on
3 the following grounds:

4 1. The administrative decision that was the subject of this proceeding,
5 Respondent's November 12, 2002 Order Compelling Mental and Physical Examination of
6 Petitioner, was void, unenforceable, arbitrary, unreasonable, abusive of discretion and
7 violated Petitioner's rights to good cause determination;

8 2. Petitioner prevailed on the merits in this proceeding affecting the public trust.
9 The Judgment and Writ of Mandate issued at Petitioner's request provided a significant non-
10 pecuniary benefit to the general public and a large class of persons: California physicians;

11 3. The Judgment and Writ of Mandate issued by this court serve the public
12 interest and will greatly benefit the general public, by requiring the Medical Board of
13 California in this case, and in cases involving proceedings where it is claimed that a medical
14 licentiate is physically or mentally impaired, to assure that the public interest is protected by
15 subjecting to Medical Board orders and discipline under Business and Professions Code
16 §820 and §821, only those physicians who are determined, for good cause, based upon all
17 relevant evidence, with participation of qualified, unbiased, disinterested medical experts, to
18 be so impaired. This will assure full and free access to competent medical care provided by
19 patient-chosen practitioners;

20 4. The Judgment and Writ of Mandate will serve as a deterrent to the Medical
21 Board of California, and to medical boards of other states, and will constrain them from
22 instituting and prosecuting mental and physical examination proceedings against
23 practitioners as to whom there is no good cause determination, by an impartial, fairly
24 selected qualified expert, free of conflicts of interest, and based upon all available evidence,
25 that there are reasonable grounds to believe that such impairment exists.

26 5. The necessity and financial burden of private enforcement and vindication of
27 Petitioner's rights make an award to Petitioner of attorneys fees, costs of expenses under
28 Section 1021.5 appropriate;

1 This motion is based upon this paper, the attached Points and Authorities and
2 Declaration of Gil N. Mileikowsky, M.D., the concurrently filed declarations of Lawrence R.
3 Huntoon, M.D., Ph.D., F.A.A.N., Dr. Deane Hillsman, C. William Hinnant, M.D., J.D., Dr.
4 Robert Weinmann, Barbara Hensleigh, Russell Iungerich, Roger Jon Diamond, and Paul M.
5 Hittelman, and upon the pleadings, papers and records on file in this action.

6
7 Dated: June 20, 2005

ROGER JON DIAMOND ESQ.

PAUL M. HITTELMAN, ESQ.

8
9
10
11 By: 

PAUL M. HITTELMAN
Attorneys for Petitioner,
Gil Nathan Mileikowsky, M.D.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Having succeeded in this proceeding in procuring Judgment entered December 21,
4 2004, and issuance of the Writ of Mandate issued December 30, 2004, Petitioner seeks by this
5 motion, to recover the \$152,377.40 in attorneys' fees costs and expenses he incurred in
6 prosecuting the matter where this award is sought under the provisions of the Private
7 Attorney General Statute, Code of Civil Procedure section 1021.5 (hereafter "§1021.5").

8 The declarations of Petitioner, four prominent physicians affiliated with professional
9 organizations (Lawrence R. Huntoon, M.D., PhD, FAAN; Dr. Robert Weinmann; C. William
10 Hinnant, Jr. M.D, J.D., and Dr. Deane Hillsman, and a prominent physicians' attorney,
11 Barbara Hensleigh, amply demonstrate that all of the criteria that must be established to
12 warrant an award under such a §1021.5 are present in this case, as:

13 • Petitioner prevailed on the merits in this proceeding, which enforced rights
14 affecting the public interest by procuring a Judgment and Writ of Mandate, requiring the
15 Medical Board of California, when ordering physicians to undergo physical and
16 psychological examinations, to do so only upon appropriate showings of good cause based
17 upon evaluation of all available evidence with the participation of qualified, unbiased,
18 disinterested medical reviewers.

19 • The Judgment and Writ of Mandate in this proceeding provided a significant
20 non-pecuniary benefit to both the general public and a large class of persons: California
21 physicians, both as to procedural and privacy rights. as:

22 The general public will benefit by having continued access to, and the free choice of,
23 qualified physicians whose number will not be arbitrarily reduced by physicians disciplined
24 based upon determinations by medical reviewers who are biased or subject to conflicts of
25 interest, and upon determinations made in the absence of good cause based on consideration
26 and evaluation of all available relevant evidence.

