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November 10, 2023

VIA TRUEFILING

The Honorable Patricia Guerrero, Chief Justice
The Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102

Re: *Mission Hospital Regional Medical Center v. Superior Court of Orange County*
Supreme Court Case No. S282260
Letter in Support of Petition for Review

Dear Honorable Justices:

This law firm represents the California Hospital Association ("CHA"). Pursuant to California Rules of Court, rule 8.500(g), we submit this letter on CHA's behalf in support of the Petition for Review filed by Mission Hospital Regional Medical Center ("Mission Hospital"), in the above-referenced matter ("*Mission*").

At the heart of this case is whether a California hospital voluntarily assumes a licensed physician and surgeon's duty to obtain the patient's informed consent when the hospital asks the patient to sign standard "Conditions of Admission" forms. This issue is of great interest to CHA's over 400 member hospitals, many of which use admissions forms like that at issue in this case to obtain patients' general consent to hospitalization and the routine, noncomplex health care services associated with the hospitalization. The superior court's ruling erroneously conflates general consent with informed consent, concluding that a hospital may assume the long-recognized duty of the physician to obtain the informed consent required for complex procedures. (See *Gladstone v. Nguyen* (Super. Ct. Orange County, 2023, No. 30-2022-01250914), p. 2.) However, the law assigns this duty only to physicians because obtaining informed consent constitutes the practice of medicine. Imposing that duty on hospitals would upend the long-established assignment of roles between hospitals, which cannot lawfully practice medicine, and physicians, who have that unique role. Such a revolutionary reordering of those roles would contradict California's long-standing statutory ban on the corporate practice of medicine which (with extremely narrow exceptions) prohibits non-physician entities like hospitals from practicing medicine or employing physicians.

CHA therefore urges this Court to grant review of *Mission*. A decision by this Court is critical to avoid forcing California hospitals to engage in the corporate practice of medicine, in contravention of the decades-old bar to such activity; to sustain and reinforce the distinction between informed consent and general consent; and to provide statewide guidance to litigants and lower courts in similar lawsuits.

I. Interest of the California Hospital Association

CHA is a non-profit association dedicated to representing the interests of California's hospitals. It is the largest hospital advocacy organization in California and one of the largest hospital trade associations in the nation, serving more than 400 hospitals and health systems and 97 percent of the patient beds in California. CHA's members include general acute care hospitals, acute psychiatric hospitals, academic medical centers, county hospitals, and multi-hospital health systems. Its members furnish vital health care services to millions of our state's residents every year. CHA provides its members with state and federal representation in the legislative, judicial, and regulatory arenas in its continuing efforts to improve health care quality, access, and coverage.

CHA has extensive expertise in the legal and practical aspects of patient consent. CHA publishes and regularly updates the California Hospital Consent Manual, which is the only comprehensive guide to patient consent for hospital treatment, physician treatment, and related California health care law. The latest, 49th edition of the Consent Manual was released this year. (See California Hospital Association, California Hospital Consent Manual (49th ed. 2023).)

CHA's members have a vital interest in the resolution of *Mission*. Like all California hospitals, they are required by law to obtain patients' general consent to hospitalization and routine treatment, and to verify that the patients' informed consent to complex procedures has been obtained and documented by the physician. To treat such documentation as the hospital's voluntary assumption of the physician's duty to obtain informed consent would be legally and practically untenable. Hospitals do not have the expertise to provide or even confirm the accuracy of a physician's informed consent discussion with his or her patient. Any hospital's attempt to do so would constitute interference with the physician-patient relationship, as well as the unlicensed practice of medicine.

II. Informed Consent Is Distinguished from General Consent

The requirement to obtain patient consent stems from tort law. Generally, a patient must give consent before being touched, otherwise the unconsented touching would constitute civil battery. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1495.) Thus, any kind of health care treatment or services that involves contact with the patient requires, at minimum, the patient's general consent. This includes hospitalization and routine treatments, such as blood tests, X-rays, and nursing services. (See, e.g., *Piedra*, at p. 1496 [explaining that patient gave "general consent" to "basic care and treatment" at the hospital, including an echocardiogram and medication].)

But for more complex medical procedures, long-established California law imposes on physicians a heightened duty to obtain *informed* consent. For such procedures, the "medical doctor has a duty to disclose to his patient the potential of death or serious harm," to "explain in lay terms the complications that might possibly occur," and "reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 244–245; see also *Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343.)

III. Hospitals Use "Conditions of Admission" Forms to Obtain General Consent

California hospitals document the beginning of a treatment relationship at the hospital by having the patient sign a Conditions of Admission form. Hospitals may call the form by different names, such as "Registration Form," "Conditions of Service," or "Conditions of Outpatient Treatment." Regardless of the name, this type of form is intended to establish the conditions under which a patient is admitted for inpatient or outpatient services. One of the primary conditions in these forms is the patient's *general* consent to hospitalization and routine services—that is, services about which laypersons understand the risks and benefits, without a physician's explanation. (See, e.g., *Piedra*, 123 Cal.App.4th at p. 1496.) Other conditions include the patient's financial responsibility for paying the hospital's charges for services rendered, agreement to arbitrate any disputes that may arise, and acknowledgment that physicians are not employees or agents of the hospitals (see Section IV, *infra*).

