March 6, 2003
Miliekowsky
rfjn2

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Attorney for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

GIL N. MILEIKOWSKY, M.D. Petitioner, vs. TENET HEALTHSYSTEM,ENCINO - TARZANA REGIONAL MEDICAL CENTER, A CALIFORNIA CORPORATION AND DOES 1 THROUGH 100 INCLUSIVE, Respondents	CASE NO: BS079131 REQUEST FOR JUDICIAL NOTICE NO. 2 DATE: March 14, 2003 TIME: 9:30 A.M. PLACE: Department 86 Honorable David P. Yaffe (Janavs Disqualified By Respondents on CCP 170.6 Challenge)

Pursuant to Evidence Code Section 452(g) and (h) Petitioner requests the Court to take judicial notice of the website of Respondent's attorney, Mark T. Kawa, where he displays his paid advertisement in the Los Angeles Business Journal as being a "featured article." This website item did not exist during the time of the administrative hearing.

Respectfully submitted,

Roger Jon Diamond

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Attorney for Petitioner

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Position | Areas of Practice | Bar Admissions
Education | Published Works | Affiliations

Mark T. Kawa is a partner at the Beverly Hills law firm of Ervin, Cohen & Jessup LLP, where he is a member of the Litigation and Healthcare Law Departments. His areas of practice encompass commercial civil litigation including healthcare litigation, banking/creditors' rights, probate litigation and advice and counseling to hospitals regarding medical staff and operational issues.

Mr. Kawa is admitted to the State Bar of California and to the United States District Court, Central District of California. Mr. Kawa received his J.D. from the University of Southern California Law Center in 1988. While at USC, he served as Managing Editor for the publication *Major Tax Planning* , 1987-88, and Managing Editor for *Computer Law Journal* , 1987-88. He was a recipient of the American Juris Prudence Awards for Agency Law and Appellate Advocacy. He attended the

University of California at Berkeley earning a B.A., with honors, in 1984.

Mr. Kawa is author of "Cable Television Exclusive Franchise Agreements: Has 'State Action' Gone Too Far?" 8 *Computer Law Journal* 311; "Changing Terms of Employment," *ECJ's Employment Law Reporter* , April 1997 and "Protection of Medical Staff Records After *Dal Cielo* ," *ECJ's Healthcare Law Bulletin* , Spring 1997. The *Healthcare Law Bulletin* also appears on the Internet via Managed Care On Line (MCOL).

Mr. Kawa is a member of Rotary International, North Redondo Beach Chapter; the University of Southern California Cardinal and Gold Alumni Association; and the Los Angeles County and American Bar Associations.

Current Employment Position(s):

Partner

Areas Of Practice:

Commercial Civil Litigation
Health Care Litigation
Banking/Creditors' Rights
Probate Litigation
Hospital Advisor/Consultant Regarding Medical Staff and Operational Issues

Bar Admissions:

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U.S. District Court Central District of California

Education:

University of Southern California Law Center, Los Angeles, California, 1988
J.D.
Honors: American Juris Prudence Awards for Agency Law and Appellate Advocacy
Law Journal: Managing Editor, Major Tax Planning, 1987 - 1988
Law Journal: Managing Editor, Computer Law Journal, 1987 - 1988

University of California, Berkeley, CA, 1984
B.A.
Honors: With Honors

Published Works:

"Cable Television Exclusive Franchise Agreements: Has 'State Action' Gone Too Far?", 8 Computer Law Journal 311

"Changing Terms of Employment", ECJ's Employment Law Reporter, April, 1997

"Protection of Medical Staff Records After Dal Cielo", ECJ's Healthcare Law Bulletin, Spring, 1997

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American Bar Association
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bulletins

Featured Article

October 2002

Taming The Disruptive Physician

By Mark T. Kawa, Esq.

Anyone who has worked in a hospital for any length of time probably knows one -- and wishes he didn't. I'm talking about the disruptive physician. You know the type, he (and with increasing frequency, she) throws temper tantrums, yells at colleagues, threatens lawsuits if his conduct or medical practice is reviewed, complains to patients about the nursing staff and generally adheres to the belief that the hospital's and Medical Staff's rules apply to everyone but him.

The disruptive physician's impact on patient care and hospital operations can be severe. Nurses and support staff may be so intimidated by the disruptive physician's conduct that they hesitate contacting him about patient issues for fear of incurring his wrath. Medical Staff members may find him so abusive that they choose to move their practice elsewhere. Hospital administrators may find themselves constantly addressing employee complaints and threats of hostile work environment litigation.

So how do you break the cycle and tame the seemingly untamable? Here's a few tips.

Identify Conduct That Is Unacceptable

All applicants to the Medical Staff should be notified at the time they apply for privileges (and when they are appointed and reappointed) that disruptive behavior will not be tolerated. The admonition should clearly describe what conduct is unacceptable and the consequences for acting inappropriately. The standards should be set forth in both the Medical Staff Bylaws and in a written Policy and Procedure.

