EXHIBIT 6

COPY

B168705

IN THE COURT OF APPEAL, STATE OF CALIFONRIA
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 Honorable David Yaffee, Judge Presiding, LASC Case No. BS 079 131

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF GIL N. MILEIKOWSKY BY THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.
AND
MEMORANDUM OF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. IN SUPPORT OF PETITIONER-APPELLANT GIL N. MILEIKOWSKY, M.D.

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF GIL N. MILEIKOWSKY BY THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.

INTEREST OF AMICUS CURIAE

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit national organization consisting of thousands of physicians in all specialties. Founded in 1943, AAPS is dedicated to defending the patient-physician relationship and free enterprise in medicine. AAPS is one of the largest physician organizations funded virtually entirely by its physician membership. This enables it 0to speak directly on behalf of ethical medical practice and the interests of patients who entrust their care to physicians. AAPS files amicus briefs in cases of high importance to the medical profession, like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court citing AAPS frequently); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997).

AAPS vigorously opposes the tendency of hospitals to use "sham peer reviews" to rid themselves of physicians who speak out in favor of improved patient care or testify against hospitals in malpractice proceedings. Nothing in federal or state law authorizes or confers protection on those who misuse peer review to destroy a physician. AAPS submits this brief to emphasize that peer reviews should not extend to actions taken to cover up a hospital's wrongdoing or promote its financial interests.

MEMORANDUM OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. IN SUPPORT OF PETITIONER-APPELLANT GIL N. MILEIKOWSKY, M.D.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Amicus adopts and incorporates the statement of issues presented for review as previously submitted in the Briefs of Plaintiff-Appellant Dr. Gil N. Mileikowsky.

STATEMENT OF THE CASE

Amicus adopts and incorporates the statement of the case as previously submitted in the Briefs of Plaintiff-Appellant Dr. Gil N. Mileikowsky.

STATEMENT OF FACTS

Amicus adopts and incorporates the statement of facts as previously submitted in the Briefs of Plaintiff-Appellant Dr. Gil N. Mileikowsky.

ARGUMENT

Summary suspension is typically equivalent to the death penalty for a physician. It announces to the whole world that the physician is so dangerous that he had to be immediately restrained. Federal law requires reporting it to the National Practitioners Data Bank, upon which all hospitals nationwide rely. Summary suspension is understood to be the most extreme action a hospital can take against a physician on staff, and is historically confined to situations far more extreme than that presented at bar. Its legal analog is the exigency exception to search warrant requirements, whereby the police can enter a home without a warrant if a defendant is armed and dangerous or there is otherwise an emergency. But the exigency must be legitimate, and it was not here.

The summary suspension of Appellant Dr. Mileikowsky lacked any justification in potential harm to any patients. He was suspended on November 16, 2000, based on trumped-up and disingenuous allegations. The most serious charge appears to be that Dr. Mileikowsky performed an inadequate circumcision, but the "expert" who made the allegation had never performed a circumcision! Moreover, there was no real harm to the patient, who was released immediately afterwards by that same doctor who examined him. Another reviewer was ignored by the hospital. He criticized Dr. Mileikowsky in a way that directly contradicted the complaint of the first "expert". In another instance, Tenet improperly attempted to extend a restriction on nurses to Dr. Mileikowsky, complaining how he utilized a vacuum procedure in connection with delivering a baby. Afterwards, the mother and child were in excellent health and expressed gratitude to Dr. Mileikowsky for his fine care. The other charges against this physician date back as far as ten years and cannot justify discipline as harsh as the summary suspension.

Summary suspension requires the threat of immediate bodily harm to one or more patients. There was never a plausible claim of such threat posed by Dr. Mileikowsky, nor could there be. Summary suspension bypasses the ordinary procedural safeguards for physicians and their patients, enabling a hospital administration to take abrupt and draconian action only in exigent circumstances. Nothing remotely similar to that requirement exists here. Summary suspension on these facts is the *sine qua non* of bad faith peer review, increasingly known among physicians, hospitals and now even courts as "sham peer review." As shown below, the action by Tenet was entirely unjustified and is undeserving of peer review immunity.

