2ND Civil 168705

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GIL N. MILEIKOWSKY, M.D. Plaintiff and Appellant, vs. TENET HEALTHSYSTEM, ENCINO TARZANA REGIONAL MEDICAL CENTER, A CALIFORNIA CORPORATION, Defendant and Appellee	2nd Civil No. B168705 L.A.S.C. NO. BS079131

APPEAL FROM THE SUPERIOR COURT

OF THE COUNTY OF LOS ANGELES

HONORABLE DAVID P. YAFFE, JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I

INTRODUCTION

Petitioner and Appellant Gil N. Mileikowsky hereby responds to the Reply Brief filed by Tenet Healthcare System.

The basic argument of Tenet is that although no by-law, statute, or regulation gives the administrative hearing officer the authority to impose the most drastic sanction of all - termination of the hearing, that somehow the hearing officer, a hospital attorney with an obvious conflict of interest, had the "inherent authority" to pull the plug on Dr. Mileikowsky and abort the proceeding. Indeed, Tenet HealthSystem goes so far as to say

that the "hearing officer" it hired did not even have to obtain a statutorily mandated decision from the Medical Hearing Committee charged by law with deciding the case.

Petitioner reiterates at the outset that the scope of review or standard for review is de novo. With respect to both the factual record contained in the administrative transcripts as well as the legal issues this Court stands in the same position occupied by the Superior Court when the matter was first heard by that Court. Petitioner discussed the standard of review by this Court at pages 21-23 of Petitioner's Opening Brief. Tenet apparently agrees. At page 21 of Respondent's Brief Respondent Tenet acknowledges that the function of this Court on appeal is to review the same administrative record which the trial court reviewed.

At the bottom of page 21 and the top of page 22 of Respondent's Brief Tenet states that where a hospital board has discretion to formulate procedure, interpret by-laws or establish criteria, the Court of Appeal should defer to the hospital board and not overturn it. The key to this statement, of course, is "discretion." If the board has no discretion this Court need not defer to its decision. It is important to keep in mind that the by-laws in this case essentially track the requirements of Business and Professions Code Sections 809.1 et.seq. regarding peer review. Neither the hearing officer, the Medical Hearing Committee, nor the Governing Board, had the authority to deviate from the requirements of the Business and Professions Code with respect to the conduct of hearings. Tenet was obligated to follow not only its own by-laws

but, more important, the provisions of the Business and Professions Code regarding the conduct of such hearings. As stated, Tenet had no authority or discretion to deviate from the requirements of the Business and Professions Code. Neither the by-laws nor the provisions of the Business and Professions Code gave Tenet's attorney, Dan Willick, the authority to terminate the hearing and to dispense with the requirement that the Medical Hearing Committee render a written decision. See Business & Professions Code §809.4.

The first case cited by Tenet is Redding v. St. Francis Medical Center, 208 Cal.App.3d 98 (1989), where the Court of Appeal affirmed an order denying a preliminary injunction sought by two hospital staff surgeons who challenged the decision of the hospital to change its open staff system for the performance of heart by-pass surgeries to a closed system in which an exclusive contract to perform such surgeries was granted to another physician. The case has nothing to do with the interpretation of by-laws or the enforcement of Business and Professions Code Sections 809.1 et.seq.. The decision does not support any argument of Tenet that the hearing officer had the "implied" right to disregard the by-laws, assume authority not given to him by the Business and Professions Code, or usurp the authority of the doctors on the hearing committee.

Likewise, the second case cited by Tenet, Lewin v. St. Joseph Hospital of Orange, 82 Cal.App.3d 368 (1978) involved a dispute between a physician and a hospital as to whether the hospital should operate on a open-staff basis or a closed staff basis.

Nothing in the case involved an interpretation of by-laws or the Business and Professions Code.

Finally, in its discussion of scope of review Tenet cites Pinksker v. Pacific Coast Society of Orthodontists, 12 Cal.3d 541 (1974), but this case did not involve peer review or an attempt by a hearing officer to exceed the authority given to him by by-laws or by the Business and Professions Code. Pinksker involved the exclusion of an orthodontist by a private membership organization. The Supreme Court held that the orthodontist had a common law right to fair procedure in terms of his application for membership.

II

STATEMENT OF FACTS

Petitioner set forth the relevant facts at pages 3-21 of his Opening Brief. Nowhere in Tenet's Statement of the Case does it suggest that any fact was misstated by Petitioner in his Opening Brief. Unfortunately, Tenet misstates certain key facts, distorts others, and forgets that no written findings were ever rendered with respect to the underlying accusation against Petitioner. Tenet did not wait very long to make its first misstatement. Indeed, it appears in the very first sentence of Tenet's Statement of the Case.

A. REAPPOINTMENT APPLICATION

Tenet begins with the following false statement:

> "In late 1998, the Hospital sent Mileikowsky a reappointment application in the same manner as other medical staff members.

> Despite several reminders, Dr. Mileikowsky failed to submit his application. . . ."

These two sentences are totally false and not supported by the record.

Tenet refers to Volume I, Exhibit No. 104 of the exhibit book, a letter dated February 1, 1999 to Dr. Mileikowsky. That letter falsely stated that Tenet had mailed him his reappointment application on December 2, 1998 and that because he did not return it timely he was deemed to have voluntarily resigned from the staff. The second reference in footnote 1 at the bottom of page 4 is to Volume II of the exhibit book, Exhibit 151, pp. 14-15, which is a portion of the by-laws relating to the reappointment process. This issue was litigated in the case filed by Petitioner against the hospital which resulted in the issuance of a preliminary injunction by Judge O'Brien ordering Tenet to consider his application. The preliminary injunction was never vacated.

Given the obvious hostility of Tenet towards Petitioner it is now obvious that Tenet deliberately tried to prevent Petitioner from having his reappointment application considered on its merits. It is hardly coincidental that Tenet failed to deliver the reappointment application to Petitioner and then denied him his reappointment after being compelled to process the reappointment application by the Superior Court.

B. <u>DECEMBER 17, 1999 OPERATING ROOM INCIDENT</u>

In its second paragraph under the heading "Statement of the

Case," Tenet proceeds to try to prejudice this Court against Petitioner by referring to something which allegedly occurred on December 17, 1999. In particular Tenet states that Petitioner was involved in a serious altercation in the operating room and then purports to cite to the record to support the facts set forth in the paragraph. However, the reference to the record is not to sworn testimony or to any findings made by any administrative tribunal. Instead, the reference to the record is to Volume I of the exhibit books, Exhibits 113, 113A, 113B, 116, 117, and 118. Exhibit 113 is a photocopy of an unsigned report regarding an anonymous doctor. Exhibit 113 purports to be a series of reports regarding an unnamed physician involved in some arguments. Apparently someone entered the operation room where an unnamed physician (allegedly Petitioner) was in the middle of surgery when it was contended that the physician's assistant did not have certain privileges. Exhibit 113A is a diagram of the operating room. Exhibit 113B is a declaration of Patricia Doherty describing the procedure for scheduling surgery. Exhibit 116 is a letter from Debbie Miller to Dr. Sohrab Yamini dated December 20, 1999 referring to his having assisted with respect to a surgical procedure on December 17, 1999. Ms. Miller's letter is not under penalty of perjury and no cross examination appears. Exhibit 117 is an unsworn letter from Gary Dosik to Petitioner regarding the alleged incident of December 17, 1999. Exhibit 118 is an unsworn letter from Gerald Clute to Petitioner dated December 24, 1999 referring to the alleged incident of December 17, 1999.

In contrast to the allegations contained in the various exhibits to which Tenet made reference in footnote 4 at the bottom of page 4 of Respondent's Brief, Petitioner attempted to produce at the Appeal Board proceeding the deposition testimony of the surgical assistant, Dr. Sohrab Yamini. Dr. Yamini's deposition was taken by the author of Respondent's Brief, the law firm of Christensen & Auer, on January 25, 2002. The deposition was taken in connection with a lawsuit which Petitioner filed against Tenet Healthsystem, Mileikowsky v. Tenet HealthSystem, LASC No. BS056525. It is that case, combined with Superior Court Case No. BC233253, which is pending before Division Four of the Second Appellate District in Mileikowsky v. Tenet HealthSystem, Second Civil B159733. The deposition of Dr. Yamini taken in the case of Mileikowsky v. Tenet Healthsystem, BS056525 is part of the Administrative Record in this case. Please see bate stamp number 6314-6505. Petitioner called to the attention of the Superior Court below the deposition transcript of Yamini. Please see Clerk's Transcript, p. 269, line 5.[1]

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[1] Petitioner does not want to sidetrack this Honorable Court into dealing with collateral matters. However, since the Yamini deposition and the issue of Petitioner's alleged conduct on December 17, 1999 has been raised by Tenet in its Respondent's Brief, Petitioner respectfully points out that the January 25, 2002 deposition of Yamini was tendered to the Appeals Body and that Body rejected it. Please see transcript of July 2,2002 hearing before Appellate Review Committee, p. 11, lines 21-23. Petitioner mentions this issue now because the Superior Court below (Judge Yaffe) focused its attention on whether the Appeals Body (i.e., the Governing Board) acted properly. See Clerk's Transcript, p. 424, lines 12-27 and p. 425, lines 17-20. Petitioner argued in the Court below that if the hearing before Willick was improperly terminated by Willick it was irrelevant

Dr. Yamini is a physician and surgeon licensed by the State of California. He was licensed in 1983 (bate stamp 6320). He specializes in gastroenterology (bate stamp 6321). Yamini assisted Petitioner in surgeries (bate stamp 6329).

Dr. Yamini testified with respect to the incident of December 17, 1999 described by Respondent at p. 4 of its Respondent's Brief (bate stamp 6341, line 7-10).

The surgery on December 17, 1999 was for "laparoscopy, hysteroscopy, possible bilateral salpingectomy and vaporization of endometriosis. . . ." (bate stamp 6343, lines 8-10). Dr. Yamini then proceeded to describe the nature of the surgery. The beginning of the surgery includes the introduction of a needle into the abdominal cavity which is ". . . a very crucial time because there is always danger of perforating any of the organs inside...." (bate stamp 6343, lines 17-18).