Send The Message That Disruptive Conduct Will Not Be Tolerated

Sometimes the physician's anger or frustration is justified, but his reaction is not. For example, a physician may have a legitimate cause for anger if a nurse gives the wrong medication. Yet rather than calmly addressing the situation through a private one-on-one conversation, or raising the matter with the nurse's supervisor, the physician screams at the nurse, writes an inappropriate note in the medical records or makes comments to the patient about the nurse's

purported incompetence.

Situations such as these must be addressed with the physician firmly and immediately. Ignoring abusive conduct until it becomes intolerable sends the wrong message. It tells others that that disruptive physicians are welcome at your institution. It also makes it difficult when you finally do take disciplinary action. The physician will point to other physicians who have not been disciplined and argue that he is being unfairly singled out.

Use Progressive Discipline

A first time offender should be counseled face to face by his or her Department Chair. If the physician's conduct is directed at a hospital employee, the Chief Executive Officer and/or Human Resources representative should attend as well. The Chief of Staff should avoid involvement at this stage since it may be deemed an "investigation" under the Medical Staff bylaws and trigger reporting obligations to the Medical Board and Data Bank if the physician subsequently voluntarily resigns.

The tone of the meeting should be non-threatening, however the physician should be warned that further disruptive conduct could result in disciplinary action.

A subsequent infraction should be addressed in another face to face meeting led by the Department Chair and the Chief of Staff. The tone of the meeting should be harsher. At this point, it may be appropriate to require the physician to sign a "behavior contract" which sets forth the Medical Staff's expectations and identifies the types of discipline the physician will face if further violations persist. Following the meeting, the Department Chair or Chief of Staff should send the physician a letter summarizing the meeting and reiterating that disruptive conduct will not be tolerated.

Taking Disciplinary Action - Be Creative

At some point, the warnings must end and consequences imposed. In some instances, this may be done through administrative – as opposed to medical staff – sanctions. For example, if the physician's primary abuse is yelling at Medical Staff Office employees, the facility's Administrator can ban the physician from the Medical Staff Office. Likewise, if the physician physically threatens others, the Administrator can assign a security officer to follow the physician throughout the facility. Because these remedies are administrative in nature and do not impose a limitation on the practitioner's privileges, they are non-reportable and do not require a fair hearing prior to implementing.

Preparing For An Administrative Hearing

Sometimes the only viable remedy is to sanction the physician through the Medical Staff's peer review hearing process. If so, remember the following:

Document disruptive behavior immediately with incident reports or through other established reporting mechanisms. Prosecuting disruptive physician cases sometimes requires showing a pattern and practice of disruptive conduct spanning several years. Due to the passage of time, some witnesses may no longer work at the facility and cannot be located; other witnesses may have faulty memories. An incident report, prepared at the time of the incident,

can provide admissible evidence of the physician's disruptive conduct.

Establish the link between disruptive conduct and patient care. Under California law, a physician's abusive conduct, by itself, is insufficient to justify disciplinary action. The conduct must impact patient care. *See, e.g., Miller v. Eisenhower Medical Center, (1980) 27 Cal.3d 614.* Under the federal Health Care Quality Improvement Act ("HCQIA"), immunity exists only if the corrective action is taken in furtherance of quality health care. *42 U.S.C. 11111.*

Often the link between conduct and patient care will be easy to find. A physician who routinely yells at nurses every time they call him at home impacts patient care if the nurses become too intimidated to make further calls. Likewise, a physician who is constantly late to the operating room impacts patient care especially if his patients are under general anesthesia during the delay.

Use an expert witnesses. There are experts (generally psychiatrists) who are knowledgeable and well qualified to opine on the psyche of the disruptive physician. Hearing panel members who may not fully appreciate the disruptive impact of a physician may benefit from the testimony of an expert.

Focus on the Medical Staff's prior counseling efforts. Administrative hearing panels almost always consists of fellow physicians. By and large, they are a forgiving group when it comes to imposing discipline. Thus, if the peer review body believes the disruptive physician did not get sufficient warning or was otherwise treated unfairly, the disruptive physician will win, consequently emboldening him with respect to future behavior.. It is therefore imperative to emphasize the Medical Staff's efforts to modify the physician's conduct prior to initiating disciplinary action.

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If you have any questions regarding this bulletin, please contact Stacey Olliff, Esq., at 310.281.6306 or solliff@ecjlaw.com. Correspondence regarding information contained in this issue or address corrections should be sent to Cynthia S. Kaiser, Ervin, Cohen & Jessup LLP, 9401 Wilshire Boulevard, 9th Floor, Beverly Hills, CA 90212-2974. If you would like to receive copies of any of ECJ's other publications, please contact Ms. Kaiser at 310.281.6328 or ckaiser@ecjlaw.com.

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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5200 KANAN RD #223 AGOURA, CA 91301

On the date shown below I served the foregoing document described as: **REQUEST FOR JUDICIAL NOTICE** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Christensen & Auer
Jay Christensen, Esq.
Stephen Auer, Esq.
225 South Lake Ave., 9th Floor
Pasadena, Ca 91101

I caused such envelope to be personally delivered by hand to the offices of the addressee.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was executed at LOS ANGELES, California on the 10 day of March 2003.

Juliet Lopez