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June 21, 2022

Presiding Justice Maria E. Stratton
Associate Justice Elizabeth A. Grimes
Associate Justice John Shepard Wiley Jr.
California Court of Appeal
Second Appellate District, Division Eight
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Re: ***Facey Medical Group v. Superior Court Los Angeles County
(Doe)***
Court of Appeal Case No. B320470
Amicus Curiae Letter in Support of Petition for Writ of Mandate

Dear Presiding Justice Stratton and Associate Justices:

We write on behalf of the California Hospital Association (CHA) as amicus curiae asking that this court issue an alternative writ or order to show cause in order to address the merits of the important Evidence Code section 1157 (section 1157) issue presented in the pending writ petition. To the extent necessary, we ask that the court treat this as a formal application to file this amicus letter.

AUTHORITY FOR FILING THIS AMICUS LETTER

Rule 8.487(e)(1) of the California Rules of Court expressly permits the filing of amicus briefs after an appellate court issues an alternative writ or order to show cause. However, the Judicial Council's Advisory Committee Comment to rule 8.487 clarifies that amicus letters are also permissible *before* a court issues an alternative writ or order to show cause:

Subdivisions (d) and (e). These provisions do not alter the court's authority to request or permit the filing of amicus briefs or amicus letters in writ proceedings in circumstances not covered by these subdivisions, *such as before the court has determined whether to issue*

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an alternative writ or order to show cause or when it notifies the parties that it is considering issuing a peremptory writ in the first instance.

(Advisory Com. com, 23 pt. 4 West’s Ann. Codes, Rules (2017 ed.) foll. rule 8.487, boldface omitted and emphasis added.)

Indeed, Division Seven has stated in a published opinion that the filing of amicus letters in connection with a writ petition was one factor the court considered in deciding whether to issue an order to show cause. (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 557–558 [Second Dist., Div. Seven] [noting that amicus letters were filed in support of a writ petition and that “based on the amici curiae submissions we have received” the matter “appears to be of widespread interest” such that writ review was appropriate]; see also *Los Angeles County Bd. of Supervisors v. Superior Court* (2015) 185 Cal.Rptr.3d 842, 847 [Second Dist., Div. Three] [noting that an amicus letter was filed “in support of issuance of the writ”], revd. (2016) 2 Cal.5th 282.)

Therefore, we ask the court to consider this amicus letter in deciding the threshold issue of whether to issue an alternative writ or order to show cause so that the court can address the merits of the important section 1157 issue presented in the writ petition.

INTEREST OF AMICUS CURIAE

CHA is a nonprofit, member-driven organization, representing more than 400 hospitals throughout California. It advocates for better and more accessible health care for Californians and provides resources and information to state and federal policy makers. To that end, CHA supports hospitals in improving health care quality, access, and coverage; promoting health care reform and integration of services; complying with laws and regulations; and maintaining the public trust in health care. CHA’s support of its members includes regularly filing amicus curiae briefs in appellate matters where legal issues that are significant to CHA’s members will be decided. CHA is filing this amicus letter because its member hospitals will benefit from the clear and consistent legal precedent governing the application of section 1157 that will result if this court reaches the merits of Facey Medical Group’s pending writ petition. Therefore, CHA has an interest in the outcome of this writ proceeding.

WHY THIS COURT SHOULD ADDRESS THE PETITION ON ITS MERITS

Section 1157 is tremendously important to hospitals and other medical providers. As the Supreme Court observed, the “purpose of section 1157 is to improve the quality of medical care in the hospitals by the use of peer review committees.” (*West Covina Hospital v. Superior Court* (1986) 41 Cal.3d 846, 851 (*West Covina Hospital I*)). The seminal appellate decision explaining the purpose of section 1157 states:

When medical staff committees bear delegated responsibility for the competence of staff practitioners, the quality of in-hospital medical care depends heavily upon the committee members’ frankness in evaluating their associates’ medical skills and their objectivity in regulating staff privileges. Although composed of volunteer professionals, these committees are affected with a strong element of public interest.

Section 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces *a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality.*

(*Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 628–629 (*Matchett*), emphasis added; see also Horvitz & Levy LLP, Evidence Code section 1157 Manual (2022) pp. 4–9 <<https://www.horvitzlevy.com/R5FD3S351/assets/files/Documents/Evidence%20Code%20section%201157%202022%20Update.pdf>> [as of June 17, 2022] [listing policy rationales supporting section 1157] (Section 1157 Manual).)

Section 1157 furthers the effectiveness of peer review committees by giving them confidentiality to encourage candid participation in the evaluation process. “If doctors who serve on such committees were subject in malpractice cases to the burdens of discovery and involuntary testimony on the basis of their committee work, the evidentiary burdens could consume large portions of the doctors’ time to the prejudice of their medical practices or personal endeavors and could cause many doctors to refuse to serve on the committees.” (*West Covina Hospital I, supra*, 41 Cal.3d at pp. 851–852; see *Fox v. Kramer* (2000) 22 Cal.4th 531, 539–540.) It is thus

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recognized that there is a “strong public interest in preserving the confidentiality of the medical peer review process.” (*Fox*, at p. 539; see also *id.* at p. 542 [purpose of section 1157 is “preserving the confidentiality of hospital peer review proceedings”]; *Cedars-Sinai Medical Center v. Superior Court* (1993) 12 Cal.App.4th 579, 589 [the Legislature has determined “the public good requires confidentiality in medical staff evaluation proceedings”].)