Dr. Yamini recalled that as he and Petitioner ". . . were starting to raise the abdomen wall to put the catheter inside" (bate stamp 6346, lines 23-24), an issue arose regarding his

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whether the Appeals Body procedure was fair or not. See Clerk's Transcript, pp. 419-420. However, as stated in this footnote, if this Honorable Court of Appeal should agree with Judge Yaffe that it was irrelevant whether the hearing before the Medical Hearing Committee was fair, Petitioner submits that it was error for the Appeals Body not to consider the deposition transcript for Dr. Yamini's deposition. It is in box number 2, item 34, bate stamp number 6314-6505. See Clerk's Transcript p.441 where the deposition of Dr. Yamini is listed. Please also note that the three volume deposition transcripts for Petitioner, bate stamp numbers 6506-6634 were also submitted to the Appeals Body and rejected. See Clerk's Transcript, p. 441 and see July 2, 2002 transcript of oral argument before Appellate Review Committee (the Appeal Body) of July 2, 2002.

privileges to act as a surgical assistant (bate stamp 6346, lines 16-20).

As they were about to insert the needle, a nurse named Marlene [Jones] entered the operating room and told Dr. Yamini that he had to leave immediately (bate stamp 6348, lines 1-4). Dr. Yamini testified that he was surprised and asked for the reason and was told that he did not have the privileges to act as an assistant surgeon. At that time Dr. Yamini told "Marlene" that there must be a mistake and that he would be happy to clear the matter up as soon as the surgery was completed (bate stamp 6348, lines 1-13). Dr. Yamini testified that "Marlene" told him that he had to leave immediately (bate stamp 6348, lines 15-16). She was in "the sterile field." (bate stamp 6349, lines 5-8). At this time the patient was already "anaesthetized" (bate stamp 6350, lines 1-8).

Marlene then telephoned someone and kept insisting that Dr. Yamini leave the operating room (bate stamp 6350, line 25, 6351, lines 1-6). According to Dr. Yamini, Petitioner instructed "Marlene" that it was his operating room, that he was in charge of it, and that he would talk to Mr. Clute later (bate stamp 6352, lines 7-10).

Dr. Yamini believed he had been granted assistant privileges. He had assisted Petitioner a few days earlier and had assisted another doctor prior to the incident. He had many cases at N. Hollywood Hospital, which was affiliated with Tarzana. He had never been challenged with respect to assistant privileges which is why he was so surprised (bate stamp 6353, lines 13-20).

Dr. Yamini was of the opinion that even if he lacked privileges to assist in this particular surgery there would have been no need to stop the surgery because assistant surgeon privileges could easily have been granted and he had them at many hospitals including Century City Hospital (bate stamp 6356, lines 1-20).

Dr. Yamini testified that Petitioner instructed "Marlene" that she was there at a very important time of the surgery and that she needed to leave (bate stamp 6357, lines 14-17).

Petitioner walked towards Marlene and asked her to leave because she would not leave. Petitioner told Marlene to let the surgery continue and to call Mr. Gerald Clute, the Chief Executive Officer of the hospital (bate stamp 6358, lines 6-9).

Petitioner told the anesthesiologist to remain because the patient had been anaesthetized (bate stamp 6359, lines 6-13).

Dr. Yamini testified that the closest Petitioner came to "Marlene" was about 3 to 4 feet (bate stamp 6363, lines 7-12).

Dr. Yamini testified that Petitioner did not shout (bate stamp 6365, lines 4-5). Petitioner never yelled at "Marlene." He did not shout at her (bate stamp 6366, lines 1-5).

According to Dr. Yamini, Petitioner proceeded to complete the surgery, which went very "peacefully." (bate stamp 6370, lines 11-13).

Dr. Yamini wrote a letter to the hospital on December 28, 1999 describing the incident of December 17, 1999 (bate stamp 6478-6479). Dr. Yamini told the hospital on December 28, 1999 that

"Marlene's" behavior was very unprofessional and disrespectful (bate stamp 4678).

Petitioner's evidence regarding the December 17, 1999 incident was submitted to the Medical Hearing Committee. See Administrative Record, bate stamp numbers 5218-5826. See in particular Petitioner's letter of January 7, 2000 wherein he explained in great detail what occurred on December 17, 1999. He pointed out that Marlene Jones burst into the operating room on December 17, 1999 wearing street clothes (bate stamp No. 5626-5627). Petitioner requested the opportunity to address the Medical Executive Committee at its next meeting of January 11, 2000 (bate stamp No. 5631). Dr. Yamini also reported the matter to Gerald Clute, Tenet's Chief Executive Officer (Bate Stamp No. 5640).

Gerald Clute, the non physician Chief Executive Officer at Tenet's hospital, was questioned about this incident at the administrative hearing. He testified on September 24, 2001 (Volume VII of transcripts) that it was his idea to suspend Petitioner' staff privileges (Transcript, Vo. VII, p. 829). He also conceded under cross examination by Petitioner that the rules and regulations of the hospital delegated to the primary surgeon (i.e. Petitioner) the discretion to select his physician assistant (Vol. VII Transcript of September 24, 2001, pp. 839-840).

It is obvious the December 17, 1999 operating room incident was provoked and even staged by Tenet because Petitioner overcame Tenet's earlier effort to get rid of Petitioner by claiming Petitioner did not timely submit his reappointment application.

The December 17, 1999 incident was the subject of a hearing before Judge Yaffe on July 11, 2000 in Mileikowsky v. Tenet Healthsystem, BC233153 in connection with Petitioner's request for a restraining order against certain restrictions imposed upon him by Tenet. Judge Yaffe was struck by the fact that the hospital did not see fit to take any action against Petitioner with respect to the December 17, 1999 incident until June 23, 2000, shortly after Petitioner agreed to serve as an expert witness (CT 285). Petitioner had responded on December 27, 1999 to an inquiry as to what occurred (CT 290). After considering the alleged December 17, 1999 incident, Superior Court Judge Yaffe issued a restraining order against Tenet (CT 309-310).

The point of this discussion is not to ask this Court to resolve the issue of December 17, 1999; rather, the point of this discussion is to respond to the second paragraph of Respondent's Statement of the Case at p. 4 of Respondent's Brief wherein Respondent asserts facts which not only have not been adjudicated but which, in all likelihood, are false. As stated, Respondent ignored the deposition testimony of Yamini, bate stamp 6314-6505, and ignored bate stamp numbers 5218-5826 when it asserted as a "fact" that Petitioner somehow acted unprofessionally on December 17, 1999 with respect to an alleged operating room incident.[2]

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[2] The record shows that the confrontation was directed by Tenet, which earlier failed to get rid of Petitioner by claiming Petitioner did not timely submit his reappointment application. It is obvious Marlene Jones did not create the operating room confrontation on her own. She must have been directed by some high official or attorney for Tenet. Petitioner was never

C. **FEBRUARY 1999 OFFICE INCIDENT**

The second part of the second paragraph at p. 4 is likewise not true - that in February 1999 Petitioner appeared at the Medical Staff Office and assaulted two female employees. There are no findings regarding this allegation and it is simply false. Indeed, during the hearing before Judge Yaffe in the Court below Judge Yaffe acknowledged that there was no evidence in the record that Petitioner had assaulted people or challenged them (CT 401, lines 17-21). Hearing Officer Willick made no findings on this issue nor did the Appeals Board. The reference to the record is to Volume I of the exhibit book, Exhibits 96, 97, 98, and 99, but those exhibits are not identified. They appear to be some sort of minutes or unsigned reports. They are not under oath and there is no cross examination. As stated, there are no findings.

In the last paragraph at page 4 Tenet asserts that on January 11, 2000 the Medical Executive Committee "determined" that Petitioner's application for renewal must be denied based upon his alleged "long history of disruptive, threatening and uncooperative conduct. . . ." Other allegations were included in the January 12, 2000 letter (Exhibit Book Vol. I, Exhibit No. 1). However, the January 12, 2000 letter from David Kayne simply asserted that there was evidence of "dangerous, disruptive, threatening, abusive and unprofessional conduct. . . ." As the letter correctly

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charged with knowingly arranging for a surgeon assistant without staff privileges. Petitioner reasonably believed he had such privileges. The error, if any, was by Tenet.

acknowledged, Petitioner was entitled to a hearing on these allegations which were never proven.

D. CEDARS SINAI MEDICAL PEER REVIEW RECORDS

There was also a reference to an allegation that Petitioner had been "charged with substandard and incompetent practice" at Cedars Sinai and a complaint about the Medical Executive Committee's alleged inability to otherwise obtain information relating to that matter. (Tenet's Brief, pp. 4,5,9 and 34)However, a letter dated August 10, 1999 from Murray Mazur, Vol. I of the Exhibit Book, Exhibit 107, acknowledges that Petitioner signed a general release on March 15, 1999! Mazur contended that Petitioner's general release which he signed on March 15, 1999 was not sufficient to satisfy Cedars Sinai. The next exhibit referenced by Tenet in support of its assertion is Exhibit 112 which consists of the minutes of the Medical Executive Committee of January 11, 2000. The minutes (Exhibit 112), reflect the introduction of Jay Christensen and Mark Kawa to members of the Committee. The minutes state that both of them "are representing the Medical Staff and Medical Staff Officers." It should be noted that Mark Kawa already represented Tenet in connection with the preliminary injunction which Petitioner obtained from Judge O'Brien to compel Tenet to process his application for reappointment. It should be noted that these attorneys and their law firms had been representing Tenet from the beginning of Petitioner's dispute with

Tenet (CT 167, line 3 and CT 278, lines 17-24). [3]

The issue regarding Petitioner's alleged refusal to allow Tenet to have access to Petitioner's records at Cedars Sinai was created by Tenet's attorneys. Knowing that Cedars Sinai would not authorize the release of its records without Petitioner's authority Tenet demanded the confidential peer review records from Petitioner, who did not have possession of them. Cedars Sinai did, as provided by law.

Tenet contends that the General Release signed by Petitioner on March 15, 1999 (Vol. I of exhibit book, Exhibit 107), was not sufficient. Tenet claims that Petitioner did not execute a second release which was more specific but this allegation is an absolute lie. The lie repeated by Tenet that Petitioner did not allow Tenet to secure the Cedars Sinai peer review medical records is refuted by the record and Petitioner is taking the liberty to attach 10 pages of the record to this Reply Brief in accordance with Rule 14(d) of the California Rules of Court.[4] The issue of

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[3] Representation of Tenet is extremely important given Petitioner's assertion that Tenet, through its attorneys, manipulated the entire process to get rid of Petitioner. As indicated in his Opening Brief, eventually it was Christensen & Auer who sent the letter to Dan Willick requesting that Willick terminate the proceedings. See March 19, 2002 letter from Christensen & Auer found at Tab 120 of the "Encino-Tarzana Regional Medical Center, Dr. Mileikowsky, Medical Executive Committee correspondence, Vol. XI." See also Petitioner's Opening Brief, pp.8-9. The letter was written by attorney Anna M. Suda of the firm of Christensen & Auer.

