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ENDORSED
AUG 10 2004
By C. Miller, Deputy

Attorney for Applicant and Proposed Amicus Curiae
ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO**

GIL NATHAN MILEIKOWSKY, M.D.,) Case No: 04CS00969
)
) **APPLICATION FOR LEAVE TO FILE**
) **AMICUS CURIAE BRIEF IN SUPPORT**
) **OF PETITIONER BY ASSOCIATION OF**
) **AMERICAN PHYSICIANS &**
) **SURGEONS, INC.**
)
) (ASSIGNED TO Judge Raymond Cadei)
)
) Department 25

vs.
MEDICAL BOARD OF CALIFORNIA,
Respondent.

1 **TO THE HONORABLE COURT AND THE ABOVE ENTITLED ACTION:**

2 The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit,
3 national group of thousands of physicians founded in 1943. For over 60 years, it has defended the
4 practice of private and ethical medicine. AAPS is dedicated to defending the patient-physician
5 relationship and free enterprise in medicine. AAPS is one of the largest physician organizations
6 that is almost entirely funded by physician membership, including many in California. This
7 enables it to speak directly on behalf of physicians and their patients. AAPS files amicus briefs in
8 cases of high importance to the medical profession, like this one. *See Sinaiko v. Medical Board of*
9 *California*, No. 99-CS-02275 (Cal. Super. Ct., Ronald Robie, J.); *see also Stenberg v. Carhart*, 530
10 U.S. 914 (2000) (U.S. Supreme Court citing AAPS frequently); *United States v. Rutgard*, 116 F.3d
11 1270 (9th Cir. 1997).

12 AAPS opposes unjust interference in the practice of medicine by medical boards
13 particularly where, as here, there has been retaliation against the physician for complaining at a
14 hospital. Hospitals are notorious in initiating peer reviews that are motivated by economic or other
15 improper factors rather than genuine concern about patient care, and in particular retaliating against
16 Dr. Mileikowsky here. AAPS brings this application and seeks leave to make the amicus curiae
17 submission set forth below in order to emphasize the need to protect Dr. Mileikowsky and others
18 like him from arbitrary and capricious action by the Medical Board, as prompted by the hospital.

19 AAPS hereby applies for leave as *amicus curiae* to present the following:

20 1. AAPS submits that the Medical Board of California ("Medical Board") has ordered
21 a psychiatric examination of Dr. Gil Mileikowsky ("Dr. Mileikowsky") in an arbitrary and
22 capricious manner. As reflected in the record in support of the Petition, Dr. Mileikowsky has done
23 nothing to jeopardize the health of any patient that would justify a state-mandated order of a
24 psychiatric evaluation. He has not been sued for malpractice in over 14 years. He is not aware of
25 any patient complaints about his practice. The Medical Board is apparently acting without a single
26 patient complaint about Dr. Mileikowsky.

1 2. It was Dr. Mileikowsky who spoke up and commendably reported the improper
2 destruction of the embryos of a couple and agreed to testify against the Tenet-owned hospital
3 Encino Tarzana Regional Medical Center in a malpractice proceeding. The Medical Board's Order
4 dated June 24, 2004 ignores these pivotal facts and cites no support for ordering a psychiatric
5 evaluation. The Decision of Ronald L. Moy, M.D., dated July 16, 2004, further fails to cite any
6 support for so draconian an Order.

7 3. The record further reflects that Dr. Mileikowsky complained to the Medical Board
8 as early as February 2002 about improprieties at his hospital. Many months passed, and yet neither
9 the Board nor the Attorney General took any disciplinary or remedial action against physicians at
10 that hospital. On November 4, 2002, Dr. Mileikowsky complained further to the Medical Board
11 that two physicians at that hospital removed a patient's fallopian tubes without consent and that
12 frozen embryos had been improperly destroyed. This was a serious allegation of battery, yet, once
13 again, neither the Medical Board nor the Attorney General took any action against those
14 responsible. Instead, it has taken this unjustified action against Dr. Mileikowsky.