I. THE SUMMARY SUSPENSION OF DR. MILEIKOWSKY WAS UNREASONABLE, CAPRICIOUS AND MALICIOUS.

Bad faith presumptively exists where, as here, summary suspension is imposed without any evidence that the physician poses any threat of immediate harm to patients. In the absence of meaningful evidence of imminent harm, defendant Tenet has combed the medical records of Dr. Mileikowsky to find whatever it can trump up in its determination to exclude him from the staff. In this case, it found remarkably little in its campaign to oust him, demonstrating that the expulsion was for personal rather than professional reasons.

The cited bases for the summary suspension of Dr. Mileikowsky are absurdly pretextual. In one of only two hospital complaints about his recent treatment of patients, it argues that a urologist should have attended to a circumcision that Dr. Mileikowsky performed. Yet the Medical Hearing Committee never made an adverse finding against Dr. Mileikowsky, and it is easy to see why. The hospital's "expert" was Dr. G. Irani, but he discharged the patient immediately after examining him, thereby demonstrating that there was not an injury of any

seriousness. Even more telling, Dr. Irani himself had never once performed a circumcision, yet he insisted that Dr. Mileikowsky had removed too much skin. Another expert opinion, which had been withheld from the Medical Hearing Committee and Dr. Mileikowsky, directly contradicted Dr. Irani's view by declaring that Dr. Mileikowsky had left too much skin in the circumcision. These conflicting opinions, in the context of a patient who was promptly discharged after independent examination, utterly fails to satisfy the high standard required for summary suspension.

The other medical charge against Dr. Mileikowsky is even sillier, and does not begin to support the severe discipline. Supposedly Dr. Mileikowsky departed from a hospital guideline for nurses, not physicians, in applying a vacuum multiple times and requesting fundal pressure. Once again, there was no demonstrable harm to a patient and clearly no justification here for summary suspension. This is no more significant than the non-medical charges asserted against Dr. Mileikowsky, which are typical in nearly every sham peer review. Independent reviewers have proven that Dr. Mileikowsky's medical work was within the standard of care, and even exemplary.

There is, obviously, more here than meets the eye to explain Tenet's action. It feared the consequences of Dr. Mileikowsky's outspokenness against wrongdoing attributable to the hospital. In 2000, he spoke out about the improper destruction of the embryos of two couples and also agreed to testify against the Encino Tarzana Regional Medical Center in a malpractice proceeding. The powerful hospital was determined not to allow a witness against it to continue to remain on staff. Dr. Mileikowsky was poised to tell the truth for patients and possibly harm the hospital economically, and it fought back by eliminating him from its staff. The hospital's

sham peer review is similar to that of other hospitals that act against those who speak out about hospital negligence and wrongdoing.

If sustained, the summary suspension destroys Dr. Mileikowsky's career and enormously chills all other doctors who are in a position to disclose wrongdoing by hospitals. The hospital reports, as it must, protracted summary suspensions to the National Practitioner Data Bank (NPDB). The NPDB is effectively a blacklist that is used by prospective employers and hospitals to exclude physicians. Prospective employers use the NPDB to reject job applicants; hospitals use it to deny applications for hospital privileges. The NPDB can wield more power over physicians than the entire federal and state court systems. In court, physicians and everyone else have a right to due process; but through operation of the NPDB, self-serving acts by hospitals can and do destroy those who speak out for patients as Dr. Mileikowsky did.

The public then suffers enormously. The number one cause of deaths in America is not tragic fires, handguns, car accidents, or other familiar calamities. Instead, the top killer is hospital errors, incompetence, wrongdoing and cover-ups. "If you add up all the deaths each year from crime, from motor vehicle accidents and from fires, they will not equal the estimated 80,000 people who die in hospitals annually from some form of negligence or malpractice." Bob Herbert, "Victims of Malpractice Face a New Knife: Health 'Reform,'" San Jose Mercury News 9B (Aug. 11, 1994). That was ten years ago, and only the tip of the iceberg then. "Scores of thousands of patients each year are left paralyzed, brain-damaged, blind or otherwise horribly disabled from malpractice." *Id.*