[4] Rule 14(d) provides, in part, as follows:
"A party filing a brief may attach copies of exhibits or other materials in the appellate record.

the Cedars Sinai peer review medical records was considered by Hearing Officer Lowell C. Brown during the first hearing on October 18, 2000. Because of the 10 page limit imposed by Rule 14(d) Petitioner is attaching to this Reply Brief the cover of the October 18, 2000 transcript, page 20 of the transcript, which sets forth the position of the "prosecutor" (Dr. Richard L. Wulfsberg, the representative of the Medical Executive Committee for Tenet) and Petitioner's Exhibit 6 to the transcript. Dr. Wulfsberg's comments regarding the production of documents by Petitioner is set forth at page 20 of the transcript of proceedings of October 18, 2000. Before we discuss in detail Dr. Wulfsberg's response to the production of documents, Petitioner will set forth the chronology by reference to Petitioner's exhibit 6 to the transcript of October 18, 2000. The chronology is as follows:

On April 16, 1999 attorney Gordon Simonds of the law firm of Latham & Watkins wrote a letter to Petitioner's attorney, Paul M. Hittelman, regarding the release by Cedars Sinai of Petitioner's medical peer review hearing records at that institution. Essentially attorney Simonds on behalf of Cedars Sinai notified Petitioner's attorney, Mr. Hittelman, that Cedars Sinai would not honor the authorization signed by Petitioner. Mr. Simonds stated in his letter of April 16, 1999 that Cedars Sinai would respond appropriately to any hospital seeking information regarding Petitioner's medical staff privileges status at Cedars Sinai.

The attachment must not exceed a total of 10 pages. . . ."

Next in this chronology is a letter dated June 25, 1999 from attorney Mark T. Kawa of the law firm of Ervin, Cohen & Jessup representing Tenet. Essentially Mr. Kawa advised Mr. Hittelman that Cedars would not release information until Petitioner executed a release prepared by Cedars Sinai. Mark Kawa's letter to Hittelman dated June 25, 1999 attached the June 24, 1999 letter from Cedars Sinai to Tarzana Hospital. The June 24, 1999 letter from Cedars Sinai to Tarzana Hospital required Petitioner himself to sign a particular form. The form itself was attached to the Cedars Sinai letter dated June 24, 1999 to Tarzana.

On August 13, 1999 attorney Paul M. Hittelman sent a letter to Dr. Murray Mazur along with a Cedars Sinai form dated August 11, 1999 signed by Petitioner. As stated, Petitioner has taken advantage of California Rule of Court, Rule 14(d), and has attached for this Court's convenience the cover sheet for the October 18, 2000 transcript of proceedings, page 20 of the transcript showing Dr. Wulfsberg's statement that any documents presented by Petitioner would not be considered. Petitioner cannot emphasize enough the importance of this Honorable Court's reviewing Exhibit 6 to the October 18, 2000 transcript. Exhibit 6 and the transcript more than anything else demonstrates the perfidy of Tenet with respect to the alleged refusal of Petitioner to provide Tenet with records from Cedars Sinai.

The obvious reason that the Medical Executive Committee ("the prosecution") did not actually want the records is that the records would not have helped Tenet with respect to its campaign to rid

itself of Petitioner, a whistle blower and expert witness against Tenet.

Petitioner understands the record is voluminous but it is vitally important for justice that this Honorable Court of Appeal review additional materials in the record on appeal. The reason for this is that the presentation by Tenet is very subtle: it is attempting to prejudice this Honorable Court against Petitioner by lies, innuendoes and misstatements. Because the hearing was aborted by Tenet's attorney, Dan Willick, the doctors on the Medical Hearing Committee never got the opportunity to actually decide the merits of the case as required by California law. While it is true Petitioner lost his staff privileges at Cedars Sinai (for reasons which are beyond the scope of this administrative record and appellate record), see Exhibit Book, Vol. II, Exhibit Tabs 136 and 137, the record is also equally clear that the Medical Board of California exonerated Petitioner notwithstanding the adverse decision by Cedars Sinai, which for reasons beyond the scope of these proceedings Petitioner did not challenge. Petitioner respectfully refers this Honorable Court of Appeal to Petitioner's Exhibit 5 of the October 18, 2000 proceeding before Hearing Officer Lowell Brown. Exhibit 5 contains an October 17, 2000 letter by Petitioner to Hearing Officer Lowell C. Brown and also, and more importantly, contains the August 23, 2000 letter from the Medical Board of California to Petitioner. The letter states:

> "The Medical Board of California has concluded its review of the 805 Report received from Cedars-Sinai

> Medical Center indicating your staff privileges were suspended. Please be advised the file is closed and no further action is anticipated.
>
> Thank you for your cooperation in this matter."

Thus, whatever the issues were with Cedars Sinai, the California Medical Board was apparently not impressed with the report sent to it by Cedars Sinai (Exhibit Book, Volume I, exhibit 107 (Mazur letter acknowledging report was sent to Board)). Moreover, it is clear from Exhibit 6 that Petitioner cooperated with respect to the production of records from Cedars Sinai, but Tenet was obviously not interested in actually seeing them. Its whole purpose was simply to concoct a situation to try to make Petitioner appear "uncooperative."

This Honorable Court should keep in mind that the issue of the Cedars Sinai medical peer review records was presented at the first hearing before Hearing Officer Lowell Brown. Tenet, therefore, had access to the records it professed it was seeking before the second hearing began that was conducted by Dan Willick.

Although the Medical Board of California exonerated Petitioner he concedes that the California Medical Board has no direct jurisdiction over hospitals. Therefore, the decision by Cedars-Sinai stands notwithstanding Petitioner having been exonerated by the Medical Board of California. Petitioner does not wish to overstate his case. The decision by the Medical Board of California to take no action is the practical equivalent of exoneration of his conduct. The problem is that hospitals are not

governed by the Medical Board of California but rather by the Joint Commission on Accreditation (42 U.S.C. §1395b6) and the California Department of Health Services (Health & Safety Code § 1285). The conflict between hospitals on the one hand and physicians on the other has been recognized by the State Legislature. If there were no conflict there would have been no need for state mandated peer review. The tension between hospitals on the one hand and physicians on the other, especially those physicians, like Petitioner, who are strong advocates for patient rights, frequently creates the kind of proceeding which is presently before this Honorable Court of Appeal for its review.

E. <u>OTHER UNAJUDICATED MATTERS AND CHARACTER ASSASSINATION: REPETITION OF LIES</u>

Tenet's brief continues for a number of pages by mingling procedural facts with unajudicated allegations. For example at page 5 of Tenet's brief Tenet recounts the procedural history with respect to the first Medical Hearing Committee decision and its reversal by the Board. However, in addition to the procedural description set forth at page 5, Tenet states that during the preparation for Hearing I, "the Hospital's Administrator learned of Dr. Mileikowsky's history of threatening and disruptive behavior. . . ." This alleged "fact" is not based upon any finding made by any hearing officer, Medical Hearing Committee, Board, or Superior Court. The "facts" set forth at the top of page 6 of the Tenet brief are not based upon sworn testimony, findings, or anything

similar to that which would justify their reference in an appellate brief. For example, the reference in footnote 9 at page 6 of Tenet's brief is to Exhibit Vol. I, No. 26, p.2. If one takes the trouble to sort through the voluminous Administrative Record to actually find the reference (footnote 9) one will see an unsigned, typed document that purports to describe something that occurred about 13 years ago, on November 14, 1991. There is an unsworn reference to some event allegedly involving Petitioner. Likewise, footnote 10 at page 6 of the Tenet brief references a phone call at an unspecified time. The document is not sworn and no finding was made regarding the allegation set forth in the text of the brief that accompanies footnote 10. The same can be said for the text accompanying footnote 11 at page 6 of the Tenet brief. The text states that Petitioner "abused two (2) female employees in the medical staff office. . . ." Tenet's brief references the Administrative Record, Exhibit Vol. No. I, Exhibits 96, 97 and 98. Again, these documents are unsigned, anonymous entries in some document. No findings were ever made with respect to the "facts" set forth in Tenet's brief although such findings are mandated by Business & Professions Code §809.4 when a hearing committee makes its decision, which it never got to do in this case. Again at page 6 there is a reference in the Tenet brief to Petitioner having "assaulted the OR Director." This "fact" is allegedly supported by Exhibit Vol 1, No. 113. However, if one takes the trouble to look at the exhibit one will note that it is not a declaration, it is not testimony, it is not a finding, it is simply an unsigned

typewritten piece of paper.

Tenet's brief is extremely misleading. First, appellate briefs that set forth facts must reference where in the record the fact can be supported. The record must consist of admissible evidence that the lower court or administrative tribunal utilized in arriving at a finding or a conclusion. Here the references to the record by Tenet are not to findings by any lower court or tribunal but are simply references to unsworn statements. Tenet tries to create the impression that these are adjudicated facts or are otherwise entitled to be credited as the truth. In addition to not being supported by the record, the factual recitation is also misleading because it is duplicative. For example the alleged abuse of two female employees in the medical staff office (footnote 11 at page 6) is simply repetition of the alleged verbal attack and "assault" of two female employees mentioned at page 4 of the Tenet brief. All one needs to do to determine that the references at pages 4 and 6 are to the same alleged incident is look at the footnote citations. At the bottom of page 4 Tenet uses footnote 5 to reference the record which consists of Exhibit Vol. 1, Nos. 96, 97, 98, and 99. Moving ahead to page 6 and, in particular, examining footnote 11, we see that we have a reference to the same exhibits, Nos. 96, 97 and 98. For some reason Tenet dropped the reference to Exhibit 99. The point of all this is that Tenet repeats the allegations in a slightly different way to create the false impression that it is speaking about different incidents. This is a very clever technique. For example, with respect to the

text accompanying footnote 5 at page 4, Tenet describes the February 2, 1999 incident as "a verbal attack and assault of two female employees." At page 6 Tenet uses the word "abused" but Tenet is referring to the same alleged incident. By using the word "abused" Tenet very cleverly creates the false impression that it is referring to a different incident at page 6. Also, the word "abused" carries with it some sinister connotation of sexual misconduct.

The reason Petitioner spends time in this Reply Brief on these points is to persuade this Court not to conclude that the facts set forth by Tenet are true. In particular, Petitioner is concerned about decisions holding that the failure of an appellant to deny a fact allows the appellate court to conclude that the fact is true. See generally Bank of America v. McLaughlin Land and Livestock Co., 40 Cal.App.2d 620 (1940), cert.den. 313 U.S. 571, 85 L.Ed. 1529, 61 S.Ct. 958 (1941); Atwood v. Hammond, 4 Cal.2d 31 (1935).