27 As Petitioner proceeded against the governmental agency, the necessity of

1 private enforcement is established;

2 The financial burden upon Petitioner of private enforcement makes the award of
3 attorneys' fees necessary and appropriate; the proceeding and its costs transcended
4 Petitioner's personal interest and placed a disproportionate burden upon him, although, in the
5 long run, the successful results of this proceeding may not ultimately benefit Petitioner, the
6 public, and other physicians will undoubtedly benefit.

7 The circumstances of this case and the applicable law amply warrant the award
8 of the attorneys' fees, costs and expenses incurred in procuring the Judgment and Writ of
9 Mandate and the attorneys' fees and costs incurred and that will be incurred in this motion.

10 **II. ARGUMENT**

11 **A. AN AWARD OF ATTORNEY'S FEES UNDER THE PRIVATE ATTORNEY**
12 **GENERAL STATUTE, CCP§ 1021.5 IS WARRANTED. ALL OF THE**
13 **ELEMENTS NECESSARY TO THE APPLICATION OF THAT STATUTE**
14 **ARE PRESENT**

15 Code of Civil Procedure §1021.5 codifies the private attorney general statute
16 providing for an award of attorney's fees for successful litigants in:..."any action which has
17 resulted in the enforcement of an important right affecting the public interest if: (a) a
18 significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general
19 public or a large class of persons, (b) the necessity and financial burden of private
20 enforcement is such as to make the award appropriate and when (c) such fees should not in
21 the interests of justice be paid out of a recovery, if any."

22 The basic principles applicable in all cases in which attorneys' fees are sought under
23 the provisions of §1021.5 were recently well summarized in Ryan v. California Inter-
Scholastic Federation (2001) 94 Cal.App4.1033 at 1044:

24 Section 1021.5 codifies the "private attorney general doctrine" adopted by our
25 Supreme Court in *Serrano v. Priest* (1977) 20 Cal.3d 25 [141 Cal.Rptr. 315, 569 P.2d
26 1303]. (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 317 [193 Cal.Rptr. 900, 667
27 P.2d 704]; *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 634
28 [71 Cal.Rptr.2d 632]; *Family Planning Specialists Medical Group, Inc. v. Powers*
(1995) 39 Cal.App.4th 1561, 1566 [46 Cal.Rptr.2d 667].) The doctrine is designed to
encourage private enforcement of important public rights and to ensure aggrieved

1 citizens access to the judicial process where statutory or constitutional rights have
2 been violated. (*Olney v. Municipal Court* (1982) 133 Cal.App.3d 455, 463 [184
3 Cal.Rptr. 78].) In determining whether to award attorney fees under section 1021.5 to
4 the "successful party," we apply a three-prong test inquiring whether (1) the litigation
5 resulted in the enforcement of an important right affecting the public interest, (2) a
6 significant benefit has been conferred on the general public or a large class of
7 individuals, and (3) the necessity and financial burden of private enforcement renders
8 the award appropriate. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142 [185 Cal.Rptr.
9 232, 649 P.2d 874]; *Family Planning Specialists Medical Group, Inc. v. Powers*,
10 *supra*, 39 Cal.App.4th at p. 1567; *Planned Parenthood v. Aakhus* (1993) 14
11 Cal.App.4th 162, 169-170 [17 Cal.Rptr.2d 510].) Regarding the nature of the public
12 right, it must be important and cannot involve trivial or peripheral public policies. The
13 significance of the benefit conferred is determined from a realistic assessment of all
14 the relevant surrounding circumstances. As to the necessity and financial burden of
15 private enforcement, an award is appropriate where the cost of the legal victory
16 transcends the claimant's personal interest; in other words, where the burden of
17 pursuing the litigation is out of proportion to the plaintiff's individual stake in the
18 matter. (*Olney v. Municipal Court, supra*, 133 Cal.App.3d at pp. 463-464.) The
19 decision whether the claimant has met his burden of proving each of these
20 prerequisites and is thus entitled to an award of attorney fees under section 1021.5
21 rests within the sound discretion of the trial court and that discretion shall not be
22 disturbed on appeal absent a clear abuse. (*Family Planning Specialists Medical
23 Group, Inc. v. Powers, supra*, 39 Cal.App.4th at p. 1567; *Olney v. Municipal Court,
24 supra*, 133 Cal.App.3d at p. 464.)