While the discovery bar erected by section 1157 plainly inhibits plaintiff’s ability to marshal and present evidence supporting their claims, the Legislature has determined that this social cost is outweighed by the social benefit of promoting medical staff candor and participation in hiring and credentialing decisions. (*Matchett, supra*, 40 Cal.App.3d at p. 629; see *West Covina Hospital v. Superior Court* (1984) 153 Cal.App.3d 134, 138 (*West Covina Hospital II*)). The assertion of a negligent credentialing or negligent supervision claim does not avoid application of section 1157. (E.g., *Mt. Diablo Hospital Medical Center v. Superior Court* (1984) 158 Cal.App.3d 344, 347; *West Covina Hospital II*, at pp. 138–139.)

The Legislature has amended section 1157 more than a dozen times, often to *expand* the scope of the privilege but never to *contract* it. This is strong evidence that the Legislature expects courts to construe section 1157 broadly and to reject arguments for a narrow construction of the privilege.

Therefore, section 1157 “gives a blanket exclusion from discovery to proceedings and records of committees of hospital medical staffs concerned with evaluation and improvement of the quality of care in the hospital.” (*Roseville Community Hospital v. Superior Court* (1977) 70 Cal.App.3d 809, 813.) The discovery exclusion applies equally to deposition questions in addition to document production requests, interrogatories, and requests for admissions. (See *Santa Rosa Memorial Hospital v. Superior Court* (1985) 174 Cal.App.3d 711, 721, fn. 8.)

The current petition raises significant issues regarding the extent to which section 1157 bars discovery of information and documents connected with a medical group’s decision to hire and credential a particular physician, including whether the peer review committee was told about certain patient complaints and which employees have information about the credentialing process, deliberations, and decision. The law is clear that when hospitals consider extending staff privileges to physicians, all documents and information related to that credentialing process are shielded from disclosure under section 1157. (*Alexander v. Superior Court* (1993)

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5 Cal.4th 1218, 1223–1226, disapproved on another ground in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 719, 724.) Analytically, a medical group hiring a physician is no different than the credentialing process at a hospital. In both circumstances, the physician needs to be thoroughly vetted and evaluated. That requires candid evaluations, exactly the type of communications that are protected from disclosure by section 1157. Moreover, information provided by third parties needs to be equally protected against disclosure or else the third parties will not be candid and forthright in their assessment of the candidate. (See PWM 29–30.)

Plaintiff argues that any documents within administrative files is discoverable even if later reviewed by a peer review body. (Oppos. 7, 11–12.) That’s not correct. Hospital administration files “are discoverable only to the extent they do not contain references to the immune proceedings.” (*Saddleback Community Hospital v. Superior Court* (1984) 158 Cal.App.3d 206, 209; accord, *County of Kern v. Superior Court* (1978) 82 Cal.App.3d 396, 401–402; *Henry Mayo Newhall Memorial Hospital v. Superior Court* (1978) 81 Cal.App.3d 626, 636–637; *Schulz v. Superior Court* (1977) 66 Cal.App.3d 440, 446–447; *Matchett, supra*, 40 Cal.App.3d at p. 628.)

Plaintiff also argues, without citation to authority, that the protections afforded by section 1157 can be waived. (Oppos. 11–12.) However, section 1157 arguably creates an *absolute* immunity from discovery that cannot be waived (see Section 1157 Manual, § L.2, pp. 78-79 [collecting authorities]), but in any event the mere failure to produce a privilege log cannot support a waiver claim (*id.*, § K.1-2, p. 76).

This petition, therefore, raises an issue of great importance to CHA’s member hospitals, as well as other members of the medical profession and the public at large. This court should thus grant an alternative writ or order to show cause in order to address the issues raised in the petition on the merits.

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Respectfully submitted,

HORVITZ & LEVY LLP
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STEVEN S. FLEISCHMAN

By: 

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Attorneys for Amicus Curiae
CALIFORNIA HOSPITAL ASSOCIATION

cc: See attached Proof of Service

PROOF OF SERVICE

**Facey Medical Group, a California Corporation v. Superior Court Los Angeles County et al.
Case No. B320470**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On June 21, 2022, I served true copies of the following document(s) described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

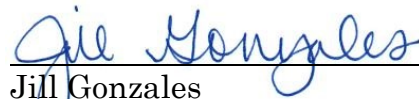
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 21, 2022, at Burbank, California.



Jill Gonzales

SERVICE LIST
Facey Medical Group, a California Corporation v. Superior Court Los Angeles County et al.
Case No. B320470

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Via U.S. Mail