Tenet's brief continues to refer to "facts" that were never adjudicated in the administrative mandamus proceeding in the court below. At page 6 Tenet refers to a September 14, 2000 ruling by Judge Yaffe on a motion for preliminary injunction. Tenet does not make clear in its brief that the ruling by Judge Yaffe came in an earlier case, not the case decided by Judge Yaffe (administrative mandamus) which is now before this Court. The denial by Judge Yaffe in an earlier case of a preliminary injunction is not a ruling on the merits of that case nor was the

issue before Judge Yaffe with respect to the preliminary injunction motion resolved in the administrative proceeding which was pending when Willick terminated it.

It is extremely important for this Honorable Court of Appeal to review the relevant record and findings with regard to two decisions. First, this Court should review and consider the March 30, 2002 ruling of Dan Willick terminating the proceedings. The Willick ruling is set forth in the Clerk's Transcript at pages 62-73. Willick's ruling made no findings with respect to any of the alleged facts set forth in the Tenet brief. Rather, the Willick ruling only related to the manner in which the hearing was conducted. Second, what this Honorable Court of Appeal has before it is the decision of the Appellate Review Body of July 25, 2002 set forth in the Clerk's Transcript at pages 35-44. It is impermissible for Tenet to set forth in its Statement of Facts alleged "facts" that were not adjudicated. Tenet has very cleverly engaged in character assassination to try to prejudice this Honorable Court of Appeal against Petitioner, to imply, in effect, that even if the hearing officer was wrong to do what he did, Petitioner somehow had it coming to him. That is precisely how Tenet's lawyers misled the Board and the Superior Court to commit error below. The issues before this Court are whether Willick had the authority to terminate the hearing, whether there were grounds to terminate the hearing, and whether the Appellate Body erred in uphold Willick's termination of the hearing. Repetition of lies and unsubstantiated allegations by Tenet cannot

substitute for the requirement that Statement of Facts be referenced to the record and that the record support the statement contained in the brief. Petitioner reiterates his strong opposition to, and denies, the facts set forth in Tenet's brief.

Petitioner wants to make sure that he is not conceding any facts set forth in Tenet's brief. Out of an abundance of caution he is generally denying all of them. He must be allowed to use a general denial. Compare Code of Civil Procedure Section 431.30 (d) (general denials permitted in answers to unverified complaints in trial courts).

With respect to the record of what occurred before the Hearing Officer, Mr. Willick, evidence of what occurred might be relevant on the issue of whether Willick had the right to terminate the proceeding. Petitioner asserts herein that even if Petitioner did not comply with obviously prejudicial rulings, the remedy would have been for Willick to obtain a decision from the Medical Hearing Committee to terminate the proceedings if that remedy were available and justified. Petitioner could have been excluded from the hearing, which could have proceeded in his absence, according to the by-laws. All we have in this case are attempts by a non lawyer, whose request to have an attorney was rejected, to preserve his record in an effort to keep his whole life and career from being destroyed by a vengeful hospital who was trying to discredit him because he had the temerity to testify for a patient who had been harmed. Petitioner was extremely concerned that failure to object and failure to challenge Willick's rulings would be deemed

by an appellate tribunal as acquiescence or waiver. Petitioner obviously was told that he needed to exhaust administrative remedies and did not wish to waive any right. See generally Unnamed Physician v. Board of Trustees, 93 Cal.App.4th 607 (2001). Tenet's argument that Petitioner "waived" anything, much less his right to a hearing, is preposterous.

With respect to the constant repetition of lies by Tenet in its Reply Brief Petitioner respectfully refers this Honorable Court of Appeal to the proceedings before Judge Yaffe on the writ of administrative mandamus petition when the discussion of whether or not Petitioner accused Tenet's attorneys at the Appeal Board II of engineering the proceedings. During one of the hearing sessions Petitioner compared the accusations by Tenet against him to Joseph Goebbels, the Nazi propaganda chief (CT 424, lines 3-4). At the proceeding of March 14, 2003 Tenet tried to ridicule the reference to Goebbels by falsely attributing to Petitioner an allegation that Christensen was the equivalent of a Nazi, whereas in fact the reference to Goebbels was not to any reference to Christensen but only to the fact that Goebbels said "If one repeats a lie over and over again people tend to believe it." It was for that limited purpose that Petitioner made a reference to Goebbels, not to any accusation that Christensen was a Nazi. Ironically, Tenet twisted Petitioner's argument to ridicule him when that was not the point of the reference to Goebbels. The twisting of arguments in this particular case was what Tenet did over and over again in the trial court and before Willick, and the hospital Board. See Clerk's

Transcript p. 415, line 20.[5]

III

ARGUMENT

A. INTRODUCTION

This Court should disregard references by both sides to unajudicated and unresolved facts in dispute that were the subject of the hearing before Willick. See Bollengier v. Doctor's Medical Center, 222 Cal.App.3d 1115, 1122-1123 (1990), where the Court of Appeal stated:

> "The parties present extensive arguments regarding the facts surrounding the suspension and provide conflicting evidence to support their respective positions. Petitioner presents evidence of his outstanding surgical skill and 'legendary' patient care. He alleges the suspension was economically motivated. In contrast, D.M.C. sets forth evidence of Petitioner's 'gross misconduct' and concludes the summary suspension was necessary to protect patients and others from Petitioner. Factual findings have not yet been made in this case and, as is evident from the arguments, many of the facts are hotly contested. This Court cannot make the required factual determinations. . . . Thus, all of the discussion and exhibits regarding the disputed facts are irrelevant to the issues before us." (Emphasis added)

Petitioner heartily agrees. This Court should focus narrowly

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[5] Attorney Christensen during oral argument before Judge Yaffe mistakenly referred to Joseph Goebbels as Hermann Goebbels. Obviously he confused Hermann Goering with Joseph Goebbles. Christensen could not get his Nazis straight.

on the limited legal issues presented by the appeal. Petitioner has already submitted his position in his Opening Brief and will therefore limit this Reply Brief to a response to the points made by Tenet.

B. THERE WAS NO BASIS FOR THE TERMINATION OF THE HEARING

In judging Petitioner's conduct at the hearing itself this Court of Appeal should obviously keep in mind the importance of the hearing to Petitioner. Although Judge Yaffe probably did not recognize it, Petitioner did not benefit from delay. His staff privileges had already been summarily suspended and therefore Petitioner was "out of work" during the long pendency of the proceedings. He would gain nothing by disrupting the proceedings. He could not benefit in any way from delay. Evaluation of Petitioner's conduct during the hearing should be done in light of certain undisputed facts: (1) Petitioner was unrepresented by counsel at the hearing; (2) the outcome of the hearing was extremely important to Petitioner; (3) Willick was being paid by Tenet and had an interest future work.

One of the major complaints against Petitioner was that he allegedly misrepresented the significance of legal documents. Willick stated at page 3 of his March 30, 2002 ruling (CT 64):

> ". . . These materials contain a number of misrepresentations and misleading statements. . . ."

Willick was adopting arguments made by Tenet's attorneys when Petitioner was struggling to represent himself. The Appellate

Board apparently agreed that Petitioner "falsely" referred to pleadings in various lawsuits.

Petitioner never "falsely referred" to any document or pleading. In good faith he attempted to characterize the significance of particular documents. If mischaracterization of a document were grounds to terminate a hearing many trials and administrative hearings would be terminated prematurely. Indeed in this very case we have evidence that Tenet has repeatedly misrepresented matters in the record. Would that mean that Tenet forfeits its right to defend this appeal? Of course not. If Petitioner misstated a particular pleading, and he did not, the remedy would have been for the Medical Executive Committee or even, indeed, Willick, to "correct" any misstatement allegedly made by Petitioner. The proposition advanced by Tenet in this case - that a hearing can be terminated if one side makes a misstatement - is frightening. There is no authority for this startling proposition. Could a trial judge, for example, terminate a proceeding in front of a jury if the judge felt that the plaintiff or the defendant lied on the witness stand (i.e., perjury). Under California Law a judge can comment on the evidence although most judges do not. No judge, however, has the authority to take a case from a jury and dismiss a case if the judge believes that the plaintiff lied on the witness stand. It is up to the jury to assess the credibility of a witness.[6]

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[6] Of course, Petitioner by no means is equating a ministerial hearing officer (really an attorney hired by an

In an amazing double standard, Tenet, at the bottom of page 23 of its Brief, refers to the Board's decision to uphold Willick with reference to Willick's decision to prohibit Petitioner from referring to certain lawsuits which had been filed. According to the Board ". . . these pleadings would be prejudicial to either party without final orders. . . ." (Respondent's Brief, p. 23).

In other words, Tenet is supporting the Board's decision that it is improper for a party to refer to a lawsuit that has not yet been resolved. This is one of the most hypocritical points made by Tenet in these proceedings. At the top of page 19 of Tenet's Brief filed with this Court Tenet makes the following statement,

> ". . . Then in December of 2002, the Medical Board filed a formal Accusation against Dr. Mileikowsky."

If Tenet were judged in the same way that Petitioner were judged - making repeated references to mere allegations and unajudicated lawsuits - Tenet's Brief should be stricken and Petitioner's appeal should result in a summary reversal. Why does Tenet get away with referring to a December 2002 Medical Board Accusation against Petitioner that has yet to be adjudicated? Indeed, there is no reference to the record by Tenet in its Brief to the allegation that the Medical Board in December of 2002 did file a formal Accusation against Petitioner.

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adverse party) on the one hand with a judge on the other. Willick had very limited authority. He was not functioning as a judge but simply as a functionary whose main purpose was to schedule hearings and assist the doctors with their decision of Petitioner's case.

At the bottom of page 18 of the Tenet Brief Tenet refers to a Superior Court judge having issued terminating sanctions against Petitioner. Tenet cites to the record with respect to its statement that a Superior Court judge has issued terminating sanctions against Petitioner. This statement comes from the decision of the Appellate Body which refers to the Report and Recommendation of a discovery referee in the case of Mileikowsky v. Tenet Healthsystem, LASC Nos. BS056125 and BC233153. See Clerk's Transcript, page 44. This is an extreme example of character assassination of Petitioner by Tenet and the Appeals Body apparently agreed. However, what Tenet did not disclose in its Brief was that only one order was made in that case, an order sanctioning Petitioner for not complying with discovery, and that order is currently pending before the Court of Appeal, Second Appellate District, Division Four, Second Civil B159733. No separate order terminating the case has been entered by the Superior Court. The decision of the Appeal Board states that "a discovery referee" previously terminated a case against Petitioner. Again, this is not accurate. Please see Mileikowsky v. Tenet Healthsystem, 2nd Civ. B159733. More important, whether or not a discovery referee in an unrelated case involving the same parties made a discovery order is irrelevant. What is especially outrageous about the reference is that the basis for the termination by Willick was Petitioner's alleged reference to other cases that have not been adjudicated and are not final. The reference to the discovery referee's decision in the case cited at

the end of the Appeal Board decision (CT 44) was improper based upon the theory advanced by Tenet in its Brief filed with this Court. What Tenet is really trying to create is the impression that this unrepresented doctor, who it has egged on and repeatedly lied about, was behaving badly and therefore did not deserve to have any hearing, much less the unfair hearing it was trying to put him through.