25 Each of the essential elements is satisfied here as the following discussion more
26 particularly demonstrates.

27 1. Petitioner prevailed on the merits in this action, which enforced rights affecting
28 the public interest.

Petitioner successfully prosecuted this proceeding which resulted in a Judgment in his
favor and the issuance of a Writ of Mandate ordering vacation of the Medical Board's order
compelling physical and mental examination and its subsequent revocation of Petitioner's
license.

That this proceeding enforced an important right affecting the public interest is clear.
It is well established that "...the Legislature has recently specified that in exercising its
discipline or authority, 'Protection of the public shall be the highest priority' of the Board.
([Business and Professions Code] §2229, subd.(a))" Arnett v. Dal Cielo (1996) 14 Cal.4th

1 4,9. Earlier decisional authority is to the same effect. In Ettinger v. BMOA (1982) 135
2 Cal.App.3d 853, 856, the Court declared: "The purpose of an administrative proceeding
3 concerning the revocation or suspension of a license is not to punish the individual; the
4 purpose is to protect the public from dishonest, immoral, disreputable or incompetent
5 practitioners." See also Yakov v. Board of Medical Examiners (1968) 68 Cal.2d 67, 73, N.6
6 ("The purpose of an action seeking revocation of a doctor's certificate is not to punish the
7 doctor but rather to protect the public.")
8

9 Hence, since disciplinary proceedings so strongly affect the public interest, this
10 proceeding enforcing the practitioner's rights in such proceedings is inextricably intertwined
11 with the public interest.
12

13 **2. A Significant Benefit Has Been Conferred On Both The General Public And**
14 **California Physicians.**

15 Code of Civil Procedure § 1021.5 requires that an important right, although not
16 necessarily a constitutional right be involved. That the right to free choice of medical
17 practitioners is an important right within the purview of § 1021.5, is thoroughly well-
18 established. Portions of the Business and Professions Code concerning physicians, including
19 §§ 809, et seq, are devoted to the subject of peer review and, for protection of the public to
20 assure free choice of qualified physicians, and to assure due process and fair hearing rights to
21 physicians whose rights to practice are protected from arbitrary, unwarranted and unfounded
22 disciplinary challenges re other provisions of the Business and Professions Code §§820 et
23 seq., empower the Medical Board, under specified circumstances, when it appears that a
24 licensee "...may not be able to practice his or her profession safely because the licentiate's
25 ability to practice is impaired due to mental illness, or physical illness affecting
26 competency...", to order the licensee to be examined by one or more physicians or
27
28

1 psychologists. This “investigatory” power however, may not be invoked without a showing
2 of good cause. This limitation protecting physicians, and the public, from the unwarranted
3 exercise of a draconian police power.

4
5 The authorities herein discussed amply demonstrate that Petitioner is entitled to an
6 award of his attorneys’ fees, costs and expenses incurred in instituting and maintaining this
7 proceeding and in presenting this motion to recover these fees, costs and expenses, assuring
8 procedural rights and privacy protection to physicians whose ability to practice must not be
9 hindered by unfair, capricious, unwarranted or inappropriate disciplinary procedures.

10
11 Petitioner’s supporting declarations, of physicians’ organization officials and
12 representatives establish that both the general public and physicians are benefitted by the
13 Judgment and Writ of Mandate issued in this matter. The public’s free choice of qualified
14 physicians is promoted. Physicians may not be inappropriately disciplined or adversely
15 affected in the rights to practice their profession by arbitrary and unreasonable attempts by
16 the Medical Board to expose them to challenge their rights to practice through directing them
17 to undergo physical and mental examinations required as a result of arbitrary determinations
18 by unqualified, biased and conflict of interest affected “medical consultants,” chosen in a
19 manner that does not eliminate the possibility of bias or conflicts of interest..
20

21 The Judgment and Writ of Mandate restrain Respondent from arbitrarily and
22 capriciously acting upon inherently unreliable bases for subjecting physicians to the
23 humiliations and hostile physical and psychological testing.

24 **3. As This Is A Proceeding Against A Government Agency And Its Officials, The**
25 **Necessity Of Private Enforcement Is Established.**

26
27 When a party to the proceeding in which §1021.5 attorneys’ fees are sought is a
28 government agency, the burden of private enforcement is obvious and deemed established.

1 (Sacramento v. Drew (1989) 207 Cal.App 3d 1287, 1299; See Also Woodland Hills
2 Residents v. City Council (1979) 23Cal.App3d 917.

