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May 31, 2005

The Honorable Chief Justice Ronald M. George
Honorable Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, California 94102-4712

Re: Dr. Gil Mileikowsky, M.D. v. Tenet HealthSystems
2d Dist., Div. 4, Case No. B159733
Support for Review

Dear Chief Justice George and Associate Justices:

The Association of American Physicians & Surgeons, Inc. ("AAPS")[1] urges this Court to grant the Petition for Review ("Petition") recently filed in the above referenced case by Appellant Dr. Gil Mileikowsky ("Appellant" or "Dr. Mileikowsky").

This case merits review because it involves not only an issue of first impression, whether a stipulation signed by counsel will substitute for an order compelling discovery, for purposes of terminating sanctions (as noted in Appellant's Petition), but because, even if a stipulation could suffice for that purpose, this case also presents important questions questions of law concerning the inherent authority of litigation counsel and the attorney-client relationship in the context of litigation (California Rules of Court, Rule 28(b)(1)), namely: (1) absent actual consent from the client, does trial counsel have

[1] AAPS is a non-profit, national group of thousands of physicians founded in 1943. For over 60 years, it has defended the practice of private and ethical medicine. AAPS is dedicated to defending the patient-physician relationship and free enterprise in medicine. AAPS is one of the largest physician organizations that is almost entirely funded by physician membership, including many in California. This enables it to speak directly on behalf of physicians and their patients. AAPS files amicus briefs in cases of high importance to the medical profession, like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court citing AAPS frequently); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997). AAPS has also submitted an amicus brief in support of Dr. Mileikowsky's appeal in *Mileikowsky v. Tenet*, Case No. B168705 and expects to also urge review of that opinion in the near future.

inherent authority to enter into a stipulation which lays the foundation for a possible summary, non-merits, and punitive dismissal of the client's case; and (2) if client authorization must first be obtained, must such authorization be by way of client's "informed consent"?

If this Court determines that a stipulation can substitute for a predicate order compelling discovery for purposes of later terminating sanctions, that squarely poses the issue of validity of the stipulation since, as the record plainly reflects, the client (Dr. Mileikowsky) did not give consent to the stipulation which, as was plainly foreseeable, created an imminent risk that the entire case would be dismissed without trial on the merits. Such a stipulation, involving the potential involuntary dismissal of the case without regard to the merits, is a highly significant event and one that ought not to be within the inherent authority of the litigation attorney. It cannot reasonably be classified as merely "procedural."

This is an area of the law that is relatively not well developed, as is dramatically revealed by the paucity of authority cited by the Court of Appeal in reaching a decision on an issue of first impression, and thus represents an issue that should be addressed by this Court in order to clarify the rights of litigants and provide guidance to trial lawyers. For sake of convenience we quote from the relevant discussion in the 2nd District Court of Appeal's Opinion ("Opinion"):

> "Since there is no dispute that the stipulation of January 2002 was never submitted to the court for signature, we agree that there was no order requiring Dr. Mileikowsky to respond to the specific interrogatories and requests for production of documents that were the subject of the dispute. The issue becomes whether the stipulation can be seen as tantamount to the requisite order. We see no reason why it cannot.
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> "A stipulation is '[a]n agreement between opposing counsel . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,' (Ballentine, Law Dict. (1930) p. 1235, col. 2) and serves 'to obviate need for proof or to narrow [the] range of litigable issues' (Black's Law Dict. (6th ed. 1990) p. 1415, col. 1)." (*County of Sacramento v. Workers' Comp. Appeals Bd.* (2000) 77 Cal.App.4th 1114, 1118.) "'A stipulation in proper form is binding upon the parties if it is within the authority of the attorneys.'" (*Bowden v. Green* (1982) 128 Cal.App.3d 65, 72.) "'The attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action . . . . "In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and

> among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client."'" (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403-404.) A stipulation may result in impairment of a party's rights. "But a poor outcome is not a principled reason to set aside a stipulation by counsel." (*County of Sacramento v. Workers' Comp. Appeals Bd., supra*, 77 Cal.App.4th at p. 1121.)
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> The stipulation signed by counsel for the parties here was designed to avoid the "trouble and expense" of yet another hearing on Dr. Mileikowsky's failure to respond to simple discovery requests. Like the order that would have issued, the stipulation made clear that respondent "may file a motion for sanctions, including but not limited to, issue, evidence or terminating sanctions, if they do not receive [Dr. Mileikowsky's] supplemental discovery responses by [February 15, 2002]." By signing the stipulation, counsel essentially waived Dr. Mileikowsky's right to insist on a formal order compelling responses as a precursor to an issuance of evidentiary, issue, or terminating sanctions. That the court and referee did not sign the stipulation does not negate the fact that this was the parties' agreement. In view of the parties' stipulation, the referee and the court did not err in treating the stipulation as the order required by sections 2030 and 2031." (underscoring added)