Petitioner has already demonstrated in this Reply Brief that he did authorize Cedars Sinai to release the records regarding the Cedars Sinai matter. Notwithstanding Petitioner's signing of all of the releases necessary for Tenet to secure the peer review hearing records from Cedars Sinai Tenet persists in arguing that the Appeal Body correctly decided that Petitioner did not provide the Cedars Sinai peer review records.

Essentially what Tenet argues before this Honorable Court of Appeal is that Petitioner, a non attorney, argued too vociferously his case. He disagreed with certain rulings of the hearing officer. He had a right to do so in order to preserve the record for any appeal. There is simply insufficient evidence in this record to justify the deprivation of a hearing to which Petitioner was legally entitled.

Apparently the straw that broke the camel's back was the alleged "ex parte" communication by Petitioner to members of the Medical Hearing Committee. Tenet kept referring to the communication as being ex parte. Borrowing from Tenet's rhetoric, Petitioner could certainly argue here that Tenet lied and Willick

lied and the Appeals Board lied when they all asserted that the communication was "ex parte." This is not true as Tenet apparently now acknowledges. The false reference to the document having been delivered "ex parte" should, under Tenet's theory, lead this Court to conclude that they all lied and therefore are not entitled to a hearing before this Court of Appeal. Of course, Petitioner does not go that far. Petitioner did have the right to tell this Court of Appeal that the document was not delivered ex parte even though Tenet previously represented through Willick and others that it was delivered ex parte. Tenet repeatedly contended below that Petitioner routinely misrepresented the significance and nature of legal documents. Well how about Tenet? How about Willick? Clearly their earlier references to the communication as having been "ex parte" was simply false. Should they be condemned for this misstatement? Yes, but that does not mean they waived their right to be heard on appeal. Petitioner had the right to correct the misstatements and he has done so.

Likewise, whenever Petitioner allegedly made a misrepresentation with respect to the significance of a legal document the other side had the right to "correct" the record. The remedy was not to terminate the hearing. The termination of the hearing was outrageous and contrary to California law.

Tenet selectively quotes isolated passages from a voluminous administrative record to try to create the impression that Petitioner so destroyed the hearing process that the hearing officer had no choice but to terminate the hearing. Petitioner, a

non lawyer, on a few occasions, wrote or said things that some timid souls not used to the give and take of lawyers, hearing officers, and some judges might consider to be inflammatory rhetoric. Because the record is so voluminous it is impossible because of the word limit imposed by the California Rules of Court on this Brief to set forth the entire record. The only way this Court can really appreciate that the comments made by Petitioner were a minuscule part of the entire record is to read the entire record. Petitioner essentially conducted himself in a dignified manner. Once in a great while he might have been provoked by Willick into saying something that perhaps, on reflection, he should not have said. However, judges and attorneys functioning as hearing officers should have thick skins. Published opinions of appellate justices have gone far beyond what has been attributed to Petitioner in this particular case. For example, in People v. Arno, 90 Cal.App.3d 505 (1979), Associate Justice Robert S. Thompson called dissenting Justice L. Thaxton Hanson a "SCHMUCK." See People v. Arno, 90 Cal.App.3d at 514, footnote 2. Justice Hanson, in his dissenting opinion, responded to the majority's reference to him as being a schmuck in footnote 2 by protesting the "judicial temperament" displayed in footnote 2. In footnote 14 of the dissenting opinion, Justice Hanson noted that the Los Angeles Times on March 13, 1979 published an article on the subject of the majority's opinion.[7]

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[7] The reference to "SCHMUCK" is appropriate in this case given the fact that one of the two medical cases being considered

If the reference to dissenting Justice Hanson ("SCHMUCK") by Justice Thompson (Justice Lillie concurred), were truly offensive, the Commission on Judicial Performance could have taken action against Justices Thompson and Lillie but no action was taken against them.[8]

As stated, it appears that the major reason for terminating the hearing was the allegation by Willick that Petitioner, a non attorney, misrepresented the nature and significance of legal documents. Appellate Justices frequently accuse each other of doing the same thing and no one would suggest that appellate justices should be sanctioned or their careers be terminated for

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by the Medical Hearing Committee involved a penis. It bears repetition at this point to emphasize that the doctors who comprised the Medical Hearing Committee never decided the ultimate issue regarding the circumcision case. Willick's termination of the hearing precluded a decision on the merits. If this Honorable Court of Appeal should reverse the judgment below and direct that the hearing be resumed Petitioner is confident that he will be vindicated by the doctors on the Medical Hearing Committee.

[8] This Court may take judicial notice that the Commission on Judicial Performance may take action against an appellate justice for what he or she writes in an opinion. Recently Presiding Justice J. Anthony Kline was the subject of a proceeding because of something he wrote in a dissenting opinion. In the instant case Petitioner did not call Willick any name although it is conceded that on a rare occasion Petitioner submitted some argumentative statements to Willick. However, for the most part he was provoked by Willick. But at no time did Petitioner ever react physically. His responses were always oral or written. If Willick was so upset with Petitioner's conduct Willick should have resigned and been replaced by a less touchy hearing officer. See generally Offott v. United States, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11 (1954) (trial judge who becomes personally embroiled with attorney should not sit in judgment of him).

making such comments. For example in the recent opinion in Farrakhan v. State of Washington, ___ F.3d ____, 2004 DJDAR 2374 (9th Cir. 2004), seven justices dissented from the denial of a rehearing en banc petition and stated in reference to the majority panel decision:

> "This is a dark day for the Voting Rights Act. In adopting a constitutionally questionable interpretation of the Act, the panel lays the ground work for the dismantling of the most important piece of civil rights legislation since Reconstruction. The panel also misinterprets the evidence, flouts our voting rights precedent and tramples settled circuit law pertaining to summary judgment, all in an effort to give felons the right to vote. . . ."

Justice Kozinski, writing for the dissenting justices, concluded his attack upon the panel decision by accusing the panel of utterly disregarding precedent. In particular Justice Kozinski stated in the last paragraph of his dissenting opinion,

> ". . . I am troubled not only by my colleagues' insistence on an indefensible interpretation of the Voting Rights Act, but also by their utter disregard for our precedent. . . ."

If an appellate justice can write such words in a published opinion no reason exists for a party being forced to advocate for himself not being able to say the same thing. Even assuming arguendo an appellate justice has a greater right to criticize a fellow justice than does an unrepresented litigant in this particular case Petitioner was not an attorney, is not an attorney,

and should not be held to the same standards that the Bar Association or the Rules of Professional Conduct may impose upon attorneys. If Tenet wanted the presentation to be governed by rules applicable to attorneys Tenet should have allowed Petitioner to have an attorney at the hearing, which it had the option of doing; then both sides would have had counsel instead of only Tenet having the advantage. But it did not because it believed that not allowing an attorney to speak for Petitioner would be to its advantage.

C. THE HEARING OFFICER HAD NO IMPLIED RIGHT TO TERMINATE THE HEARING

Petitioner reiterates that there was no basis at all to terminate the hearing. Even if there was a possible basis for terminating the hearing the decision had to have been made by the Medical Hearing Committee and not by Tenet attorney Dan Willick. Willick had no inherent authority to terminate the hearing even if there were grounds for the Medical Hearing Committee to terminate the hearing. Not one case cited by Tenet supports the proposition that a hearing officer, with limited authority and with a conflict of interest, has the right to take the matter from the Medical Hearing Committee and terminate the proceeding himself. Let us look at each of the cases cited for the proposition that there is such inherent authority.

The first case relied upon by Tenet at page 27 of its Brief is Fairbank v. Hardin, 429 F.2d 264 (9th Cir. 1970). The case

involved a hearing before the Secretary of Agricultural pursuant to the Federal Administrative Procedure Act. A hearing examiner conducted the hearing which eventually resulted in a final decision by the Secretary of Agricultural. The case did not involve the termination of the hearing by the hearing examiner. The case is totally off point. Likewise, Cella v. United States, 208 F.2d 783 (7th Cir. 1953) has no application to the dispute between Petitioner and Tenet. The case was also a hearing by the Secretary of Agricultural. The case involved application of a federal statute. The hearing examiner did not terminate the hearing prematurely. The case is not on point.

Likewise, neither Laurelle v. Bush, 17 Cal.App. 409 (1911), Shoults v. Alderson, 55 Cal.App. 527 (1921), nor California Drive-In Restaurant Association v. Clark, 22 Cal.2d 287 (1943) involved the termination of a hearing by a hearing officer. The California Drive-In Restaurant Association case involved the issue as to whether a particular regulation adopted by the Industrial Welfare Commission was valid. It is a well known and long established principle of administrative law that governmental administrative agencies have rule making authority. The rules adopted by the administrative agency must be consistent with the statutory authority which establishes the agency. The case involved the validity of a particular regulation adopted by the Industrial Welfare Commission. It is clear once an agency properly adopts a regulation under its authority that regulation governs the parties subject to the regulation.

In the instant case the by-laws adopted by Tenet had to be consistent with, and could not exceed, the authority established by Business & Professions Code Sections 809 et.seq.. The by-laws cannot exceed the provisions of the Business & Professions Code. Even assuming arguendo they could exceed the limits imposed by the Business & Professions Code in this particular case the by-laws do not provide for the termination of a hearing by a hearing officer. The California Drive-In Restaurant Association case would only be relevant to the issue in this case if Petitioner were challenging the validity of a by-law on the ground the by-law exceeded the scope of the statute. Here, however, Petitioner is not challenging any provision of the by-laws of Tenet. Rather, Petitioner contends the by-laws did not authorize the hearing officer to terminate the hearing and neither did the Business & Professions Code. Unlike California Drive-In Restaurant Association v. Clark, which involved the validity of a regulation adopted by a governmental administrative agency, the instant case involves a hearing officer exceeding his authority under the by-laws and under the Business & Professions Code.

At the bottom of page 29 and the top of page 30 of its Brief, Tenet agrees that the hearing officer did not have any express authority to terminate the hearing. However, Tenet argues that the hearing officer "has the implied power to issue reasonable rules. . . ." This is not true. The hearing officer has no authority to issue any rule, reasonable or otherwise. Hearing officers do not make rules.