By using this type of form, a hospital does not "undertake[] the task to obtain informed consent" or "insert itself into the process of obtaining informed consent," as the trial court suggests. (See *Gladstone v. Nguyen* (Super. Ct. Orange County, 2023, No. 30-2022-01250914), p. 2.) Rather, the hospital is fulfilling its own obligation to obtain

general consent for medical services that hospital employees provide, such as nursing and other supportive services. It does not seek to intrude on the physician's obligation to obtain informed consent for complex procedures and treatment. In fact, in many cases, the complex procedures or treatments a patient will eventually undergo may be unknown at the time the patient signs the Conditions of Admission form, as the need for those procedures may arise during the course of hospitalization.

IV. Hospitals Are Prohibited from Obtaining Informed Consent, Which Is Part of the Practice of Medicine

Obtaining informed consent is part of the practice of medicine because it requires medical expertise, training, and judgment: "[A]s an integral part of the physician's overall obligation to the patient there is a duty of reasonable disclosure . . . . 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." (*Cobbs*, 8 Cal.3d at p. 243.) Since *Cobb*, the California Supreme Court has consistently imposed the duty of obtaining informed consent only on physicians. (See, e.g., *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 133 ["The Regents, Quan, Genetics Institute, and Sandoz are not physicians. . . . none of these defendants . . . had the duty to obtain [the patient's] informed consent to medical procedures"]; *Arato v. Avedon* (1993) 5 Cal.4th 1172; *Truman v. Thomas* (1980) 27 Cal.3d 285, 291.)

In fact, California hospitals are effectively barred from obtaining informed consent due to California's 100-year-old ban on the corporate practice of medicine. (*California Physicians' Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506, 1514; Bus. & Prof. Code, §§ 2052, 2400.) To comply with the statutory restriction, California hospitals generally do not employ physicians to provide care.[1] Rather, physicians who hold clinical privileges at hospitals are independent, and hospitals are prohibited from exercising control over their medical judgment. (See *California Medical Ass'n, Inc. v. Regents of University of California* (2000) 79 Cal.App.4th 542, 550 [the statutory ban "was adopted to protect the professional independence of physicians and to

[1] There are some exceptions to this prohibition, but they do not apply to Mission Hospital or to most California hospitals.

avoid the divided loyalty inherent in the relationship of a physician employee to a lay employer"].)

The hospital's role in the informed consent process is therefore limited to verifying that the physician obtained the patient's informed consent and that this informed consent has been documented in the medical record. (See Cal. Code Regs., tit. 22, § 70749, subd. (a)(10); 42 C.F.R. § 482.51(b)(2).) California hospitals have no mechanism to override, supplement, or clarify the physician's disclosures to the patient during the informed consent discussion. None of them have the trained staff, systems, or institutional expertise to fill the medical role of a licensed physician. Thus, the superior court's creation of a duty requiring Mission Hospital to assume a physician's role and obtain informed consent not only contradicts long-standing California Supreme Court precedent, but would also burden Mission Hospital with a duty that it has no legal way to fulfill.

* * * * *

For the reasons stated above, CHA respectfully asks the Court to grant the Petition for Review in *Mission* to prevent hospitals from being compelled to violate existing statutory law, to sustain and reinforce the distinction between general and informed consent, and to provide much-needed guidance to litigants and lower courts.

Respectfully submitted,

By: _____
Lowell C. Brown
Attorney for California Hospital Association

cc: See attached proof of service

CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 West Fifth Street, 48th Floor, Los Angeles, California 90013-1065. My email address is katryn.smith@afslaw.com.

I hereby certify that on November 10, 2023, I caused to be electronically filed the foregoing **LETTER TO SUPREME COURT IN SUPPORT OF PETITION FOR REVIEW FILED IN *MISSION HOSPITAL REGIONAL MEDICAL CENTER v. SUPERIOR COURT OF ORANGE COUNTY*** with the California Supreme Court, using the TrueFiling system.

I certify that, except as noted, and on information and belief, all participants in this action are registered to use TrueFiling and that service will be accomplished by TrueFiling. All other parties will be served as indicated on the service list by either:

☒ (U.S. Mail) I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business. On this date, I placed the document(s) in envelopes addressed to the person(s) on the attached service list and sealed and placed the envelopes for collection and mailing following ordinary business practices.

☒ (By Electronic Service through TrueFiling) By emailing true and correct copies to the person(s) at the electronic notification address(es) shown on the accompanying service list. The document was/were served electronically, and the transmission was reported as complete and without error.

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

Executed on November 10, 2023, at West Grove, California.

Katryn F. Smith

Mission Hospital Regional Medical Center v. Superior Court of Orange County
Supreme Court Case No. S282260

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