Ten years of hospital abuse of outspoken physicians like Dr. Mileikowsky have greatly worsened the situation since 1994. The incessant retaliation against physicians who report

negligence, as Dr. Mileikowsky did, has kept the numbers of deaths caused by hospitals astronomically high. Several years ago a widely publicized study by the Institute of Medicine revealed that hospitals negligently kill as many as 98,000 patients each year. How could that be with so many physicians watching? The answer is illustrated by this case of Dr. Mileikowsky, who complained about hospital negligence and finds himself subjected to a career-ending action by the hospital. Predictably, the numbers of deaths caused by hospital negligence has not declined since the Institute of Medicine's report.

The Christian Science Monitor reported last year that "about 1 of every 200 patients admitted to a hospital died because of a treatment mistake ... [which] was more ... than died in 1998 from highway accidents (43,458), breast cancer (42,297), or AIDS (16,516)." It then added that some experts think this number of deaths due to hospital misconduct "was almost certainly far too low." Gregory M. Lamb, "Fatal Errors Push Hospitals to Make Big Changes," Christian Science Monitor, July 8, 2004. The only way to reduce these errors is to stop retaliation against physicians like Dr. Mileikowsky who speak out against them.

A study by Health Grades, Inc., estimates that medical errors in American hospitals "contributed 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." Paul Davies, "Fatal Medical Errors Said To Be More Widespread," Wall Street J., at D5 (July 27, 2004). This Health Grades study was based on data from "37 million Medicare patients in every state over three years." *Id.* But when physicians like Dr. Mileikowsky complain about poor care, they face discipline by the hospital and revocation of their privileges or even license. This retaliation must stop to allow improvement in safety at hospitals.

This type of retaliation by a hospital sets a dreadful precedent for other physicians knowledgeable about poor hospital care. Dr. Scott Plantz published a study of about 400 physicians in a 1998 edition of the Journal of Emergency Medicine. He found that almost 1 in 4 of roughly 400 physicians who responded to his survey had been terminated or threatened with termination for reporting problems with patient care. Steve Twedt of the Pittsburgh Post-Gazette has reported on the same problem in his series "The Cost of Courage." His articles demonstrated the pervasiveness of this problem nationwide, describing in detail the experiences of 25 physicians and a nurse all of who experienced retaliation after trying to improve care at their respective institutions. He has told us that Dr. Mileikowsky's hospital peer review, yet to be completed, is the longest-running one in the nation.

Dr. Harry Horner is a physician who had to fight all the way to the Supreme Court of his State of Virginia to obtain reinstatement after retaliation for complaining about poor care at the hospital. *See Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 2004 Va. LEXIS 83 (Va., June 10, 2004). Though difficult to glean from the reported decision, Dr. Horner was exposing the poor care of patients when an administrator at Western State Hospital charged him with violating another employee's right to confidentiality. Similar to the picayune charges against Dr. Mileikowsky here, the administration of Dr. Horner's hospital added charges that he was guilty of abuse and neglect because he failed to wear gloves while dressing a wound on a patient's foot. See Bob Stuart, "Court Rules for Whistleblower," News Virginian, June 16, 2004.

The impact of allowing retaliation against physicians like Dr. Mileikowsky is severe. While the hospital benefits economically from hushing up problems and covering up negligence,

the public pays an enormous price indeed. Lives are lost. In this case, embryos were senselessly destroyed and fallopian tubes wrongfully removed. Establishing quality control of the delivery of medical care may be economically harmful to the hospital, but essential to the public's safety and economics. Killing the messenger does not resolve the problem. Instead, the hospital should be held accountable.

In 2003, Tenet Healthcare Corporation and Tenet HealthSystems Hospitals, Inc., the owners and affiliates of the hospital at issue here, paid $51 million "to settle government allegations that Tenet's Redding, California facility performed unnecessary cardiac procedures that were then billed to Medicare, Medicaid and TRICARE. In addition, Tenet paid nearly $3 million to reimburse California's Medicaid funds." "Corporate Accountability and Compliance in Health Care - Will Health Care be the Next Enron?," Mondaq Business Briefing, July 26, 2004. Punishing Dr. Mileikowsky, who was reporting on the misconduct at Tenet, only encourages greater fraud and more losses to the public.