In citing California Drive-In Restaurant Association v. Clark, Tenet manifests a misunderstanding of the difference between a rule and an order. The California Drive-In Restaurant Association case involved the validity of a rule adopted by the administrative agency. A rule has general applicability. An order governs only the parties to a particular judicial or administrative proceeding. An order cannot exceed the scope of authority granted to the person issuing the order. Here Tenet can refer us to no authority upon which any order was made. Tenet concludes its discussion of the California Drive-In Restaurant Association case by making the following misstatement,

> ". . . As in California Drive-In, the Hearing Officer must have the implied power to make his rulings effective." (Tenet Brief, page 30).

Again this misstates the holding of the Supreme Court in the California Drive-In Restaurant Association case. The case did not involve any attempt by the Industrial Welfare Commission to make a particular ruling effective. Instead, the case involved the validity of a regulation which was referred to as "Order 12-A." Ironically, this is another example of Tenet misstating a ruling of a court, in this case the California Supreme Court. This was one of the major criticisms directed toward Petitioner - that he misconstrued legal rulings with respect to his briefs and arguments. Even if he did, and he did not, such conduct would not justify and could not possibly justify the termination of a hearing. Lawyers and judges frequently misconstrue or misapply

legal rulings and court decisions. Learned appellate justices frequently disagree as to the meaning and significance of a particular case. That is why we have dissenting opinions.

Mendoza v. Merit Systems Protection Board, 966 F.2d 650 (Fed. Cir. 1992), cited by Tenet at page 31, is not on point. The case involved the application of a rule that required administrative appeals from the Office of Personnel Management to be filed within 25 days of its decision. The plaintiff filed her appeal too late. Accordingly, pursuant to the appellate rule applicable to the case the Administrative Law Judge dismissed the untimely appeal. As stated, the dismissal of the appeal was based upon an established rule found at 5 C.F.R. Section 1201.22(b). (The Code of Federal Regulations). In the instant case Tenet cannot cite any rule analogous to a rule contained in the Code of Federal Regulations. Here Willick made up his own rule and then enforced it against Petitioner without even seeking approval of the Medical Hearing Committee. At least Lowell Brown in Hearing No. I was aware of the need to seek and obtain approval of the Medical Hearing Committee.

The second decision on this point, Cheguina v. Merit Systems Protection Board, 69 F.3d 1143 (Fed. Cir. 1995) follows the decision in the Mendoza case. It is another case involving an untimely appeal. The case might be more on point if Petitioner in this case had filed an untimely appeal and then sought to extricate himself from that predicament. Article VIII of the by-laws, Section 6 (A), provides 14 days for the filing of a request for appellate review. See page 29 of by-laws set forth in Tab 151 of

Exhibit Book, Volume 2.

At the bottom of page 32 and the top of page 33 of Tenet's Brief, Tenet states that on March 15, 2002 Petitioner violated the hearing officer's "clear and unambiguous order" by submitting copies of his brief to the Medical Hearing Committee. It should be noted that Tenet has abandoned its earlier misstatement that Petitioner submitted his brief ex parte. Tenet now acknowledges implicitly at the top of page 33 of its Brief that Petitioner delivered his copies of the brief to the hearing officer and the Medical Executive Committee in addition to the Medical Hearing Committee. Thus, it is obvious the brief was not submitted "ex parte" as Tenet previously falsely asserted. In Willick's March 30, 2002 termination order he vaguely referred to a prior order of November 1, 2001 (CT 173-174). The March 30, 2002 ruling terminating the case is based upon a "finding" that Petitioner violated a November 1, 2001 ruling. That ruling is set forth at Tab 59 of the "Hearing Officer's Correspondence and Rulings", Volume I. A review of the November 1, 2001 ruling at Tab 59 reveals that it does not constitute an order prohibiting the delivery of a brief to members of the Medical Hearing Committee. The November 1, 2001 ruling by Willick focuses on communications outside the hearing room. The November 1, 2001 ruling does not appear to cover a written communication delivered to everyone but rather to ex parte oral communications outside of the hearing room. The November 1, 2001 ruling of Willick does not give reasonable notice to anyone that a party may not deliver a written brief to

members of the Medical Hearing Committee. Nowhere in the November 1, 2001 ruling is there any warning that if a brief were given to members of the Medical Hearing Committee along with the Medical Executive Committee and the hearing officer that the hearing would be terminated.

At the bottom of page 34 and top of page 35 Tenet again concedes that the communication by Petitioner was not ex parte. AT the top of page 35 Tenet contends that Willick previously made an order that the response brief was to be submitted to him, not to the Medical Hearing Committee. Nothing in the November 1, 2001 ruling says this. Tenet has misstated the nature of the November 1, 2001 ruling. Tenet also argues at the top of page 35 that Petitioner's delivery of his brief to members of the Medical Hearing Committee ". . . was also indirect violation of the law and the by-laws which delegate to the hearing officer the authority to resolve issues related to procedural matters and the admissibility of evidence." However, Tenet does not tell us what "law" to which it makes reference. Precisely what "law" did Petitioner violate? Tenet does not say. Furthermore, the delegation by the by-laws to the hearing officer to resolve issues related to procedural matters is not a direct prohibition against the delivery of a brief to members of the Medical Hearing Committee.

Tenet then proceeds at pages 35 and 36 to analogize the Medical Hearing Committee process to a criminal jury trial. There are limits to analogies and in this particular case the Medical

Hearing Committee is not to be equated with a lay jury. The physicians are intelligent, knowledgeable, and not influenced by misstatements. Tenet claims that the brief submitted by Petitioner contained "a number of misstatements of rulings. . . ." Petitioner takes issue with Tenet's assertion that Petitioner misstated rulings. Of course, the irony here is that Tenet has misstated the Willick ruling of November 1, 2001. Tenet has misdescribed that ruling as a prohibition against the delivery of a brief. Moreover, as stated earlier in this Brief Tenet previously misrepresented that Petitioner had delivered a brief "ex parte" to the Medical Hearing Committee. Tenet now of course has to back off from that "misstatement."

Tenet states with no support in the record that Petitioner prejudiced the Medical Hearing Committee against Willick. At no time did Willick ever conduct a voir dire of the Medical Hearing Committee to find out if they were prejudiced by the brief. Only one doctor, Dr. Pleet, left a voice mail message which Tenet quoted in its letter requesting that Willick terminate the hearing. Dr. Pleet also spoke with Debbie Miller of the hospital. No effort was made by Willick to question Pleet or, indeed, any of the other members of the Committee. No effort was made by Willick to "correct" the alleged misstatements made by Petitioner.

D. THE APPELLATE BOARD HAD NO AUTHORITY TO UPHOLD THE TERMINATION OF THE HEARING BY WILLICK

Tenet relies heavily upon Hongsathavij v. Queen of Angels

Medical Center, 62 Cal.App.4th 1123 (1998). The case is not on point. The physician in that case was provided a hearing by the Medical Hearing Committee of the hospital (called Judicial Review Committee). The Committee determined that there was an insufficient basis to remove the physician and recommended a reinstatement. An administrative appeal was pursued by the Medical Center and the Board of Directors (acting as an appeal board) reversed the decision of the Judicial Review Committee. The Superior Court affirmed the Board and the Court of Appeal affirmed the Superior Court.

The critical distinction between the Hongsathavij case and the instant case is that here the Medical Hearing Committee rendered no decision. In contrast, in Hongsathavij, the Judicial Review Committee did render a decision. If Willick had no authority to terminate the hearing by himself, and he did not, the Appeal Board had no authority to uphold Willick's decision.

If a clerk or a bailiff decides that a defendant is guilty in a criminal case, instead of the judge or the jury, the Court of Appeal may not affirm the conviction on the ground that had the matter been submitted to the judge or the jury, either one would have found the defendant guilty and therefore the Court of Appeal may affirm. The Appeal Board was just as bound to follow the by-laws as was Willick. Neither one had the authority to disregard the by-laws and the California Business & Professions Code. While it may be true that what the Superior Court reviews in an administrative mandamus proceeding is the final decision of the

administrative agency, in this case the hospital appellate board, that board still must be required to follow the Business & Professions Code and the by-laws. If Willick had no authority to do what he did the Appeal Body had no authority to affirm his ruling.

E. PETITIONER WAS ENTITLED TO A HEARING AND DID NOT REFUSE TO PROVIDE RELEVANT EVIDENCE

Tenet cites Webman v. Little Company of Mary Hospital, 39 Cal.App.4th 592 (1995) for the proposition that a reappointment application may be denied if the physician refuses to comply with a request to produce documents. The Webman case is not on point for the same reason that the Hongsathavij case is not on point. In the Webman case the physician whose staff privileges were not renewed was provided a hearing by a Judicial Review Committee and that Committee rendered a decision. It was the decision of the Judicial Review Committee which was upheld by the Governing Board and then upheld by the Superior Court.

Again, Petitioner respectfully points out that here the Medical Hearing Committee was not given the opportunity to render a decision. According to the by-laws, the Governing Appeal Board in this case only had jurisdiction to review the written decision of the Medical Hearing Committee. No such decision was rendered in this case.

Arguably the Appeals Board did not even have jurisdiction because there was no written decision of the Medical Hearing

Committee that it could review. It was for this reason that Petitioner in the instant case brought his petition both under Code of Civil Procedure Section 1085 as well as 1094.5 given the uncertainty as to whether the Superior Court would be reviewing the decision of Willick or the decision of the Appeals Body. As stated in his Opening Brief, had Petitioner not appealed to the Appeals Body he most assuredly would have been attacked for failing to exhaust administrative remedies. See Bollengier v. Doctors Medical Center, 222 Cal.App.3d 1115 (1990) (doctor loses because he did not exhaust administrative remedies). Therefore, he has covered his bases. This Court may very well conclude that what is before this Court only is the decision of Willick terminating the hearing and not the decision of the Appeals Board. Petitioner submits the decision of this Court should be the same irrespective of whether it reviews Willick's decision or the Appeals Board's decision.

On the merits, Petitioner submits that Willick and the Board were both wrong when they concluded that Petitioner did not produce the records requested by Tenet. Thus, even disregarding the procedural distinction between the Webman case and this case (no written decision by the Medical Hearing Committee here, unlike Webman), factually the two cases are not the same because here, unlike Webman, the materials were produced by Petitioner's signing two releases to allow Tenet to get Petitioner's peer review records directly from Cedars Sinai. Moreover, the physician in Webman expressly refused to allow the Committee to review the records of the hospital. He would not authorize the release of the records.

