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May 7, 2018

Via Electronic Filing

Acting Presiding Justice Judith L. Haller
Associate Justice Terry B. O'Rourke
Associate Justice William Dato
Court of Appeal of the State of California
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, California 92101

Re: ***Alexander v. Scripps Memorial Hospital La Jolla***
Court of Appeal No. D071001
Request for Publication; Opinion filed April 16, 2018

Dear Presiding Justice Haller and Associate Justices:

The California Hospital Association (CHA) respectfully requests that this court certify for publication its April 16, 2018, opinion in *Alexander v. Scripps Memorial Hospital La Jolla* (*Alexander*). The opinion makes important contributions to healthcare law and the opinion satisfies numerous criteria for publication. As explained below, the opinion "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions," "explains . . . with reasons given, an existing rule of law," "[a]dvances a new interpretation . . . or construction of a provision of a . . . statute," and "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(2), (3), (4), (6).)

I. CHA has an interest in requesting publication as part of its overall interest in healthcare litigation on behalf of its members.

CHA is a nonprofit organization dedicated to representing the interests of California hospitals and the patients they serve. CHA represents over 400 hospitals and healthcare systems in California, comprising over 97 percent of the hospitals in the state, including general acute care hospitals, children's hospitals, rural hospitals, psychiatric hospitals, academic medical centers, county hospitals, investor-owned hospitals, and multi-hospital health systems. These hospitals furnish vital health care services to millions of our state's citizens. CHA provides its members with state and

federal representation in the legislative, judicial, and regulatory arenas, in an effort to improve health care quality, access and coverage; promote health care reform and integration; achieve adequate health care funding and contain costs; improve and update laws and regulations; and maintain public trust in health care. CHA promotes its objectives, in part, by participating as amicus curiae and by filing requests for publication in cases involving issues of vital significance to its members. CHA's members have an important and ongoing interest in supporting California hospitals in meeting their legal and fiduciary responsibilities and improving the quality of healthcare they provide. CHA therefore has a significant interest in the issues addressed in this court's opinion.

II. Under the Rules of Court, there are four independent grounds on which to certify the opinion for publication.

California Rules of Court, rule 8.1105(c), provides that an "opinion of a Court of Appeal . . . *should* be certified for publication in the Official Reports" if the opinion falls within any *one* of nine categories. (Emphasis added.) Here, this court's *Alexander* opinion satisfies at least four of the enumerated categories, thus publication is warranted.

1. *Alexander*'s discussion of Appropriate Care Committees and whether they owe a duty of care to patients "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions," and "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(2) & (6).) *Alexander* held that doctor-members of an Appropriate Care Committee do not have a physician-patient relationship sufficient to impose upon them a duty of care to a patient. (Typed opn. at 55-56.) As this court recognized, committee doctors simply make recommendations to treating physicians whose proposed care may conflict with a patient's health care directive. (*Id.* at 56.)

In general, a physician's duty of care to a patient does not arise until a physician-patient relationship is established. (*Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1471.) This court collected previous cases holding that "a physician-patient relationship does not exist where the physician does not affirmatively treat or directly advise the patient. (Typed opn. at 54-55, citing *Felton v. Schaeffer* (1991) 229 Cal.App.3d 229, 234-235; *Clarke v. Hoek* (1985) 174 Cal.App.3d 208, 211; *Keene v. Wiggins* (1977) 69 Cal.App.3d 308, 310-311; *Rainer v. Grossman* (1973) 31 Cal.App.3d 539, 542-543.) But no prior decision assessed whether Appropriate Care Committees, and other similar hospital ethics committees, owe a duty of care to patients. This court therefore analogized to the cases cited above in this new context. The facts of this case

were "not identical" to previous cases that had found no patient-physician relationship where the physician neither affirmatively treated nor directly advised the patient. (Typed opn. at 55.) But this court properly concluded that the principle from the previous cases applied equally to Appropriate Care Committees. (*Ibid.*)

This court's analogy provides guidance for lower courts and litigants in future cases: "the critical inquiry is the nature of the relationship and contact between the physician and patient." (Typed opn. at 55.) Here, the committee doctors' role was limited to reviewing patient medical records, considering the impressions of the patient's doctors, and observing the patient for the purpose of making recommendations that the patient's doctors could accept or reject. Thus, the "Appropriate Care Committee doctors' actions were insufficient to give rise to a physician-patient relationship and associated duty of care to [the patient]." (*Id.* at 55-56.) Because there is no published opinion concerning an Appropriate Care Committee's duty to patients (nor is there published authority on the duties owed by other similar hospital ethics committees), the court should publish *Alexander* to provide guidance to trial courts and litigants on this issue. (Cal. Rules of Court, rule 8.1105(c)(3) & (4).)