We know from this Court's Decision in *Blanton v. Womancare*, one of only two cases cited by the Court of Appeal in dealing with this issue of first impression (though not meaningfully discussed in the opinion, as one can see from the extended quote above and the Opinion), that an attorney does not have the inherent right to stipulate that the client's dispute may be resolved by binding arbitration and thereby waive a constitutional right to a jury trial. By contrast, we know that lawyers do have authority to enter into stipulations involving extensions of time to respond to pleadings or discovery, and many other "procedural" matters. The dividing line between "procedure" and "substantive" rights, between the routine and the extraordinary, is not so easy to divine, especially when there are no clear guidelines. The Opinion here crosses the line and creates a danger that lawyers can take it upon themselves to make arrangements, perhaps for their own convenience, which creates serious risks for the client, all without the knowledge or consent of the client. Under no circumstances does it represent a reasoned nor reasonable application of the principles enunciated by this Court in *Blanton*.

If this Court agrees to grant review and concludes that counsel lacked inherent authority to enter into the stipulation, AAPS urges this Court to also address the nature of the consent to be obtained. AAPS members, as physicians, when seeking patient consent to perform surgery or take other potentially risky procedures, are required by California law to obtain the patient's "informed consent." AAPS submits that to the extent attorneys are required to obtain authorization based on Blanton, such must likewise be based on "informed consent." AAPS does not believe there is any reason to discriminate between the rights of patients and clients, nor the professional obligations of physicians and lawyers.[2]

However, while the doctrine of informed consent, as applied to physicians, has been extensively developed in California[3] over more than three decades[4], and has been extended to other areas involving fundamental personal rights[5], there is a paucity of

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[2] There is a powerful irony in Dr. Mileikowsky's underlying case, as his summary suspension by the Tenet-owned hospital followed in the wake of his having risked his professional standing and career by agreeing to give expert testimony against two fellow physicians at the Tenet-owned facility, Tarzana Regional Medical Center, in *Donna Head et al v. Michael Vermesh, M.D., et al*, Los Angeles Superior Court Case No. LC 046 932—*testimony that at its core involved the very issue of informed consent*, i.e., the failure of the physicians to obtain informed consent from their female patient, i.e., the failure to inform her that they were proposing a procedure (surgical removal of her Fallopian tubes) which would terminate her ability to bear children, and their later discarding of three of the patient's embryos without her consent. Dr. Mileikowsky's June 28, 2000 declaration in the *Head* proceedings is a part of the record below.

[3] The concept of informed consent in refusing medical treatment goes back to the U.S. Supreme Court's decision in *Union Pacific Railway Co. v. Botsford* (1891) 141 U.S. 250, 251, and as applied to consent to medical procedures was first enunciated in an opinion authored by Justice Cardozo in *Schloendorff v. Society of New York Hospital* (1914) 211 N.Y. 125.

[4] The seminal California case is this Court's opinion in *Cobbs v. Grant* (1972). The history of the concept as applied to California physicians is well summarized by this Court in *Conservatorship of Wendland* (2001) 26 Cal.4th 519. Over the years, the standard as been codified for various purposes, including the Lanterman-Petris-Short Act. See California Welfare & Institutions Code § 5326, which provides a check list of information which "shall be given to the patient in a clear and explicit manner." *See In re Qawi* (2004) 32 Cal.4th 1, 18.

[5] Informed consent is applied to birth parents who give up their children for adoption, as noted by this Court recently in *Sharon S. v. Superior Court* (2004) 31 Cal.4th 417, 429, despite the fact that Family Code § 8604 does not qualify the term "consent".

authority for the application of this doctrine to lawyers (outside the area of conflicts rules in the California Rules of Professional Conduct)[6].

This Court should grant review in order to rectify this situation, bring parity among professions, provide protection to clients and guidance to California trial lawyers, indeed the entire California bar.