Webman at 597-598.

F. WILLICK WAS BIASED AGAINST PETITIONER

Tenet does not deny that Willick was retained by Tenet. Tenet does not deny that its other attorneys, Christensen & Auer, requested that Tenet attorney Willick terminate the hearing.

Tenet cites Gill v. Mercy Hospital, 199 Cal.App.3d 889 (1988), but that case is no longer good law. It relied upon Andrews v. Agricultural Labor Relations Board, 28 Cal.3d 781 (1981), a State Supreme Court decision involving bias of hearing officers. Id., 199 Cal.App.3d at 911. The California Supreme Court later in Haas v. County of San Bernardino, 27 Cal.4th 1017, 1034-1035 (2002) rejected the dictum from the Andrews case. Thus, the bias of Willick must be viewed through the lens of the Haas case, not the Gill case. With the benefit of the Haas case it is now clear that Willick had an obvious conflict of interest. He could not expect to be rehired by Tenet or other hospitals if he ruled for physicians.

G. ON REMAND THE HEARING SHOULD BE BIFURCATED

The accusation regarding the circumcision and delivery cases which allegedly led to Petitioner's summary suspension was based on two cases, October 24, 2000 and November 5, 2000 (Tab 3 of Medical Executive Committee correspondence Volume I). These two "incidents" occurred almost one year after the Medical Executive Committee on January 11, 2000 recommended denial of Petitioner's application for reappointment. That recommendation, which

triggered a hearing to which Petitioner was entitled, long preceded the alleged medical incidents regarding the circumcision and the delivery. Petitioner should be entitled to an immediate hearing on the two cases because they are the only ones that involve Petitioner's medical competence. Even then there can be no claim of imminent danger to a patient. Imminent danger relates to general incompetence, alcoholism, or something else that demonstrates imminent danger to patients. It would be the type of conduct that would justify the suspension or revocation of a medical license.

It is clear Petitioner should be entitled to have his staff privileges reinstated while he is afforded a hearing just on these two cases. While Petitioner concedes that no findings were ever made with respect to these two cases, the evidence that was presented was insufficient as a matter of law to justify summary suspension.

Tenet wants to tie Petitioner up in a protracted hearing that involves allegations of rude behavior going back 13 years, long before his staff privileges were routinely renewed.

If Petitioner were guilty of rude conduct 13 years ago, in no way would that demonstrate that he is an imminent danger to the health or safety of patients. Nothing in the Business & Professions Code or case law bars a limited hearing on the issue of imminent danger with respect to a summary suspension.

Tenet cites a number of cases that have no bearing on the issue before this Court. For example, Kumar v. National Medical

Enterprises, Inc., 218 Cal.App.3d 1050 (1990) held that a doctor has no right to appeal a trial court order remanding the matter to the administrative level for further proceedings. In Kumar the Court of Appeal dismissed the appeal on the ground that it was not an appealable order.

Cipriotti v. Board of Directors, 147 Cal.App.3d 144 (1983) was decided before the Legislature adopted Business & Professions Code §§809 et.seq.. The case does not stand for any proposition of law relevant to this case.

Finally, Tenet relies upon Bollengier v. Doctors Medical Center, 222 Cal.App.3d 1115 (1990). Again, this case predates the adoption of Business & Professions Code § 809.1 et.seq.. As Petitioner pointed out in his Opening Brief this Court should decide that when a physician has his staff privileges summarily suspended and there is no evidence of imminent danger to patients immediate judicial review ought to be available. As the Bollengier case itself concedes, exhaustion of administrative remedies may be excused when the allegedly available administrative remedy is not adequate. Petitioner previously raised this precise issue in a discretionary writ proceeding, Mileikowsky v. Superior Court, B150037, but this Court denied discretionary review because Petitioner had not sought a preliminary injunction but rather only a temporary restraining order. The administrative record in this case includes a copy of the Petition filed by Petitioner in B150037 along with copies of the amicus briefs. Petitioner respectfully requests this Honorable Court to review that petition and also

suggests that if this Court is not ready to hold as a matter of law that judicial review is available immediately from a summary suspension order that at a minimum this Court should rule that it is unfair for a hospital to combine a summary suspension involving one or two medical issues with a lengthy administrative hearing involving allegedly rude conduct by a physician occurring many years ago. No statute bars a hospital from bifurcating this summary suspension issue from the non summary suspension issues. This is the perfect case because here we have at the most two cases involving medical issues (both of which were sham accusations made after staff privileges were rejected) and a lengthy series of accusations regarding alleged rude conduct. Petitioner, like other physicians in his position, ought not to have to wait the years it might take to unravel rude conduct allegations from 13 years ago. The Business & Professions Code does not preclude an immediate hearing on the medical issues followed by either prompt judicial review or, at a minimum, an administrative appeal to the Governing Board and then judicial review. In other words, while Petitioner would prefer immediate judicial review of a summary suspension, at a minimum he ought to be entitled to have judicial review after the Governing Board reviews the summary suspension.[9]

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[9] The necessity for prompt judicial review of administrative decisions when there is no stay in effect has been recognized by the Ninth Circuit Court of Appeals and other circuits, in First Amendment cases. See 4805 Convoy, Inc. v. City of San Diego, 183 F.3d 1108 (9th Cir. 1999). These "first amendment cases" are applicable to Petitioner because he was attacked by Tenet because of his "speech" (whistle blowing, filing lawsuits, and testifying are considered speech, see Code

There is no reason to combine the two hearings. That is why Petitioner believes that should this Honorable Court reverse the judgment below with directions to Tenet to resume the hearing that this Court should direct that the resumed hearing be limited to the two medical issues, which should allow the Medical Hearing Committee to render a decision within 3 days.

IV

CONCLUSION

Sometimes we get lost because we cannot see the forest because of the trees. The record is voluminous and accusations have been flung back and forth. But we should not lose sight of the big picture. What would motivate Tenet to take such aggressive action against Petitioner? Tenet wants to silence Petitioner, who has broken the code of silence and has revealed that what motivates Tenet is profit. Hospitals want to make sure that high income producing doctors have staff privileges.

The doctors who generate high income for hospitals are preferred over those doctors whose primary interest is in

---

of Civil Procedure §425.16 and cases construing it, Equilon Enterprises v. Consumer Cause, Inc., 29 Cal.4th 53 (2002); Navellier v. Sletten, 29 Cal.4th 82 (2002); People v. Ex rel Century Ins.v Building Permit Consultants, Inc., 86 Cal.App.4th 280, 285 (2000). The suspension without prompt judicial review not only violates his first amendment speech rights, it violates his right to earn a living without improper interference. Compare California Constitution, Article I, Section 8 (right to pursue profession may not be restricted because of sex, race, creed, color or national or ethnic origin). The lengthy suspension of a doctor's staff privileges essentially destroys the doctor's practice and the doctor.

protecting the well being of patients. Petitioner exposed the income generating practice of Tenet which does not serve the well being of its patients in his letter to Willick of March 21, 2002 (CT 463-466).

Petitioner pointed this out to the Superior Court below (CT 447, lines 21-27) but the Superior Court ignored the explanation.

Petitioner's analysis of Tenet, that what motivated Tenet to attack Petitioner so vigorously, was proven correct when the Department of Justice filed its action in the federal court against Tenet for fraud. See Clerk's Transcript, page 270, lines 19-27.

Tenet's attorneys know how to pursue physicians to get rid of them. Tenet developed a procedure for getting rid of "disruptive" physicians. Petitioner requested the trial court to take judicial notice of the advertisement which Tenet attorney Mark Kawa published in the Los Angeles Business Journal of October 14, 2002. (CT 364, lines 15-20). The hospital is encouraged to label the physician "disruptive" and then pursue such physician. That is what occurred here. This Honorable Court of Appeal has the ability to look at the big picture and recognize exactly what Tenet did to Petitioner. A published decision by this Court condemning the practice of hospitals of pursuing "disruptive" physicians to get rid of whistle blowers and physicians who testify as experts against hospitals will go a long way to solving the current health care crisis in this country.

For the foregoing reasons, Petitioner respectfully urges this Honorable Court to reverse the judgment below with directions that

the Superior Court issue a writ of mandate directing Tenet to resume the hearing limited to the two medical cases. Also, this Court should direct the Superior Court to order Tenet to allow the Medical Hearing Committee to select its own Chairman or to provide for a replacement for Mr. Willick mutually agreeable to both sides.

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Attorney for Petitioner &
Appellant

BEFORE THE HEARING COMMITTEE OF THE MEDICAL STAFF

OF ENCINO-TARZANA MEDICAL CENTER

IN THE MATTER OF)
)
GIL N. MILEIKOWSKY, M.D.)
)

CONFIDENTIAL

CERTIFIED COPY

C O N F I D E N T I A L

TRANSCRIPT OF PROCEEDINGS

Tarzana, California

Wednesday, October 18, 2000

Reported by:
ANITA NOBLE
CSR No. 1565
JOB No. 836295

We are going to mark this document as Exhibit No. 6.

(Exhibit No. 6 was marked for identification by the court reporter.)

DR. WULFSBERG: May I make a statement?

THE HEARING OFFICER: Please.

DR. WULFSBERG: It's the position of the Medical Executive Committee, and as a representative I am supporting that position, that any documents that are presented tonight may not be received. They are not within the time frame that was authorized. They are not within your rulings. This is a new document, so any documents that would be presented this evening cannot be received by the medical staff. They are out of time. They indicate that we would have to go over this document in its entirety, to understand it completely. These documents were asked for as long ago as June; they were asked for again in August. They were subsequently asked for on three separate specific occasions, and they are now appearing this evening. So I believe that these documents are improperly presented this evening and should not be taken as evidence.

THE HEARING OFFICER: I understand your point, Dr. Wulfsberg. What we are going to do this evening is consider the documents for the purpose for which

FROM LATHAM & WATKINS (FRI) 4. 16' 99 10:02 ST. 10:01/NO.

EXHIBIT [redacted]
6

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April 16, 1999

FILE No. [illegible]

VIA FACSIMILE

Paul M. Hittelman, Esq.
9100 Wilshire Blvd., East Tower, Suite 601
Beverly Hills, CA 90212-1315

Re: In the Matter of Gil Mileikowsky, MD

Dear Paul:

Following my discussion with my client, this letter is in further response to your letters dated April 1, 1999 and April 2, 1999 requesting approval for release by Dr. Mileikowsky to other facilities of copies of charts identified in the Notice of Charges and other records pertaining to the above-referenced proceedings at Cedars-Sinai Medical Center.