II. TENET VIOLATED THE PROCEDURAL RIGHTS OF DR. MILEIKOWSKY BY TERMINATING THE HEARING AND INJURING HIM FURTHER BY FILING A BASELESS "805 REPORT" WITH THE CALIFORNIA MEDICAL BOARD.

Tenet violated the procedural rights of Dr. Mileikowsky here. Viewing him as an outspoken advocate of patient care who could end up costing it money, Tenet sought to remove him from the staff no matter how good of a physician he is. Its numerous violations of his procedural rights demonstrate that the peer review was a complete sham. Financially Tenet saved itself a bundle by destroying its nemesis, but these savings came directly at the expense of patient care.

On December 22, 2004, California Superior Court Judge Raymond M. Cadei recognized how unjust this action by Tenet really was. Judge Cadei granted an extraordinary Writ of Mandamus in favor of Dr. Mileikowsky against the Medical Board of California to prevent it from acting on Tenet's baseless complaint to it (Tenet's "805 Report"). Judge Cadei held that:

> In this case, the Court finds that, as the result of various irregularities in the process that resulted in the order that petitioner submit to a mental examination, **no showing of good cause was made, or, in fact, could be made under the procedure followed in this case.**

Amended Minute Order, Dec. 10, 2004, at 2 (emphasis added). Judge Cadei found that the incidents were quite dated and that much of the allegations were based on hearsay "without any specific factual context." *Id.*

Conflicts of interests hopelessly tainted the Tenet's actions against Dr. Mileikowksy. It was Tenet's own attorney, Daniel Willick, Esq., who presided over Dr. Mileikowksy's fair hearing. Willick proceeded to act on the advice of Tenet's other counsel Christensen & Auer and even terminated the proceeding at its request, even though there was a prohibition on involvement by Tenet's attorneys. Judge Cadei found further confliot as follows:

> Finally, and perhaps most significantly, the record shows that the assigned medical reviewer, Dr. Noble, was associated with the institution that had made the '805 report,' and that respondent knew of that association at the time he was appointed to review petitioner's case. Such association suggests, at a minimum, **the possibility of a conflict of interest that might taint Dr. Noble's ultimate conclusions.** As noted, Dr. Noble did not receive the material petitioner submitted to explain his actions.

Id. at 3 (emphasis added). The conflicts of interest or simply gross incompetence were apparently so pervasive that materials submitted by Dr. Mileikowsky in connection with his review were not even considered by the appropriate reviewers. Judge Cadei found that:

> Petitioner contends that many of the incidents recounted in the report may indeed be explained as arising out of a dispute between himself and the hospital management. Respondent [medical board] permitted petitioner to submit documentation explaining his side of the matter, but the record indicates that respondent did not forward those materials to the assigned medical reviewer for consideration. Moreover, it does not appear that petitioner's materials were considered in respondent's investigation report, although there is evidence that they had been forwarded to the assigned investigator approximately seven months prior to the date of the report. Similarly, there is no indication in the final order for examination that petitioner's materials were considered by anyone on behalf of respondent.

Id. at 2.

It is well established under California state law that hospitals may not exclude a physician based merely on personality conflicts, which is all that exists here. See *Rosner v. Eden Township Hospital District*, 58 Cal.2d 592, 598-99 (1962) (overturning an exclusion of a physician from a medical staff by holding that "[i]n these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where consideration having no relevance to fitness are present"). In *Rosner*, as here, the physician was targeted by the hospital because of his testimony against it in a malpractice action. *Id.* at 599 (Dr. Rosner "has apparently testified for plaintiffs in malpractice cases"). The California Supreme Court noted that "a hospital ... should not be permitted to adopt standards for the exclusion of doctors from the use of its hospital which are so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application." *Id.* at 598. *See also Clark v. Columbia/HCA Info. Servs.*, 25 P.3d 215 (Sup. Ct. Nev. 2001) (holding against Tenet's partner HCA because it found pretextual the hospital's claim that the physician had been "disruptive").