15 4. Business and Professions Code § 820 only allows state-mandated psychiatric
16 examinations when a physician "may be unable to practice his or her profession safely because the
17 [physician's] ability to practice is impaired due to mental illness, or physical illness affecting
18 competency, [in which case] the licensing agency may order the [physician] to be examined by one
19 or more physicians and surgeons or psychologists designated by the agency." To take such
20 extreme action, the Medical Board must make a showing of a threat to safety due to mental
21 impairment. The Medical Board cannot willy-nilly order any physician to undergo a psychiatric
22 examination. Here, Tenet's 805 Reports do not document any basis for believing such a threat
23 exists, much less that Dr. Mileikowsky has abused drugs.

24 5. Here, Dr. Mileikowsky has practiced for several years while the Medical Board has
25 considered his matter. By the Medical Board's own actions, it does not genuinely feel there is a
26 threat to patient safety. Nor does it give any reason in its order explaining why it thinks there may
27 be a threat to safety posed by Dr. Mileikowsky. An expert urologist reviewed the relevant
28 procedure, a circumcision, and said it was performed properly. The hospital's medical expert was

1 someone who had never done one himself. In any court proceeding, such purported expert
2 testimony would not even be permitted.

3 6. In addition, the Medical Board does not remotely suggest any impairment by this
4 physician. That is because there is none. Dr. Mileikowsky acted courageously in alerting the
5 board to misconduct at the hospital and should not be subjected to a psychiatric examination
6 because of it.

7 7. AAPS is all too familiar with the use of state-mandated psychiatric examinations to
8 unfairly destroy good physicians. The state selects and pays the psychiatrist, who is not then likely
9 to bite the hand that feeds it. AAPS has painfully watched physicians agree to seemingly
10 innocuous psychiatric examinations paid by their adversaries, only to be shocked at how the
11 evaluation departs from the standard of care in finding impairments where none exist. These tragic
12 misuses of psychiatric examinations to retaliate against physicians have become a national
13 calamity for medicine.

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

24 9. Dr. Harry Horner is a physician who had to fight all the way to the Supreme Court
25 of his State of Virginia to obtain reinstatement after retaliation for complaining about poor care at
26 the hospital. See *Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse*
27 *Servs.*, 2004 Va. LEXIS 83 (Va., June 10, 2004). Though difficult to glean from the reported
28 decision, Dr. Horner was exposing the poor care of patients when an administrator at Western State

1 Hospital charged him with violating another employee's right to confidentiality. Similar to the
2 fatuous charges against Dr. Mileikowsky here, the administration of Dr. Horner's hospital added
3 charges that he was guilty of abuse and neglect because he failed to wear gloves while dressing a
4 wound on a patient's foot. See Bob Stuart, "Court Rules for Whistleblower," *News Virginian*, June
5 16, 2004.

6 10. The incessant retaliation against physicians who report negligence, as Dr.
7 Mileikowsky did, has kept the numbers of deaths caused by hospitals astronomically high. Several
8 years ago a widely publicized study by the Institute of Medicine revealed that hospitals negligently
9 kill as many as 98,000 patients each year. How could that be with so many physicians watching?
10 The answer is illustrated by this case of Dr. Mileikowsky, who complained about hospital
11 negligence and finds himself subjected to a license revocation and state-mandated psychiatric
12 examination. Predictably, the numbers of deaths caused by hospital negligence have not declined
13 since the Institute of Medicine's report.

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

21 12. In fact, a more recent study by Health Grades, Inc., estimates that medical errors in
22 American hospitals "contributed to almost 600,000 patient deaths over the past three years, double
23 the number of deaths from a study published in 2000 by the Institute of Medicine." Paul Davies,
24 "Fatal Medical Errors Said To Be More Widespread," *Wall Street Journal*, July 27, 2004, at D5.
25 This Health Grades study was based on data from "37 million Medicare patients in every state over
26 three years." *Id.* But when physicians like Dr. Mileikowsky complain about poor care, they face
27 discipline by the hospital and revocation of their privileges or even license. This retaliation must
28 stop to allow improvement in safety at hospitals.