This Court's seminal decision in *Cobbs v. Grant*, *supra*, establishing the doctrine of informed consent, and rejecting standard of medical care as the defining standard for disclosures to a patient antecedent to performing an invasive procedure, rings just true when one considers the relationship of lawyer and client:

> "Preliminarily we employ several postulates. The first is that patients are generally persons unlearned in the medical sciences and therefore, except in rare cases, courts may safely assume the knowledge of patient and physician are not in parity. The second is that a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment. The third is that the patient's consent to treatment, to be effective, must be an informed consent. And the fourth is that the patient, being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arms-length transactions.
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> From the foregoing axiomatic ingredients emerges a necessity, and a resultant requirement, for divulgence by the physician to his patient of all

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[6] Rule 3-310 rules call for "written informed consent" for purposes of seeking client consent to representation where actual or potential conflicts exist as between or among multiple clients, or with former clients, or with non-clients who pay the lawyer's fees. Such consent is also required where a trial lawyer anticipates being a material witness in a jury trial. Rule 5-210. Though the exact phrase is not invoked in Rule 3-300, it is apparent that the same standard applies, as this Court recently noted in *Fletcher v. Davis* (2004) 33 Cal.4th 61, 69. Rule 3-310(A)(2) defines "written informed consent" as "the client's or former client's written agreement to the representation following written disclosure." The term "disclosure" is defined in (A)(1) as "informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client." Finally, "informed consent of the client to the fee" is one of the factors relevant to determining whether a fee is "unconscionable" under Rule 4-200. **Our research discloses no instance where the doctrine of informed consent has been applied in a case involving the lawyer-client relationship outside these conflicts rules.**

> information relevant to a meaningful decisional process. In many instances, to the physician, whose training and experience enable a self-satisfying evaluation, the particular treatment which should be undertaken may seem evident, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which he believes his interests lie. To enable the patient to chart his course knowledgeably, reasonable familiarity with the therapeutic alternatives and their hazards becomes essential." (footnotes omitted).

Most clients are generally unlearned in the law and therefore utterly reliant on their counsel. Likewise, clients, no less than patients, have the right to exercise control over their case. Self evidently, lawyers are fiduciaries. Finally, if consent is required, it should be informed, that is, as this Court wrote in *Cobb*, the attorney must "divulge... all information relevant to a meaningful decisional process...." It is no less the prerogative of the client "to determine for himself the direction in which he believes his interests lie."

On behalf of AAPS, we submit that an attorney seeking client authorization for a stipulation so laden with risk must observe the distinction between his or her duty of disclosure and the client's right to make the ultimate decision. Again, we are guided by this Court's pronouncement in *Cobb*:

> "A medical doctor, being the expert, appreciates the risks inherent in the procedure he is prescribing, the risks of a decision not to undergo the treatment, and the probability of a successful outcome of the treatment. But once this information has been disclosed, that aspect of the doctor's expert function has been performed. The weighing of these risks against the individual subjective fears and hopes of the patient is not an expert skill. Such evaluation and decision is a nonmedical judgment reserved to the patient alone." (8 Cal.3rd at 243).

So it was here. Dr. Mileikowsky, as a client, had a right to understand the relevant risks, and once that function was performed, then it was a matter of his personal judgment as to the best course of action. It was, most assuredly, not a matter of simply avoiding "trouble and expense", as the Court of Appeal suggested, ignoring (as did Dr. Mileikowsky's lawyer, evidently), the extreme risk involved in the stipulation.[7]

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[7] In effect, Dr. Mileikowsky was making a "waiver" of the right to court review—i.e., the issuance of a predicate order. Obviously, by law, a waiver must be knowing and intelligent, indistinguishable from the demands of informed consent.

A review of California case law addressing the issue of informed consent in the context of lawyer-client cases leaves no doubt that there is a critical need to provide clear guidance to the legal profession. All of the decisions, by this Court and the Court of Appeals, revolve around conflicts rules contained in the California Rules of Professional Conduct[8], not the overarching, common law fiduciary duties of lawyers.

