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Gil Mileikowsky, M.D.

By FAX (310) 858-1303

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**JOURNAL OF AMERICAN
PHYSICIANS AND SURGEONS**

Lawrence R. Huntoon, M.D., Ph.D.
Editor-in-Chief

Dear Dr. Mileikowsky:

This letter is to inform you that the AAPS American Health Legal Foundation (AHLF) has decided to file an Amicus Brief with the U.S. Supreme Court in your case.

The Amicus Brief will be authored by Professor Alan Dershowitz.

As you know, your case involves important issues of Due Process, as guaranteed by the Fourteenth Amendment of our U.S. Constitution.

The outcome of your case is of utmost importance to the integrity of the medical profession and to our patients. Quality care and patient safety cannot be guaranteed anywhere in this country if hospitals are allowed to retaliate against physicians who call attention to patient safety and quality concerns in the hospital. We must not allow hospitals to trample Due Process rights of physicians, as has happened in your case.

The AHLF is a 501 (c) (3) organization. All contributions to AHLF are fully tax deductible. We are currently soliciting donations to AHLF so as to cover the considerable cost of filing this amicus brief. Donors should make checks payable to the American Health Legal Foundation. Donations should be mailed to American Health Legal Foundation, 1601 N. Tucson Blvd., Suite 9, Tucson, AZ 85716-3450. We have already received an offer of a \$5,000 donation from an individual in support of this important cause. We need to raise much more in the next week or two.

Lawrence R. Huntoon, M.D., Ph.D., F.A.A.N.
Chairman, AAPS Committee to Combat Sham Peer Review
Editor-in-Chief
Journal of American Physicians and Surgeons
AAPS Board Member

Physician Appeals to U.S. Supreme Court vs. Tenet Petition served on Attorney General of California as California law Violates Federal law

- June 19, 2000, Mileikowsky became an expert witness in a battery and medical malpractice case against a Tenet facility (both fallopian tubes of a patient were removed without her consent).
- June 23, 2000, Tenet retaliated when its CEO required that Mileikowsky be escorted by hospital security guards while on the premises.
- November 13, 2000, Mileikowsky provided the FBI, healthcare fraud division, sensitive information regarding the loss and mishandling of embryos, eggs and sperms in the in-vitro fertilization laboratory of Tenet's facility.
- November 16, 2000, Tenet retaliated when it summarily suspended Mileikowsky's clinical privileges, without any good cause, for non-existent, alleged "imminent danger."

Mileikowsky appealed to the hospital board.

The hospital's hearing was aborted twice at the behest of Tenet. Mileikowsky was thereby prevented from addressing the merits of the dispute, even by written submission. Having denied Mileikowsky his right to be heard by counsel, Tenet then contended that the way Mileikowsky argued his case, justified terminating the hearing and his medical staff privileges.

At least one independent member of the Medical Hearing Committee was as shocked by the hearing procedure as Mileikowsky was. "To deny Dr. Mileikowsky from questioning witnesses is outrageous, absolutely outrageous, to change in the middle of the ... procedure ... is an outrageous thing to do."

The hospital upheld the summary suspension of Mileikowsky in violation of the due process clauses of the federal and state Constitutions and the hospital's bylaws.

The court assumed that California could maintain its "opt out" status with respect to the 1986 Health Care Quality Improvement Act (HCQIA). However, in 1989, Congress deleted the opt-out provision from the statute. Another state, Maryland,

has concluded that federal law no longer permits states to have “opt out” status. Thus, Maryland's code is no longer effective. The Federal Act applies in Maryland and necessarily supersedes inconsistent State law, as in California. California cannot continue to maintain "opt out" status under HCQIA after Congress removed the opt-out provision. The California court rejected the right of a physician to have counsel present in a peer review committee hearing, contrary to the procedures outlined in Congress' HCQIA.

The medical community was outraged and all major medical associations filed amici curiae briefs in support of Mileikowsky, the American Medical Association (AMA), California Medical Association (CMA), Union of American Physicians and Dentists (UAPD), Association of American Physicians and Surgeons (AAPS), the Semmelweis Society, as well as the Consumer Attorneys of California (COAC). For your convenience, see www.aapsonline.org/mileikowsky .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in relevant part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST., AMEND. XIV. Federal law provides in relevant part, “A health care entity is deemed to have met the adequate notice and hearing requirement . . . with respect to a physician [undergoing professional review body disciplinary proceedings] if the following conditions are met (or are waived voluntarily by the physician):

“... in the hearing the physician involved
has the right to representation by an attorney ...”