2. *Alexander* warrants publication because the public has an interest in encouraging hospitals to use Appropriate Care Committees and similar groups. (Cal. Rules of Court, rule 8.1105(c)(6).) This court recognized that:

> [C]ommittees such as the Appropriate Care committee serve a valuable role in patient care. They act as an independent review of what constitutes medically ineffective care and the patient's best interests when a treating physician declines to comply with a patient's health care instruction. The imposition of liability under these circumstances would be counterproductive to a valuable health care resource and would discourage physicians from participating in volunteer committees that serve an important and difficult role in circumstances in which medical providers believe complying with a patient's directives would be medically ineffective and cause the patient harm.

(Typed opn. at 56.) *Alexander* explains the many benefits (for hospitals, doctors, and patients alike) of such committees. Publishing *Alexander* will protect those benefits.

3. Publication is also warranted because *Alexander* "[a]dvances a new interpretation . . . or construction of a provision of a . . . statute," and "explains . . . an existing rule of law," that has not yet been the subject of a published opinion. (Cal.

Rules of Court, rule 8.1105(c)(3) & (4).) Here, this court interpreted provisions of the Health Care Decisions Law that provide immunity for health care providers or health care institutions, which have, acting in good faith and in accordance with generally accepted health care standards, "declin[ed] to comply with an individual health care instruction or health care decision, in accordance with [Probate Code] Sections 4734 to 4736, inclusive." (Prob. Code, § 4740.) The provision relied upon by respondents—section 4735—permits a health care provider or health care institution to "decline to comply with an individual health care instruction or health care decision that requires medically ineffective health care." (*Id*., § 4735.)

No published decision has interpreted Probate Code sections 4735 and 4740. For that reason alone, *Alexander* warrants publication. (Cal. Rules of Court, rule 8.1105(c)(3) & (4).) But the nature and extent of this court's discussion makes publication all the more important. This court explained that health care providers and institutions need not comply with every technical requirement of the Health Care Decisions Law to enjoy immunity. (Typed opn. at 41.) Instead, health care providers and institutions are entitled to immunity under section 4740 whenever they act "in good faith and in accordance with generally accepted health care standards" (*id.* at 60), which means "compl[ying] with the standard of care" (*id.* at 41). This significant contribution to the dearth of legal authority on section 4740 merits publication.

This court's opinion is also the first to interpret Probate Code section 4731, warranting publication. (Cal. Rules of Court, rule 8.1105(c)(3) & (4).) That statute "requires a supervising health care provider who knows of a patient's advance health care directive to record its existence in the patient's health care record, request a copy if it is in writing, and maintain a copy in the patient's health care record if it is furnished." (Typed opn. at 66.) *Alexander* clarifies which persons and entities bear these responsibilities: the statutory requirements apply to "supervising health care providers," not health care institutions. Hospitals, this court explained, can *never* be health care providers within the meaning of the Health Care Decisions Law because they are institutions and the law distinguishes providers from institutions. (*Id*. at 65.) This court's construction of section 4731 makes an important contribution to the development of healthcare law and deserves to be published.

4. Finally, aspects of this court's opinion "explain[ ] . . . with reasons given, an existing rule of law." (Cal. Rules of Court, rule 8.1105(c)(3).) For example, in affirming the trial court's demurrer ruling on plaintiffs' elder abuse claims, *Alexander* succinctly explained that "[d]isagreements between physicians and the patient or surrogate about the type of care being provided do[ ] *not* give rise to an elder abuse cause of action." (Typed opn. at 20, emphasis added.) In other words, disagreements about the "nature

of care" provided to a patient are not statutory elder abuse. (*Id.* at 22.) Authorities from other courts provide examples of conduct that *is* elder abuse under the Elder Abuse Act. (See, e.g. Welf. & Inst. Code, § 15610.57, subd. (b) [providing a nonexhaustive list of "neglect" examples]; *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 405-407 [providing examples of cases involving conduct sufficiently egregious to constitute elder abuse under the Elder Abuse Act].) In contrast, *Alexander* offers an example of what *is not* elder abuse—a commonly occurring situation where "family members disagree[ ] with the nature of care" their family member is receiving. (Typed opn. at 20.) Lower courts and litigants would benefit from the publication of this discussion because it would allow them to analogize future fact patterns to these contrasting examples.

For these reasons, this court should publish the entirety of its April 16, 2018, *Alexander* opinion, or should publish at minimum Parts I, IV, and V (along with the factual background section).

Respectfully submitted,

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PROOF OF SERVICE

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, California 91505-4681.

On May 7, 2018, I served true copies of the following document(s) described as **LETTER REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

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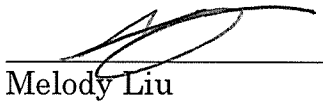
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 7, 2018, at Burbank, California.



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