

EXHIBIT 5

B168705

IN THE COURT OF APPEAL, STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

GIL N. MILEIKOWSKY, M.D.,

Petitioner and Appellant,

vs.

TENET HEALTHSYSTEM, et al.,

Respondents.

*From orders of the Superior Court for Los Angeles County,
the Hon. David Yaffee, Judges Presiding, LASC Case No. BS 079 131*

**AMICUS BRIEF OF THE
CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT
OF PETITIONER AND APPELLANT**

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Consumer Attorneys of California is a voluntary membership organization of approximately 3,000 consumer attorneys practicing throughout California. The organization was founded in 1962 and its members predominately represent individuals subjected in a variety of ways to consumer fraud practices, personal injuries and insurance bad faith. Consumer Attorneys of California has taken a leading role in advancing and protecting the rights of consumers in both the courts and the Legislature.

One issue raised by petitioner and appellant in this action is the effect of retaliation by a medical review board against a physician who testifies in support of a plaintiff in a medical malpractice action. Although the petitioner in this case was forestalled from reaching that issue because of the improper termination of his peer review hearing, it is an issue that occurs with increasing frequency in various contexts. Consumer Attorneys' members include numerous attorneys who represent victims injured by medical malpractice. The growing efforts by hospitals, medical associations and others to retaliate against doctors who testify on behalf of those victims is of extreme importance to those members. As such, Consumer Attorneys has a compelling interest in assuring that such retaliatory practices are circumscribed and prohibited.

LEGAL ARGUMENT

1.

**DR. MILEIKOWSKY MUST BE PROVIDED WITH HIS
STATUTORY PROTECTIONS AND RIGHT TO A HEARING
SO THAT THE HOSPITAL'S ILLEGITIMATE EFFORT TO
PRECLUDE HIS LITIGATION TESTIMONY CAN BE UNMASKED**

In this case, Dr. Mileikowsky seeks the reversal of the suspension of his hospital privileges. Dr. Mileikowsky contends in his action that the hospital's effort to discipline him was motivated, at least in part, by his agreement to be an expert witness in a malpractice case against the hospital. (See Appellant's Opening Brief, p. 4; Appellant's Reply Brief, pp 12, 26.)

There has recently been a growing wave of retaliatory actions directed against physicians who agree to testify for plaintiffs in medical malpractice actions. Some of those retaliatory actions are direct, while others are surreptitious and hidden under pretextual grounds for challenging the doctor and his right to practice medicine.

For example, in North Carolina, Gary J. Lustgarten, M.D., has been the subject of a direct attack by the medical board. (See *In re Gary J.*

Lustgarten, M.D., General Court of Justice, Superior Court Division, Case No. 02 CVS 12218; Stephanie Mencimer, "The White Wall, A new code of conduct is taking hold of the medical profession: First do no harm - to your colleagues," Keepmedia, Legal Affairs, March, 2004; www.keepmedia.com; Damon Adams, "North Carolina judge reverses doctor discipline license case," AMNews, June2-9, 2003, www.ama-assn.org/amednews/2003/06/02/prsd0602.htm.) In that case, the North Carolina Medical Board is attempting to revoke Dr. Lustgarten's license to practice medicine in that state. The foundation for that action is the assertion that Dr. Lustgarten's testimony in a medical malpractice action to the effect that the defendant doctor breached the standard of care was, itself, a breach of the standard of care as testified to by another doctor in the disciplinary proceedings. That revocation was ultimately reversed by the courts. But the effect of these retaliatory actions remain widespread.

Similarly, in 1998, the American Medical Association:

"declared that testifying as an expert amounted to the practice of medicine and could be regulated by state medical boards.

As a result, doctors can now be sanctioned for what they say in a courtroom. The AMA also encourages its members to report instances of allegedly fraudulent testimony to those

boards. As a result, more and more medical societies have begun to sanction members with penalties like suspension or revocation of their society membership. They have focused their energies on doctors who aid plaintiffs' attorneys."

(Mencimer, *supra*.)

As objectionable as this frontal attack is, the more insidious kind of attack as alleged by Dr. Mileikowsky in this action is far worse - and far more prevalent. Indeed, Debi Chaudhuri suffered a fate chillingly similar to Dr. Mileikowsky's. (See Elizabeth F. Kuniholm and Lucy N. Inman, North Carolina's Medical Review System: Protecting *Patients . . . or Physicians?*, Trial Briefs, February 2003, http://www.kuniholmlaw.com/articles_briefs_pdf/article_NCATL_efk_li_2003.pdf.)

Dr. Debi Chaudhuri, a trauma surgeon, was disciplined by a hospital in Fayetteville where he treated patients after he publically criticized the hospital's failure to have a neurosurgeon on call for its emergency department - a failure Dr. Chaudhuri said had affected one of his patients. Within weeks after a newspaper article regarding the staffing shortage was published, quoting Dr. Chaudhuri, the hospital's

medical executive committee - which included two neurosurgeons who were mentioned in the newspaper article - launched an investigation of Dr. Chaudhuri. Two months later, the committee unilaterally determined that Dr. Chaudhuri's continued practice in the emergency department 'presented a risk to patient safety' and, without so much as a hearing, relieved him of his duties in the emergency department and referred him to the Physicians Health Program for mental and physical health evaluation. [¶] Dr. Chaudhuri sued the hospital and obtained a court order enjoining the disciplinary action. He has resumed practicing in the hospital emergency department." (Kuniholm, pp. 1-2.)

