

11/15/2005

Re: There Can Be No Patient Safety Without
Whistleblower Protection for All Physicians

Dear Congressman Waxman,

It was a pleasure to meet you again at Alfred Mann's 80th birthday on 11/11/2005.

Since you are intimately familiar with the federal HCQIA, as you are one of its authors, I believe that you will be interested to see how far hospital attorneys are willing to go in abusing your original intent.

For Harty and Springer, Tenet and HCA's attorneys, there is no need for any physician, "licentiates," to be involved in the peer review process that you drafted, as demonstrated in my case and many others. All these administrators and attorneys wanted was the grace of your "immunity" which they interpret as "absolute," to establish what I characterize as the "Spanish Inquisition in the wild west."

De facto, today, there is no legitimate peer review in our country. Both the spirit and the letter of your HCQIA were shredded into dust. Most troublesome, California courts ignore completely the HCQIA, as if it did not exist, nor apply to California.

As I promised you, following please find copy of Petition to U.S. Supreme Court in Mileikowsky vs. Tenet and a one page legal analysis by Tenet's attorney, Mark Kawa Esq., regarding "whistleblower protection," showing that it is solely limited to physician employees of hospitals or managed care organizations in California. The complete Petition with exhibits is available at www.aapsonline.org/mileikowsky.

"No good deed goes unpunished" as demonstrated by my predicament:

- June 12, 2000, during a routine OB/GYN department meeting, at Encino-Tarzana Regional Medical Center (ETRMC), the topic on the agenda was "what criteria should trigger review of a medical record"? I suggested that any record of a patient who was readmitted within 30 days after a surgery should be

reviewed for possible complications. The department turned down my proposal.

- June 13, 2000, I am shocked to learn that physicians who are significant income providers at ETRMC escape the scrutiny of peer-review.
- June 14, 2000, I report my findings to the IMQ, DHHS and JCAHO.
- June 19, 2000, I became a designated expert in a battery and medical malpractice case against ETRMC due to the removal of both fallopian tubes of a patient without her consent.
- June 23, 2000, the CEO of ETRMC required that I be escorted by his security guards while on the hospital premises.
- November 13, 2000, I provided the FBI, healthcare fraud division, sensitive information regarding the loss and mishandling of embryos, eggs and sperms in the in-vitro fertilization laboratory of ETRMC.
- November 16, 2000, my clinical privileges were summarily suspended, by ETRMC, without any good cause, for non-existent, alleged "Imminent danger."

The medical community is outraged and all major medical associations filed amici curiae briefs in support of my litigation vs. Tenet, (AMA, CMA, UAPD, AAPS, ..) as well as the Consumer Attorneys of California (COAC). For your convenience, see www.aapsonline.org/mileikowsky.

Since there is no federal whistleblower protection for most physicians, as over 50% are not "employees," we are all looking forward to your Intervention in this most critical matter for our country.

Respectfully submitted,


Gil N. Mileikowsky, M.D.

cc **Congressman Howard Berman**
 Leadership of amici curiae societies
 Andrew Schlafly, Esq.
 Roger Diamond, Esq.
 Professor Alan Dershowitz

11/15/2005

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Dear Congressman Berman,

It was a pleasure to meet you at Alfred Mann's 80th birthday on 11/11/2005.

Since you worked on the False Claims Act jointly with Senator Grassley, and you are an active member of the House Judiciary Committee, you are most familiar with this subject. Unfortunately, the False Claims Act is limited to billing fraud, not quality of the delivery of care and patient safety issues.

Accordingly there is a loophole in physician whistleblower protection as big as a dinosaur, as over 50% of physicians in our country are neither employees of hospitals nor managed care organizations.

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cc Congressman Henry Waxman
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Andrew Schlafly, Esq.
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Professor Alan Dershowitz

Since Dr. Mileikowsky was or is neither a patient nor an employee of ETRMC, he is not part of the class protected by this statute. Accordingly, this code section cannot form the basis for a whistle blower claim.

Your reliance on *Business and Professions Code* § 2056 is similarly misplaced. That code section provides in pertinent part that:

"It is the public policy of the State of California that a physician and surgeon be encouraged to advocate for medically appropriate health care for his or her patients. For purposes of this section "to advocate for medically appropriate health care" means to appeal a payor's decision to deny payment . . . or to protest a decision, policy, or practice that the physician . . . reasonably believes impairs the physician's ability to provide medically appropriate health care to his or her patients."
[Emphasis added]

As expressly stated in the statute, the policy seeks to codify the holding of *Wickline v. State of California*, 192 Cal.App.2d 1630. Thus, the statute seeks to protect physicians whose employment or contract is terminated in retaliation for the advocacy of appropriate medical care of his or her patients. The classic example is a doctor who is terminated for performing tests and procedures which he or she deems medically necessary, but which the payor deems too costly.

There has never been an allegation -- nor can you concoct one at this late date -- that Dr. Mileikowsky was retaliated against for advocating for medically appropriate health care for his patients or protesting a decision, policy or practice that impaired his ability to provide appropriate care to his patients. Rather, Dr. Mileikowsky has previously argued that he was retaliated against for raising quality of care concerns regarding other physicians on staff at ETRMC. Accordingly, Dr.

Law Offices

KEVIN, COHEN & JESSUP LLP

Kevin J. Mirch, Esq.
February 15, 2002
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200. Your contention that "[t]he retaliatory actions are in violation of public policy of the State of California, including *Health & Safety Code* §1278.5 and *Business & Professions Code* § 2056, aimed at protecting the health and safety of the general public by providing members of the public and health care providers protection from retaliation for engaging in reporting violations of statutes" is flat out wrong. The statutes referred to -- *Health and Safety Code* § 1278.5 and *Business and Professions Code* § 2056 -- do not provide a statutory basis for a whistle-blower claim. *Health and Safety Code* § 1278.5 provides, in pertinent part that:

"No health facility shall discriminate or retaliate in any manner against any patient or employee of the health facility because that patient or employee, or any other person, has presented a grievance or complaint, or has initiated or cooperated in any investigation or proceeding of any governmental entity relating to the care, services, or conditions of that facility." [Emphasis added]

Since Dr. Mileikowsky was or is neither a patient nor an employee of ETRMC, he is not part of the class protected by this statute. Accordingly, this code section cannot form the basis for a whistle blower claim.

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California Medical Association

Physicians dedicated to the health of Californians

August 19, 2005

Gil Mileikowsky MD
FAX: 310-858-1303

Dear Gil:

I am greatly saddened to learn about the Supreme Court's decision not to intercede in your case. That is extremely disheartening and unfair.

Considering the effort and horrendous legal expenses you have incurred in pursuing justice, I am certain that this is a terrible blow for you personally, as it is for individual physicians in general in the face of the greater resources and forces of hospital systems.

Nonetheless, you have fought a noble battle against Tenet, which all of us who know you greatly respect.

As you state, it appears that the US Supreme Court may be the only possible appeal before you. I don't know what chances there are of that happening. Perhaps Catherine Hanson can opine on that when she returns from vacation.

In the meantime, Gil, your honor and your integrity are nonetheless intact. You should never forget that.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Jack Lewin'. The signature is written in a cursive, flowing style with large loops and a prominent initial 'J'.

Jack Lewin, M.D.
Executive Vice President/CEO