Nor have they addressed the concept of informed consent in the context of lawyers in their role as counselors, as part of the concept of standard of care in advising clients on alternative courses of action. Lawyers are required to exercise "informed judgment" in advising clients on debatable or unsettled issues of law (*Smith v. Lewis* (1975) 13 Cal.3d 349, 360). Should not the lawyer also ensure that the client's consent to the proposed course of action, also be "informed"? One court seems to have rejected the notion at least in the limited circumstance of whether there is a duty to advise a client that an issue of law is indeed unsettled. In *Davis v. Damrell* (1981) 119 Cal. App. 3d 883, 889, summary judgment was upheld where the attorney's advice on an unsettled proposition of law, though ultimately determined incorrect, was fully informed. The client's alternative contention was that she had the right to determine whether to pursue the issue of whether she had a community property interest in her husband's military pension, and the attorney had a duty to disclose the unsettled nature of the law. The First District disagreed:

> "We reject appellant's further contention that given the unsettled state of the law at the time the advice was rendered, respondent was under a duty to so advise his client in order to permit an informed choice whether to litigate the claim at trial and on appeal. While we recognize that an attorney owes a basic obligation to provide sound advice in furtherance of a client's best interests (see ABA Code of Prof. Responsibility, canon 7, EC 7-7, 7-8), such obligation does not include a duty to advise on all possible alternatives no matter how remote or tenuous. To impose such an extraordinary duty would effectively undermine the attorney-client relationship and vitiate the salutary purpose of the error-in-judgment rule. *As a matter of policy, an attorney should not be required to compromise or attenuate an otherwise sound exercise of informed judgment with added advice concerning the unsettled nature of relevant legal principles.* Under the venerable error-in-judgment rule, if an attorney acting in good faith exercises an honest and informed discretion in providing professional advice, the failure to anticipate correctly the resolution of an unsettled

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[8] *See, e.g., Fletcher v. Davis, supra*; *People ex rel Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135; *Flatt v. Superior Court* (1994) 9 Cal.4th 275.

> legal principle does not constitute culpable conduct. *To require the attorney to further advise a client of the uncertainty in the law would render the exercise of such professional judgment meaningless.* "The fact that greater prudence might have caused him to initiate what he believed to be a futile [appeal] . . . cannot, in lieu of a showing that he should have known it to be otherwise, now cause him to be subjected to a judgment of malpractice." (*Sprague* v. *Morgan, supra*, 185 Cal.App.2d 519, 523.) In short, the exercise of sound professional judgment rests upon considerations of legal perception and not prescience." (italics added)

It is one thing not to be prescient, but quite another to withhold from the client material information which may lead a client to elect to assert a claim which could well succeed. The *Davis* Court's summary dispatch of the issue of client advice and disclosure, without pertinent authority and confusing the two separate issues of the duty to anticipate future developments in the law and the duty to advise the client that the unsettled law means there is an opportunity to assert a claim, while it might explain the lack of citation in later cases, should be rejected and the law clarified.[9]

In *Blanton*, in her concurring opinion, Chief Justice Bird urged the Court to address the broader issue of the "allocation of decision-making authority between client and attorney," acknowledging it was a "difficult problem." 38 Cal.3d at 653-54. "Clear guidance on the scope of an attorney's implied and apparent authority and the legal consequences of the allocation of that authority would benefit both attorneys and clients." *Id.* at 654. It is no less true today.

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[9] The issue was posed, but ultimately it was not necessary to address it in this Court's later decision in *Aloy v. Mash* (1985) 38 Cal.3d 413. Like attorney Lewis in *Smith v. Lewis*, the Mash's lack of due diligence in advising on the client's community property rights to her husband's military pension was palpable. Plaintiff's expert in the case had opined in a declaration in opposition to defendant's motion for summary judgment that the standard of care called for family law attorneys to pursue such community property rights, or at least disclose the possibility to the clients. 38 Cal.3d at 417. Having concluded that there was a triable issue on negligence, this Court addressed causation, noting that there was ample reason to think that if the client had asserted community property rights 10 years earlier, she could well have succeeded since the U.S. Supreme Court decision in *McCarty v. McCarty* was not retroactive. Id. at 421-22.

Accordingly, AAPS urges the Court to take up review, uphold the right of a client to authorize a stipulation of such import as was presented here, and establish uniform disclosure requirements among the professions by clearly extending the doctrine of informed consent to the legal profession.

Very truly yours,

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PROOF OF SERVICE

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

On June 6, 2005, I served the following described as: **May 31, 2005 Amicus letter to Honorable Chief Justice Ronald M. George, California Supreme Court** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

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

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

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

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

[ ] (FEDERAL) I declare that I am employed in the offices of a member of this Court at whose direction the service was made.

Executed on June 6, 2005, at Los Angeles, California.

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