Request for authorization for Dr. Mileikowsky to release patient records to other hospitals. Section 56.10 of the California Civil Code governs the release of patient medical information. Section 56.10(a) generally requires patient consent to any release of personal medical information. Subdivisions (b) and (c) state exceptions to the general rule. None of the exceptions to the requirement for patient consent apply to Dr. Mileikowsky's request that he release Cedars-Sinai patient records to other facilities in which he is undergoing credentialing. Accordingly, Cedars-Sinai is not in a position to agree to release of the charts by Dr. Mileikosky to another hospital without its prior receipt from Dr. Mileikowsky of a lawful authorization from each affected patient.

Request for authorization to release records generated by the pending peer review process at Cedars-Sinai pertaining to Dr. Mileikowsky. The records and proceedings which have

been generated pertaining to on-going peer review of Dr. Mileikowsky at Cedar-Sinai are protected by California Evidence Code Section 1157. Dr. Mileikosky's request to release unspecified documents generated during this process at the Medical Center and protected by Section 1157 is denied for purposes of avoiding any possible waiver of the Section 1157 privilege *and* in meeting the expectations of Medical Staff participants in the process at Cedars-Sinai that all steps will be taken to assure the confidentiality of the proceedings. Cedars-Sinai's refusal to authorize release of documents generated by its peer review process does not preclude Dr. Mileikowsky from personally responding in writing and orally to questions posed by any other Medical Staff regarding his status at Cedars-Sinai. Additionally, assuming that an appropriate authorization and release has been executed by Dr. Mileikowsky and received by Cedars-Sinai, the Medical Center will respond as appropriate directly to authorized representatives of other hospitals regarding Dr. Mileikowsky's status at Cedars-Sinai.

If I can provide any follow-up, please let me know.

Regards,

Gordon Simonds
of LATHAM & WATKINS

cc: Bonnie Galt, Esq.
Fred Wolf
Deborah Voigt
(via facsimile)

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ECJ

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June 25, 1999

Refer Our File No.
9778-16

VIA FACSIMILE AND
FIRST CLASS MAIL

Paul M. Hittelman, Esq.
Law Offices of Paul M. Hittelman
9100 Wilshire Boulevard, East Tower
Los Angeles, California 90212-3415

Re: Gil Mileikowsky, M.D.

Dear Paul:

On May 24th I sent you a letter enclosing a liability waiver form from Cedars-Sinai Medical Center ("Cedars"). I requested that you have Dr. Mileikowsky complete the form and return it to Cedars at his earliest convenience, with a copy to Debbie Miller at Encino-Tarzana Regional Medical Center's Medical Staff Services Office. Having not received a response, on June 2, 1999 I sent you another letter requesting the same thing.

On June 11, 1999 you wrote me back and provided me with a signed copy of Encino-Tarzana's release provision contained in Dr. Mileikowsky's application. Encino-Tarzana forwarded your letter and a copy of the executive release provision to Cedars.

Yesterday Encino-Tarzana's Medical Staff Services Office received the enclosed response from Cedars. As you will note, Cedars will not release any information until Dr. Mileikowsky executes Cedars' release. Furthermore, Encino-Tarzana cannot process Dr. Mileikowsky's application until such information is received.

Encino-Tarzana requests for the third time that Dr. Mileikowsky execute the enclosed release and immediately return it to Ms. Debbie Miller. More than a month has passed since Encino-Tarzana requested such action.

Law Offices
ERVIN, COHEN & JESSUP LLP

I look forward to your client's prompt attention to this matter.

Sincerely,

Mark T. Kawa

cc: Debbie Miller (via telecopy)

CEDARS-SINAI MEDICAL CENTER

June 24, 1998

Tarzana Hospital
18321 Clark Street
Tarzana, CA 91356

Re: *Gil Mileikowsky, MD*

To Whom It May Concern:

We are in receipt of your request for a verification letter for Dr. Gil Mileikowsky. Although you have sent us a release from liability document that has been signed by the physician, it does not meet our basic requirements. The following page is the Medical Staff Office's routine "release from liability form." Please have Dr. Mileikowsky sign and date it. As soon as you return it to me, we will respond to your request. You may fax the release to the attention of Deborah C. Voigt, Medical Staff Services, at 310/967-0132.

Thank you.

Sincerely,

Neil E. Romanoff, MD, MPH
Vice President for Medical Affairs

NER/dcv

Attachment

via FAX: 818-609 22-88

CEDARS-SINAI MEDICAL P.O. Box 48750, Los Angeles, California 90048-0750
8700 Beverly Boulevard, Los Angeles, California 90048-1865
Operator (310) 855-5000

CEDARS-SINAI MEDICAL CENTER

_____, 1999

Office of Medical Staff Services
Cedars-Sinai Medical Center
8700 Beverly Boulevard, Room 2211
Los Angeles, California 90048

As a member of the Medical Staff, I hereby authorize Cedars-Sinai Medical Center ("Medical Center"), its agents, employees, representatives and Medical Staff to release to other hospitals and their medical staffs, other health care providers, health care service plans and other third party payors, liability insurers, and any other requesting party, and their agents, employees, and representatives (collectively, "Requesting Institution"), any and all information regarding my professional competence and character, including without limitation, credentialing information, and other documentation requested by the Requesting Institution, in connection with the evaluation of my qualifications for employment or medical staff membership and privileges at the Requesting Institution.

I am informed and acknowledge that federal and state laws provide immunity protections to certain individuals and entities for their acts and/or communications in connection with the provision of such information to all persons and entities engaged in quality assessment, peer review and credentialing activities, and for purposes of evaluating the qualifications of healthcare providers, to the extent that those acts and/or communications are protected by federal or state law.

In addition to the provisions of any other release previously or thereafter signed by me, I specifically and without qualification release the Medical Center, its directors, officers, agents, employees, representatives, servants, and its Medical Staff, and their representatives, from any and all claims and liabilities that might be incurred or asserted in connection with the communication, provision and/or review of any such information.

The foregoing shall remain in full force and effect for a period of two (2) years from the date set forth below, is given for adequate consideration, and is irrevocable. I agree that the foregoing does not obligate the Medical Center, its agents, employees, representatives and Medical Staff to release any information.

By: _____ _____
(signature) *Date*

Name: _____, M.D.
(Please print name)

g:\legal\forms\medical staff release.doc

LAW OFFICES
PAUL M. HITTELMAN
A PROFESSIONAL CORPORATION

9100 WILSHIRE BOULEVARD
EAST TOWER - SUITE 601
BEVERLY HILLS, CALIFORNIA 90212-1415
(310) 888-7790 FAX (310) 888-7793

August 13, 1999

Murray Mazur, M.D.
Chairman - Credentials Committee
c/o Medical Staff Services
Encino-Tarzana Regional Medical Center
Tarzana Hospital
18321 Clark Street, Sixth Floor
Tarzana, California 91356

Re: *Reappointment Application of Gil Mileikowsky, M.D.*

Dear Dr. Mazur:

At the request of Dr. Mileikowsky, there is attached hereto a signed copy of the Cedars-Sinai Medical Center Release Form referred to in your letter of August 10, 1999 to Dr. Mileikowsky.

Very truly yours,

PAUL M. HITTELMAN
~~A PROFESSIONAL~~ CORPORATION

PAUL M. HITTELMAN

Enclosure as noted
cc: Mark T. Kawa, Esq.

CEDARS-SINAI MEDICAL CENTER

8/11/ 1999

Office of Medical Staff Services
Cedars-Sinai Medical Center
8700 Beverly Boulevard, Room 2211
Los Angeles, California 90048

As a member of the Medical Staff, I hereby authorize Cedars-Sinai Medical Center ("Medical Center"), its agents, employees, representatives and Medical Staff to release to other hospitals and their medical staffs, other health care providers, health care service plans and other third party payors, liability insurers, and any other requesting party, and their agents, employees, and representatives (collectively, "Requesting Institution"), any and all information regarding my professional competence and character, including without limitation, credentialing information, and other documentation requested by the Requesting Institution, in connection with the evaluation of my qualifications for employment or medical staff membership and privileges at the Requesting Institution.

I am informed and acknowledge that federal and state laws provide immunity protections to certain individuals and entities for their acts and/or communications in connection with the provision of such information to all persons and entities engaged in quality assessment, peer review and credentialing activities, and for purposes of evaluating the qualifications of healthcare providers, to the extent that those acts and/or communications are protected by federal or state law.

In addition to the provisions of any other release previously or hereafter signed by me, I specifically and without qualification release the Medical Center, its directors, officers, agents, employees, representatives, servants, and its Medical Staff, and their representatives, from any and all claims and liabilities that might be incurred or asserted in connection with the communication, provision and/or review of any such information.

The foregoing shall remain in full force and effect for a period of two (2) years from the date set forth below, is given for adequate consideration, and is irrevocable. I agree that the foregoing does not obligate the Medical Center, its agents, employees, representatives and Medical Staff to release any information.

By: [signature] 8/11/99
(Signature) (Date)

Name: GIL MILEIKOWSKY M.D.
(Please print name)

[illegible]

2ND Civil 168705

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GIL N. MILEIKOWSY, Plaintiff and Appellant vs. TENET HEALTHSYSTEM, ENCINO TARZANA REGIONAL MEDICAL CENTER, A CALIFORNIA CORPORATION, Defendant and Appellee	2nd Civil No. B186705 L.A.S.C. BS079131

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 14(c)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Roman type including footnotes and contains approximately 13,712 words which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 5, 2004

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Plaintiff-Appellant

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 2115 Main Street, Santa Monica, California 90405.

On the date shown below I served the foregoing document described as:

APPELLANT'S REPLY BRIEF 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 Defendants

Mark T. Kawa
101 N. Pacific Coast Highway
Suite 100
Redondo Beach, CA 90277 Defendants

Clerk
Supreme Court
312 N. Spring Street
Los Angeles, CA 90013
(5 copies)

Andrew J. Kahn Amicus
Davis, Cowell & Bowe
595 Market St., 14th Fl.
San Francisco, CA 94105

Hon. David P. Yaffe, Judge
Superior Court
Department 86
111 N. Hill Street
Los Angeles, CA 90012

I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Santa Monica, California on March 8, 2004

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 Santa Monica, California on the 8 day of March 2004.

Judith A. Burgdorf

JUDITH A. BURGDORF

Court of Appeal, Second Appellate District

No. B168705

IN THE SUPREME COURT OF CALIFORNIA

GIL MILEIKOWSKY, M.D.

v.

TENET HEALTHSYSTEMS, et al.

The above entitled matter, now pending in the Court of Appeal, Second Appellate District, is transferred from Division Two to Division Four.

Chief Justice