1 13. The impact of allowing retaliation against physicians like Dr. Mileikowsky is
2 severe. While the hospital benefits economically from hushing up problems and covering up
3 negligence, the public pays an enormous price indeed. Lives are lost and destroyed. In this case,
4 embryos were senselessly destroyed and fallopian tubes wrongfully removed. Establishing quality
5 control of the delivery of medical care is economically harmful to the hospital, but essential to the
6 public's safety and economics. Dr. Mileikowsky's complaining should not force him to see a
7 psychiatrist, which seems plainly more aimed at destroying his credibility. Killing the messenger
8 does not resolve the problem. Instead, the hospital should be held accountable. Dr. Mileikowsky
9 also reported the failure to remove a fallopian tube containing an extra uterine (ectopic) pregnancy,
10 a life threatening condition. Yet, neither the Medical Board of California nor the Attorney General
11 took any corrective action against either hospital or physicians.

12 14. In 2003, Tenet Healthcare Corporation and Tenet HealthSystems Hospitals, Inc., the
13 owners and affiliates of the hospital at issue here, paid \$51 million "to settle government
14 allegations that Tenet's Redding, California facility performed unnecessary cardiac procedures that
15 were then billed to Medicare, Medicaid and TRICARE. In addition, Tenet paid nearly \$3 million to
16 reimburse California's Medicaid funds." "Corporate Accountability and Compliance in Health
17 Care - Will Health Care be the Next Enron?", *Mondaq Business Briefing*, July 26, 2004. These are
18 but two reports, among many, involving Tenet. This case should be viewed in that broader
19 context. Punishing Dr. Mileikowsky, who was reporting the misconduct at Tenet, only encourages
20 greater fraud and more losses to the public, to whom the Medical Board and the Attorney General
21 owe their protective mission.

22 15. AAPS does not contest the power of the Medical Board to order an examination
23 where it provides a legitimate basis for such order. But no such basis exists here. Quite the
24 opposite, Dr. Mileikowsky's skills as a surgeon have never been seriously questioned. Being a
25 whistleblower against a powerful hospital does not suggest the need for psychiatric examination
26 ordered by the State under threat of revocation. If anything, the uncontested fact that he made
27 multiple prior reports of wrongdoing should warrant a higher level of justification by the Medical
28 Board, and correspondingly higher level of scrutiny by this Court.

1 16. The revocation of Dr. Mileikowsky's license would end his career, whether stayed
2 or not by a psychiatric examination. Revocation is typically career-ending for any hospital-based
3 physician such as an OB/GYN like Dr. Mileikowsky, because it announces to the whole world that
4 the physician is so dangerous that he had to be removed from the profession. Federal law requires
5 reporting it to the National Practitioners Data Bank, upon which all hospitals nationwide rely.
6 Revocation is the rarest of disciplinary actions by a hospital, the professional version of the death
7 penalty, and must therefore be confined to situations far more extreme than that presented at bar.

8 17. It is disastrous to medical economics and public safety for the Board to be able to
9 revoke the license of Dr. Mileikowsky for speaking out in favor of patient care and against the
10 destruction of embryos by the hospital. That outspokenness may well be unsettling to the for-
11 profit, Tenet-owned hospital and maybe even unsettling to the Medical Board, but it does not
12 justify revoking his license or forcing him to undergo a psychiatric evaluation in order to discredit
13 and humiliate. Virtually no good physician would be still practicing if speaking out against
14 hospital negligence or error justified revocation and psychiatric evaluation. *See, e.g., McMillan v.*
15 *Anchorage Comm. Hosp.*, 646 P.2d 857, 859 (Alaska 1982) (reversing a summary suspension of a
16 physician based on "disruptive behavior" without a showing that the physician's "activities or
17 conduct resulted in any immediate threat to a particular patient").

18 18. AAPS is concerned that while the Attorney General and Medical Board apparently
19 took no action in response to Dr. Mileikowsky's very serious allegations of unconsented surgery
20 and destruction of embryos, the Medical Board is instead acting to revoke Dr. Mileikowsky's
21 license without any patient complaints or substantial evidence of wrongdoing. This is manifestly
22 unjust.

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PROOF OF SERVICE

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

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

On August 9, I served the following described as: **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER BY ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.** 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

(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.

(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 August 9, 2004, at Los Angeles, California.

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SIGNATURE

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