What happened to Dr. Chaudhuri is hauntingly similar to what happened to Dr. Mileikowsky. And, as the Kuniholm article concludes, "[t]he message to . . . physicians . . . is clear: Don't break the code of silence. It could cost you your hospital privileges, or even your license." (*Id.*, p. 2.)

Even more recently, John Fullerton, M.D. sued the Florida Medical Association over its efforts to suspend his licence. (See, Tanya Albert,

Amednews.com, June 28, 2004, www.ama-assn.org/amednews/2004/06/28/pr110628.htm.) As is now becoming a pattern, Dr. Fullerton testified for the plaintiff in a medical malpractice action against three physicians. After the jury found no negligence in the case, the three defendant doctors asked the Florida Medical Association to review the testimony and discipline Dr. Fullerton in order to “prevent the medical profession from being terrorized in the future by similar ‘experts.’”

Dr. Fullerton, who just received the California Physician of the Year award from Congress, is suing the FMA and the three doctors for defamation and damage to his reputation. As the attorney representing Dr. Fullerton questions, if peer review and medical society review programs directed at courtroom testimony are not intended to intimidate doctors who testify for plaintiffs, why, then, do such programs disproportionately review the testimony of plaintiffs’ witnesses?

Even William W. Parmley, M.D., MACC, the Editor-in-Chief of the *Journal of the American College of Cardiology* has questioned the use of peer review to intimidate experts as witnesses or to decrease competition. In his 2000 editorial, Vol. 36, no. 7 of that journal, Dr. Parmley discusses two cases in which he was personally involved as an independent reviewer that convinced him that the peer reviews being conducted were directed at

eliminating competition, not incompetence.


The upshot of these disturbing cases is that hospital peer review boards and medical societies must be controlled in a meaningful way in order to assure that the attack on a doctor's conduct is truly the result of the doctor's alleged incompetence or other inappropriate conduct. When peer review decisions are issued without the assurance of a meaningful opportunity to be heard, it causes untold harm to not only the doctors affected by it, but to the profession itself.

CONCLUSION

Dr. Mileikowsky should have been provided with a meaningful, due process-based, opportunity to challenge his accusers and demonstrate the falsity of the allegations against him. The failure to provide him with a meaningful hearing on the charges made against him results in the inevitable conclusion that the hospital's only interest was to get rid of Dr. Mileikowsky as a punishment for his testimony, not as an effort to protect patients or staff.

Accordingly, the trial court's determination should be reversed and Dr. Mileikowsky provided with an opportunity to present his case in the peer review process.

Dated: July 13, 2004



SHARON J. ARKIN
Attorney for *Amicus Curiae*
Consumer Attorneys of California

CERTIFICATION REGARDING LENGTH OF BRIEF

I hereby certify that this brief contains 1505 words, as established by the word count of the computer program utilized for preparation of this brief.

I declare and certify under the laws of the State of California that the foregoing statement is true and correct and that this certification was executed on July 13, 2004, at Newport Beach, California.

By: Sharon J. Arkin

SHARON J. ARKIN

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 620 Newport Center Drive, 7th Floor, Newport Beach, CA 92660; (949) 720-1288.

On July 13, 2004, I served the within document described as: **AMICUS BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PETITIONER/APPELLANT** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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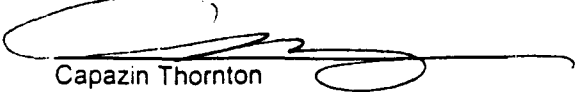
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 13, 2004 at Newport Beach, California.


Capazin Thornton

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**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF
OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN
SUPPORT OF PETITIONER AND APPELLANT**

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TO THE HONORABLE PRESIDING JUSTICE AND THE
HONORABLE ASSOCIATE JUSTICES:

Amicus Curiae CONSUMER ATTORNEYS OF CALIFORNIA
hereby respectfully requests permission to file its brief in support of
petitioner and appellant Gil N. Mileikowsky, M.D. This matter has not yet
been set for oral argument. CONSUMER ATTORNEYS OF
CALIFORNIA only recently obtained the information necessary to present
its argument with regard to the issues to be considered in this action and has
prepared and presented this brief as expeditiously as possible.
CONSUMER ATTORNEYS OF CALIFORNIA believes that the issues
presented are of utmost importance and that consideration of the analysis
presented in the brief will assist the Court in its determination.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

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organization of approximately 3,000 consumer attorneys practicing
throughout California. The organization was founded in 1962 and its
members predominately represent individuals subjected in a variety of ways
to consumer fraud practices, personal injuries and insurance bad faith.
Consumer Attorneys of California has taken a leading role in advancing and

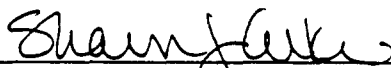
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Amicus has reviewed the briefs of the parties in this case. *Amicus* is therefore familiar with the issues in this case and the scope of their presentation, and believe that it can be of assistance to this Court by providing additional briefing that materially adds to and complements the parties' briefs. (See Cal. Rules of Court, rule 14(b).)

To properly inform the Court, *Amicus* respectfully requests permission to file the *amicus* brief in support of petitioner that is submitted concurrently herewith.

Dated: July 13, 2004



SHARON J. ARKIN
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Consumer Attorneys of California

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STATE OF CALIFORNIA, COUNTY OF ORANGE

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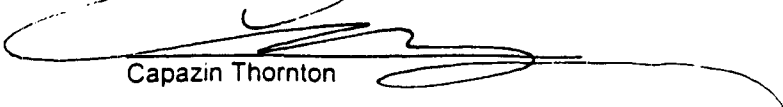
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