It was improper for Willick to terminate the proceedings on the pretext that Dr. Mileikowsy was somehow disrupting it, when there was at most a personality conflict. *See*

Lawrence R. Huntoon, M.D., Ph.D., "Abuse of the 'Disruptive Physician' Clause," 9 *Journal of American Physicians and Surgeons* 68 (Fall 2004) ("The term 'disruptive physician is purposely general, vague, subjective, and undefined so that hospital administrators can interpret it to mean whatever they wish.") (*see* Exhibit "A" attached hereto). There is no evidence of actual disruption in the hearing transcript here. Grasping at straws, Willick cited a communication by Dr. Mileikowsky to the Medical Hearing Committee, claiming that it was *ex parte* when it clearly was not because all parties received that communication. Failing with these pretexts, yet another reason was invented for terminating the proceedings: that Dr. Mileikowsky should not have communicated with the Committee at all. This is the most absurd argument, as Dr. Mileikowsky did not forfeit his free speech rights by joining the staff of Tenet. Obviously Willick terminated the proceeding at the behest of Tenet because Dr. Mileikowsky was scoring points for his side. That improper termination constituted a violation of his procedural rights under the precedent of *Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434 (1991).

In *Rosenblit*, the Court of Appeal reversed because the physician, Dr. Rosenblit, had not received a fair hearing. Using reasoning particularly apt here, the Court so held:

> We are concerned with fair play and fair treatment; with the physician's right to practice his profession; with the public's right to a diversity of opinion among competent specialist and a variety of treatment options. The record demonstrates Hospital was dedicated to removing Rosenblit rather than providing a physician with a fair opportunity to defend his treatment regimen ...."

Id. at 1447. Dr. Rosenblit's lack of objection at the time could not constitute a waiver because he, like Dr. Mileikowsky, was denied representation by counsel. *See id.* at 1437; *see also Hackethal v. California Medical Association*, 138 Cal.App.3d 435, 444 (1982) ("Failure to object

to those sessions should not be taken as a binding waiver. The person whose rights are being determined should not be placed in a position of being required to object and thereby spur hostility or not object and thereby suffer waiver.").

Particularly egregious was Willick's denial of Dr. Mileikowsky's right to videotape the hearing, which would have provided incontrovertible evidence of Willick's bias and violation of procedural rights. After expressly rejecting, without justification, Dr. Mileikowsky's request to videotape the proceedings, and Willick represented that Tenet would arrange for videotaping (CT 195). Yet Tenet did not videotape the proceedings as Willick represented. Ultimately, Willick became the subject of a complaint by at least one independent member of the Medical Hearing Committee, Dr. Larry Pleet. Tenet's other counsel, Christensen & Auer, responded by telling Willick to terminate the proceedings, which he then improperly did. This premature end was a plain violation of Dr. Mileikowsky's procedural rights.

III. TENET IS NOT ENTITLED TO ANY IMMUNITY HERE.

Tenet's bad faith peer review of Dr. Mileikowsky is not entitled to any protections of statutory immunity. Tenet cannot cite a summary suspension ***anywhere*** that was upheld on facts akin to those at bar. The injustice to Dr. Mileikowsky is far more compelling than in the leading precedents rejecting peer review immunity: *Brown v. Presbyterian Health Care Serv.*, 101 F.3d 1324 (10th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997), and *Islami v. Covenant Med. Ctr., Inc.*, 822 F. Supp. 1361 (N.D. Iowa 1992). Both of those decisions held in favor of the physicians on weaker evidence of bad faith than here.

In *Brown v. Presbyterian Health Care Serv.*, the Tenth Circuit underscored how qualified immunity does not protect hospitals whenever they can find an expert to support their action. "We are not persuaded by the defendant's view. Under its theory, a peer review participant would be absolutely immune from liability for its actions so long as it produced a single expert to testify the requirements of 42 U.S.C. § 11112(a) were satisfied. **This would be in direct contravention to Congress' intention to provide 'qualified immunity.'** Moreover, to remove a plaintiff's claims from the jury simply because of a difference of opinion among experts exists would abrogate the jury's responsibility to weigh the evidence and determine the credibility of witnesses." 101 F.3d at 1334 (emphasis added).

