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April 9, 2024

VIA TRUEFILING

The Honorable Marla J. Miller
The Honorable Therese M. Stewart
The Honorable Cindee F. Mayfield
California Court of Appeal
First Appellate District, Division Two
350 McAllister Street
San Francisco, CA 94102-7421

Re: Request for Publication
Kime v. Dignity Health, Case No. A166748

Dear Honorable Justices:

This law firm represents the California Hospital Association ("CHA"). We write respectfully to urge that the Court publish its March 29, 2024, opinion in *Kime v. Dignity Health* ("*Kime*"). CHA is a nonprofit, member-driven corporation representing the interests of more than 400 hospital and health system members in California. CHA members have an ongoing interest in promoting efficiency and clarity in matters relating to hospital operations, with the goal of protecting patients, hospital employees, and visitors. CHA members have a particular interest in issues related to exclusive contracting and peer review. Exclusive arrangements in hospital departments are common in California, and all hospitals and their medical staffs are subject to the legal reporting and hearing obligations related to peer review.

Kime qualifies for publication under California Rules of Court, rule 8.1105(c). Established California law is clear that a hospital board's decision to authorize and enter into exclusive medical services contracts is quasi-legislative. After such a decision, the hospital may deny an affected physician's application for medical staff privileges without the obligations attendant to a quasi-judicial decision. This is because rather than an individually focused quasi-judicial decision, a decision like the one at issue in *Kime* sets a standard of general application. Appellant Dr. Kime simply failed to meet that standard.

Consequently, the obligations in the Business and Professions Code requiring hospitals and medical staffs to file reports to the Medical Board of California ("Medical

Board") and provide formal hearings to affected physicians do not apply. *Kime* thus adds a new dimension to the rule on quasi-legislative decisions by holding that it applies to the specific physician eligibility provisions in an exclusive contract. *Kime*, if published, will provide hospitals, medical staffs, medical groups, and individual physicians with much-needed guidance on exclusive contracts between hospitals and physician groups, and the statutory obligations arising from peer review.

I. The Opinion Applies the Law on Quasi-Legislative Acts to Provisions of Hospitals' Exclusive Contracts

Kime held that eligibility requirements in a hospital's exclusive contract are quasi-legislative. After concluding that the respondent hospital's exclusive contract established eligibility requirements for physicians, the Court agreed with the hospital that the requirements are quasi-legislative because they are part of the exclusive contract and apply to all physicians in the contracting physician group. (Op., pp. 11, 13.) The Court rejected the Appellant's argument that the requirements were not quasi-legislative because they were "discretionary"—in fact, the requirements were based on objective criteria about disciplinary history that did not require the exercise of any discretion. (*Id*., pp. 16–17.)

In so holding, *Kime* "applies an existing rule of law to a set of facts significantly different from those stated in published opinions." (Cal. Rules of Ct., rule 8.1105(c)(2).) Although it is well-settled California law that a hospital's decision to close a service is within its quasi-legislative authority, the Court's opinion notes that until now, no published case has addressed whether provisions in a hospital's exclusive contract are quasi-legislative in nature. (See Op., p. 13 ["no court has had occasion to determine this precise issue"].) *Kime* does directly address this issue and will therefore provide important guidance to hospitals, medical staffs, and others regarding exclusive contracting and peer review.

II. The Opinion Clarifies Hospitals and Medical Staffs' Statutory Obligations to File 805 Reports and Provide Hearings

Kime also held that when a hospital denies a physician's application for privileges based on its quasi-legislative policy of denying privileges to physicians with disciplinary histories, such an action does not require "section 805 reports." (*Id*., pp. 14, 18–19.) The Court explained that such an action "does not require reports to the Medical Board under [Business and Professions Code] section 805" because it does "not result from any 'adjudicatory/quasi-judicial decisions' by [the hospital] about '[the physician's]

competency or professional conduct.'" (*Id*., p. 14.) By denying a physician's application based on objective facts in his or her disciplinary history, the hospital does not evaluate the physician's competency or conduct as it pertains to patient care at the hospital or at other health care facilities. (*Ibid*.) Moreover, the Court explained that no "purpose would be served" by requiring a section 805 report for this type of action. (*Id*., p. 15.) The "'basic purpose' for filing section 805 reports" is "'to notify the Medical Board of events which might warrant the investigation of a licensed physician,'" but for this type of action, the "facts and circumstances" of the physician's disciplinary history at other facilities would have "*already* been reported to the Medical Board." (*Id*., pp. 14–15.)

Kime further ruled that a physician is not entitled to a common law or statutory hearing when a hospital denies his or her application based on a quasi-legislative policy regarding physicians with disciplinary histories. When a hospital "stop[s] processing [the physician's] application" for this reason, the physician has "no common law right to a hearing" because the denial is based on quasi-legislative requirements, and not based on a quasi-judicial determination. (*Id*., pp. 17–18.) Nor does the physician have "any right to a hearing under [Business and Professions Code] section 809.1," as a section 805 report is not required for the hospital's decision to stop processing his application. (*Id*., p. 18.)

These important holdings not only apply an existing rule of law to a set of facts significantly different from those stated in published opinions, but also advance a "clarification" of a provision of a statute. (Cal. Rules of Ct., rule 8.1105(c)(2), (4).) No published California case has addressed whether the obligations in set forth in section 805 and section 809.1 are triggered when a peer review body denies an application based on a quasi-legislative policy of denying physicians with disciplinary histories. *Kime* directly answers these statutory questions with clear analysis. If published, *Kime* will help CHA member hospitals, their medical staffs, and others to better understand their statutory reporting and hearing obligations.

III. The Court's Finding of Forfeiture Is No Bar to Publication

In his Opposition to Request for Publication dated April 5, 2024, Appellant's counsel argues that the case should not be certified for publication. He asserts that, because the Court found the Appellant had forfeited several arguments by failing to raise them below, the Court did not consider all material arguments in making its conclusions, and thus the decision does not provide sufficient guidance to stakeholders to merit publication. This assertion is misguided. The forfeiture of certain arguments does not prevent a case from being published. The standards for certification are set forth in California Rules of

Court, rule 8.1105, which contains no reference to forfeiture. Indeed, many published opinions have specifically found that arguments not raised below were forfeited. (See, e.g., *Wisner v. Dignity Health* (2022) 85 Cal.App.5th 35, 44–45; *Family Health Centers of San Diego v. State Department of Health Care Services* (2021) 71 Cal.App.5th 88, 97; *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1074; *Consumer Watchdog v. Department of Managed Health Care* (2014) 225 Cal.App.4th 862, 877–878.)

* * * * *

Kime makes important contributions to this state's law on exclusive contracts and peer review. The Court builds on legal precedent by holding that the eligibility requirements in a hospital's exclusive contract are quasi-legislative in nature. The Court also elucidates whether statutory reporting and hearing obligations apply when a hospital denies an application based on a quasi-legislative policy like the one in this case. Hospitals, medical staffs, medical groups, and individual physicians will benefit greatly from the well-reasoned guidance in this Opinion. Thus, CHA respectfully asks the Court to publish its decision in *Kime*.

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 April 9, 2024, I caused to be electronically filed the foregoing **REQUEST FOR PUBLICATION OF *KIME V. DIGNITY HEALTH*** with the California Court of Appeal, First Appellate District, Division Two, 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.

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

Executed on April 9, 2024, at West Grove, California.

Katryn F. Smith

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