3 **4. The Financial Burden Upon Petitioner Of Private Enforcement Makes The**
4 **Award Of Attorneys' Fees Under §1021.5 Necessary And Appropriate.**

5 Determination of whether the financial burden of private enforcement makes an award
6 of attorney's fees under the statute appropriate depends on whether the cost of litigation in
7 the mandate proceeding transcends the claimant's personal interest, that is, whether the
8 litigation expenses would place a disproportionate burden upon him. This issue is addressed
9 to the discretion of the court (Woodland Hills Residents' Association v. City Council, supra,
10 23 Cal 3rd 917, 942)

11 This litigation involved the immense burden of attorneys fees of more than \$150,000,
12 through which Petitioner not only secured enforcement of his basic rights, he also established
13 for other licensees the right to have physical and mental examination orders based, only upon
14 the opinions of qualified unbiased, qualified experts, unaffected by real or potential conflicts
15 of interest.

16
17 Petitioner's position is directly analogous to the petitioners in Otto v. Los Angeles
18 Unified School District (2003) 106 Cal.App 4th 328 and Baggett v. Gates (1982) 32 Cal3d
19 128, 143 where there was no guarantee that securing the order for remand would assure that
20 the petitioners would not thereafter be exposed to discipline or adverse circumstances. There
21 is here, quite simply no assurance that if the Medical Board chooses to pursue what it began,
22 through employing proper procedure consistent with Judgment and Writ of Mandate, with a
23 qualified disinterested expert consultant, an order like that vacated by this Court's Writ of
24 Mandate might not issue. The analogous situation in Otto and Baggett was discussed at
25 length in Otto, supra, 106 Cal.App 4th at 333:

26 The trial court's and the District's positions are not in line with the Supreme
27 Court's decision in Baggett v. Gates, supra, 32 Cal.3d 128, 143 (Baggett). In
28 Baggett, four police officers employed by the Los Angeles Police Department
sued for a writ of mandate and declaratory and injunctive relief when they were

1 reassigned to lower paying positions without being afforded an administrative
2 appeal. The Supreme Court found they were entitled to an administrative
3 appeal under the Act. The court also determined the plaintiffs were entitled to
4 section 1021.5 attorney's fees. In addressing the question whether the cost of
5 the officers' legal victory transcended their personal interest, the court found it
6 did, stating: "By their action, plaintiffs have secured the enforcement of basic
7 procedural rights, including the right to an administrative appeal of disciplinary
8 actions. However, enforcement of these procedural rights may well not result
9 in any pecuniary benefit to plaintiffs themselves. [Citation.] For example,
10 plaintiffs' newly won right to an administrative appeal of the Department's
11 decision to reassign them to lower paying positions will not necessarily result
12 in the reversal of that decision. Plaintiffs' reassignment and consequent
13 reduction in salary may be approved." (*Baggett*, at p. 143.) In other words, it
14 was possible that even though the plaintiffs incurred attorney's fees, in the end
15 they might never secure any financial benefit for themselves since there was no
16 guarantee that their reassignment to lower paying positions would be
17 overturned. The same is true in the instant case, only more so. Attorney's fees
18 were incurred for trial court and appellate court proceedings, with no guarantee
19 that securing an administrative appeal of the summary of conference would
20 lead to its removal from Otto's file. The fees were incurred for the purpose of
21 securing the administrative appeal so that Otto could have an opportunity to
22 contest it. Moreover, whereas success at the administrative appeal level in
23 *Baggett* would mean a reversal of the reassignment of those plaintiffs to lower
24 paying jobs, which would constitute an immediate economic benefit to them,
25 Otto's success at the appellate level would have no such immediate economic
26 benefit because there might never have been any negative economic impact on
27 him from having the summary of conference remain in his personnel file.

15 For the same reasons, here, it is clear that the cost of Petitioner's legal victory in this
16 Court transcends his personal interest. Petitioner has secured the enforcement of basic
17 procedural and due process rights, including the right to pre-petition evaluation by a
18 qualified, disinterested expert, free of conflicts of interest. Nonetheless, enforcement of his
19 procedural rights might well not result in any pecuniary benefit to Petitioner as, ultimately,
20 the possibility exists that, if the required procedure is followed, Petitioner may be ordered to
21 submit to mental and physical examinations which might, in turn, lead to a determination of
22 impairment and consequent impact on his license status. Thus the financial burden of this
23 proceeding greatly exceeded Petitioner's personal interest.