The *Brown* court proceeded to confirm that immunity is unavailable where, as here, the Hospital fails to satisfy ***any*** of the four HCQIA requirements that the review be undertaken:

> "(1) in the reasonable belief that the action was in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3)."

101 F.3d at 1333 (citing 42 U.S.C. §§ 11111(a)(1), 11112(a) (1994)). Specifically, the *Brown* court held that "if a plaintiff challenging a peer review action proves, by a preponderance of the evidence, **any one of the four requirements was not satisfied,** the peer review body is no longer afforded immunity from damages under the Health Care Quality Improvement Act." *Id.* (citing 42 U.S.C. § 11112(a), emphasis added).

Tenet cannot distinguish *Brown* in a meaningful manner. Its facts, which the court found to constitute a failure to make a "reasonable effort to obtain the facts of the matter," were more favorable to the hospital in *Brown* than here. 101 F.3d at 1333. Yet *Brown* court rejected immunity based on the sham peer review process itself, not the subsequent defamatory report to the National Practitioners Data Bank. *Id.* at 1333-34. Moreover, *Brown* did not even entail the career-ending sanction of summary suspension inflicted upon Dr. Mileikowsky. Unlike here, no summary action was taken against Dr. Brown, and the ultimate recommendation was modified to "allow[] Dr. Brown to reapply for privileges after fulfilling certain training requirements." *Brown*, 101 F.3d at 1328.

The *Islami* court likewise rejected arguments of immunity:

> The critical issue in Dr. Islami's motion for summary judgment becomes whether the procedures the defendants afforded to Dr. Islami were fair under the circumstances. ... The court believes that "fairness based on the circumstances" is the paradigm jury question. The parties have diametrically opposed views on the issue and believe that the factual record viewed as a whole supports their position. This is an issue for the jury to decide.

822 F. Supp. at 1374.

The evidence against immunity is even more compelling here than what the *Islami* court found to be adequate. And unlike the cardiovascular and thoracic surgeon in the *Islami* case, who obviously holds the life of his patients in his hands on a daily basis, Dr. Mileikowsky was disciplined for trumped up allegations of a negligent circumcision. HCQIA "recognizes ... that suspension of a doctor's staff privileges can have a devastating effect upon a medical

professional. Consequently, the act has set up specific procedural safeguards which must be given to the doctor before the hospital and physician members of the peer review process are afforded the benefits of the immunity provisions. This court cannot say as a matter of law that the peer review process in this case accorded Dr. Islami all of the due process rights to which he is entitled. Consequently, this matter will have to be submitted to a jury." *Id.* at 1379. Likewise, Dr. Mileikowsky deserves his full day in court.

As the *Islami* decision made clear, the overall circumstances are essential in determining the fairness of the procedures. "The court will allow the jury to answer the question of **whether the procedures which the defendants afforded to Dr. Islami were fair given the entire factual circumstances in this case.**" *Id.* at 1378 (emphasis added). The "factual circumstances" of Dr. Mileikowsky's suspension are demonstrative of Tenet's bad faith. *See Clark v. Columbia/HCA Info. Servs.*, *supra* (denying immunity to HCA for revoking privileges based on the pretext of disruptive behavior by the physician). HCA owns 25% of Encino Tarzana Regional Medical Center, and evidently the *Clark* decision against HCA did not affect its conduct.

It is worth emphasizing that hospitals, like most businesses, have economic incentives to destroy their adversaries. This powerful financial motivation cannot be ignored. Evidence of wrongdoing against Dr. Mileikowsky is overwhelming, and accordingly a reversal of the decision below is warranted.

CONCLUSION

The summary suspension of Dr. Mileikowsky's clinical privileges should be reversed and Tenet's attorney, Daniel Willick, should not be allowed to serve as a hearing officer.

DATED: January 5, 2005

Respectfully Submitted,

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EXHIBIT A

Editorial:
Abuse of the "Disruptive Physician" Clause

Lawrence R. Huntoon, M.D., Ph.D.