Reasons for granting the petition:

1. Due process was violated by denying the right to be heard by counsel at a hospital privileges hearing, and then terminating the hearing based on self-representation.
2. Due process was violated by depriving Mileikowsky of a *De Novo* hearing in court on his constitutional claim.
3. Adherence to due process with respect to hospital privileges hearings is essential to the national interest in patient safety.

The number one cause of deaths in America is not tragic fires, handguns, car accidents, or other familiar calamities. Instead, the top killer is reportedly hospital errors, incompetence, wrongdoing and cover-ups.

A study by Health Grades, Inc. published in 2004, estimates that medical errors in American hospitals "contribute to almost 600,000 patient deaths over the past three years, double the number of deaths from a study published in 2000 by the Institute of Medicine."

Harvard professor Lucian Leape wrote in the Journal of the American Medical Association (JAMA), on 5/18/2005, that "[i]n most industries, defects cost money and generate warranty claims. In health care, perversely ... physicians and hospitals can bill for the additional services that are needed when patients are injured by their mistakes." Leape also wrote that patient safety at hospitals will not improve without "pressure that must come from outside the health industry."

But when physicians like Mileikowsky complain about poor care, they face discipline by the hospital and revocation of their privileges. Enforcement of the Fourteenth Amendment protections against due process violations is essential to end this abuse and allow informed efforts to improve safety at hospitals.

Mr. Schlafly concludes his petition to the U.S. Supreme Court by stating that, "California's attempt to bypass and ignore HCQIA in reviewing these issues is contrary to federal law, conflicts with other states and violates the Due Process Clause. This Petition should be granted to establish that California peer review procedures must comply with the Fourteenth Amendment and are subject to application of HCQIA."

The author of the petition and counsel for Dr. Mileikowsky is Andrew Schlafly, Esq., a Harvard graduate. Mr. Schlafly is general counsel of the Association of American Physicians and Surgeons (AAPS).

References to articles published about this case:

1. "First Things First in Peer Review"
AM News Editorial 6/18/2001 by Ben Mindell, Editor

"...if not conducted fairly and in accordance with the law, peer review can wrongfully exclude physicians from medical staffs and deprive patients of access to care."

2. "Suspended California physician's hearing put on hold"
AM News Article 6/18/2001 by Tanya Albert

"The AMA and CMA say an unfair peer review process jeopardizes the system as a whole. ... When a medical staff refuses to provide a fair and expedited hearing solely as to whether a summary suspension is justified, the court should intervene to protect the peer review process, to protect physicians and their patients and to determine whether the summary nature of the disciplinary action is warranted."

" 'A fair system is needed to ensure that doctors aren't wrongly removed from hospital medical staffs,' **said CMA attorney Catherine I. Hanson.** 'There's got to be a reasonable check.' "

" 'This is outrageous conduct by the hospital,' said neurologist **Robert L. Weinmann, MD, president of the Union of American Physicians and Dentists.** 'What Tenet HealthSystem has done amounts to a call for arms, and physicians ... should take heed of this case and get involved.' "

"Also, with some of the charges dating back as far as 10 years, attorney Schulman also questions how that can be 'imminent' danger. "

3. "Doctors Who Spoke Out"
S. Twedt 10/26/2003 Pittsburgh Post Gazette

"All over the nation, physicians who have spoken out about dangerous hospital practices or poor performance by colleagues have been punished"

4. "Rules of Fair Play Do Not Apply"
S. Twedt 10/26/2003, Pittsburgh Post Gazette

"In going up against hospitals, physicians find the deck is stacked against them"

5. "Hearts Harden as Tenet Faces Senate"
M. Davis, theStreet.com 9/17/2003
www.thestreet.com/stocks/melissadavid/10113497.html

"How do hospitals solve their problems? They shoot the messenger"

6. "Rape of the Medical Peer Review Process in Our Country"

Click here for these documents:

<http://www.aapsonline.org/mileikowsky/rmprp.pdf>