24 **B. AN AWARD OF THE FULL AMOUNT OF PETITIONER'S ATTORNEYS'
25 FEES AND EXPENSES, IN BOTH THE ADMINISTRATIVE AND COURT
26 PROCEEDINGS SHOULD BE MADE**

27 Section 1021.5 authorizes the court to award, when the criteria are established, as they
28 are here, attorneys' fees "...in any action which has resulted in the enforcement of an

1 important right affecting the public interest...". Clearly, this authorizes the court to award
2 attorneys' fees incurred in this mandate proceeding.

3 Similarly, however, where administrative proceedings and resulting litigation are
4 sufficiently intertwined, as they certainly are here, §1021.5 fees may be awarded for services
5 during the administrative proceeding. Hospital Systems, Inc. v. Office of Statewide Health
6 Planning and Development (1994) 25 Cal.App 4th 1686, 1692; Wallace v. Consumers
7 Cooperative Of Berkeley (1985) 170 Cal.App 3d 836, 848-849.

8 Petitioner's Declaration, and the supporting declarations of his attorneys, Russell
9 Iungerich, Roger Jon Diamond and Paul M. Hittelman establish that he has incurred, in
10 connection with the underlying administrative proceeding and these proceedings, the
11 following sums:

12 **1) Iungerich and Spackman:**

13	a) Attorneys' Fees	\$77,815.00
14	b) Costs and Disbursements	<u>\$4,198.21</u>
15	Total	\$82,013.21

16 **2) Roger Jon Diamond:**

17	a) Attorneys' Fees	\$40,680.00
18	b) Costs and Disbursements	<u>\$7.00</u>
19	c) Total:	\$40,687.00

20 **3) Paul M. Hittelman:**

21	a) Attorneys' Fees	\$7,539.25
22	b) Costs and Expenses	<u>\$11.00</u>
23	Total:	\$7550.25

24 **4) Costs and Expenses paid directly by Petitioner:**

25	a) Psychiatric examination and	
26	testing	\$3,000.00
27	b) Physical and neurological	

1	examination	\$250.00
2	c) Clinical laboratory tests	\$122.00
3	d) Transcripts	\$621.65
4	e) Courier Service (Filing)	\$164.85
5	f) Miscellaneous costs and	
6	expenses (postage, shipping,	
7	etc.)	\$271.21
8	g) Duplicating and photocopying	\$1,659.33
9	h) Travel expenses	<u>\$701.60</u>
10	Total	\$6,790.64

11

12 **SUMMARY OF COSTS INCURRED:**

13	Iungerich and Spackman Total	\$82,013.21
14	Roger Jon Diamond Total	\$40,687.00
15	Paul M. Hittelman Total	\$7,550.25
16	Expenses paid directly by Petitioner	<u>\$6,790.64</u>
17	Total	\$137,041.10

18 All of these sums are properly awardable under §1021.5 and should, under the
19 circumstances be awarded.

20 Finally, the declaration of Paul M. Hittelman establishes that \$15,300 of additional
21 attorneys' fees and \$36.30 of costs, for a total of \$15,336.30 will be incurred in connection
22 with preparing the moving papers, replying to any opposition and appearing at the hearing of
23 this motion. The recovery of attorneys' fees and expenses incurred in connection with
24 moving for and obtaining an attorneys' fee award under §128.5 is authorized by Graham v.
25 Daimler-Chrysler Corporation (2004) 34 Cal.4 553, 580 (see, also, Serrano v. Unruh (1982)
26 32 Cal.3d 621, 632 ("Serrano IV").

27 Accordingly, the Court is respectfully requested to award for attorneys' fees, costs

28

1 and expenses under §1021.5, the total of \$152,377.40 for fees, costs and expenses incurred
2 in the proceeding and this motion.

3 **III. CONCLUSION**

4 For the reasons herein set forth, the Court is respectfully requested to award
5 attorneys' fees under Code of Civil Procedure §1021.5 in the amount of \$152,377.40.

6 Dated: June 20, 2005

Respectfully submitted,

7 ROGER JON DIAMOND ESQ.
8 PAUL M. HITTELMAN, ESQ.

9 By: 

10 PAUL M. HITTELMAN
11 Attorneys for Petitioner,
12 Gil N. Mileikowsky, M.D.