Buried deep in the "Corrective Action" section of most medical staff bylaws is a provision known as the "Disruptive Physician" clause. It is arguably the most dangerous and, in recent years, the most abused provision in medical staff bylaws.

The term "disruptive physician" is purposely general, vague, subjective, and undefined so that hospital administrators can interpret it to mean whatever they wish.

How this treacherous trap got into medical staff bylaws is no mystery in most instances. It was added at the urging of hospital administrators, often with help from a medical staff president who was duped into believing that the clause would only be used in those extreme cases where a physician was found running drunk or naked through the halls of the hospital.

Lack of vigilance by physicians, and failure of medical staffs to obtain independent legal advice on changes to the bylaws, allowed most hospital administrations to insert this clause without difficulty or any meaningful opposition.

Why this clause was strategically placed in medical staff bylaws is also no mystery. It is part of the strategic plan developed in 1990 by the hospital industry. The stated goal was to gain more control over physicians in hospitals. Abuse of the disruptive-physician clause and increasing use of sham peer review has allowed hospital administrations to make great strides in achieving that goal.

Attorneys who specialize in representing hospitals have definite recommendations on how "disruptive physician" can be defined by a hospital, in order to remove a targeted physician from staff. In fact, some law firms offer seminars for hospital officials and their legal representatives that teach optimal methods for eliminating certain physicians that the hospital dislikes. Here are a few of the criteria for identifying a "disruptive physician":

1. **Political:** Expressing political views that are disagreeable to the hospital administration.
2. **Economic:** Refusing to join a physician-hospital venture, or to participate in an HMO offered to hospital employees, or offering a service that competes with the hospital.
3. **Concern for quality care:** Speaking out about deficiencies in quality of care or patient safety in the hospital, or simply bringing such concerns to the attention of the hospital administration.
4. **Personality:** Engaging in independent thought or resisting a hospital administration's "authority."
5. **Competence:** Striving for a high level of competence, or considering oneself to be right most of the time in clinical judgment.
6. **Timing:** Making rounds at times different than those of the "herd."

Although the disruptive-physician clause and sham peer review are current weapons of choice used by hospital administrations across the country, more weapons of physician destruction loom on the horizon.

Physicians should be aware of the "Code of Conduct" and "Exclusion from the Hospital Premises" clauses currently being promoted by the hospital bar.

AAPS has posted a letter dated January 31, 2003, to the General Counsel of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), which was drafted by the leaders of the credentialing and peer review practice group of the American Health Lawyers Association, in the Hall of Shame on our website (see www.aapsonline.org). The letter is rated "R" for stark Reality. Physicians need to wake up quickly and take notice because this is what hospitals really have in mind for medical staffs across the nation. Interested readers can also learn more about the hospital industry's strategic plan, developed in 1990: see "Hospital Industry Reveals Its Strategic Plan: Control Over Physicians" in the AAPS Hall of Shame.

Physician vigilance, and advice from knowledgeable, independent counsel, are key to preventing further abuse of medical staff bylaws by hospital administrations.

Lawrence R. Huntoon, M.D., Ph.D., is a practicing neurologist and editor-in-chief of the *Journal of American Physicians and Surgeons.*

Memo to the Disruptive Physician

Oh how we strive
For quality high,
For health
And most of all safety.

But a word to the wise:
Reproof we despise
And outspoken physicians:
We hate thee.

Feel free to opine,
But note we define
All critics
As never constructive.

And, thus shall ensue
A sham peer review
And henceforth
You're labeled "disruptive."

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 865 S. Figueroa Street, Suite 3200, Los Angeles, CA 90017.

On January 5, 2005, I served the following described as: **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER BY ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.; AND MEMORANDUM OF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. IN SUPPORT OF PETITIONER-APPELLANT GIL N. MILEIKOWSKY, M.D.** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

[x] (MAIL) I am readily familiar with the firm's practice of collection and processing correspondence by overnight mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (BY TELECOPY) I caused such document to be delivered by telecopy transmission to the offices of the addressee.

[ ] (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of the addressee.

[x] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 5, 2005, at Los Angeles, California.

ALICIA NAVARRO
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SIGNATURE

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