February 15, 2002

Honorable Chief Justice Ronald M. George
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: **Request for Depublication Under Rule of Court 979: O'Byrne v. Santa Monica Hospital (Court of Appeal, Second District, Division 1, No. B143702)**

Dear Chief Justice George and Associate Justices:

The California Medical Association ("CMA") and the American Medical Association ("AMA") respectfully request that this court depublish the opinion in this case. As will be more fully discussed below, the appellate court decision fails to properly evaluate whether certain provisions of the California Code of Regulations render all hospitals' medical staff bylaws in this state non-contractual in character.[1] Further, in reviewing a deleted provision of Assembly Bill 405 (1997-1998 Reg. Sess.), a CMA-sponsored bill, the Court relies in an improper analysis of legislative intent in reaching its decision that medical staff bylaws could never be classified as a contract supported by consideration. If allowed to stand, this decision will undermine the relationships between hospital administration and the physicians and other health care professionals on the medical staff of hospitals throughout the state. Further, given the faulty analysis of legislative intent contained in the opinion, it will also undermine appropriate legislative compromise if legislators must consider not only how they draft bills and add provisions to them, but also must assess the potential legal impact of those provisions they *amend out* of bills as well.

The California Medical Association is a non-profit, incorporated professional association of more than 30,000 physicians practicing in the State of California. CMA's membership includes most California physicians engaged in the private practice of medicine, in all specialties. CMA's primary purposes are "• to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession." CMA and its members share the objective of promoting high quality, cost-effective health care for the people of California. CMA has a long history of involvement in medical staff matters, including participation as amicus before California courts in cases such as Fox v. Kramer (2000) 22 Cal.4th 531, 93 Cal.Rptr.2d 497, and Rosenblit v. Sup. Ct. (1991) 231 Cal.App.3d 1434, 282

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[1] While the O'Byrne court was unanimous in the result, a concurring opinion disputed the analysis used by the majority in reaching that result.

Cal.Rptr. 819. CMA also publishes and revises annually the CMA Annotated Model Medical Staff Bylaws. The CMA Model Bylaws serve as guidance to medical staffs and hospitals throughout the state in crafting and amending bylaws which comply with state law and contribute to the quality of care and the efficient operation of the medical staff.

The American Medical Association, an Illinois not-for-profit corporation, is a professional organization of physicians and is the largest medical society in the United States. Its approximately 280,000 physician members practice in all fields of medical specialization and in every state, including California. The AMA is dedicated to promoting the science and art of medicine and the betterment of public health."[2]

CMA and AMA seek depublication of this opinion because it does not meet the standards for publication specified in California Rule of Court No. 976(b) and its publication would be counterproductive to the goal stated by those standards, as is further discussed below.

THE O'BYRNE COURT'S RULING SUMMARIZED

The court held that medical staff bylaws of a hospital do not constitute a contract between the medical staff/hospital and an individual member of the medical staff.[3] The court found that the element of consideration required for the formation of a contract was absent, based on the following rationale:

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[2] The AMA joins this letter on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies (the "Litigation Center"). The Litigation Center, a coalition of the AMA and 50 state medical societies, including CMA, was established to present the views of the medical profession to the courts.

[3]Though not mentioned by the O'Byrne court, the California Supreme Court presumed medical staff bylaws are in the nature of a contract in Westlake Community Hospital v. Superior Court (1976) 17 Cal.3d 465, 131 Cal.Rptr. 90. In Westlake, the Court made clear that the medical staff bylaws at issue could not require a medical staff member to waive the right to personal redress against the medical staff or hospital for disciplinary action that may be taken. The Supreme Court applied Civil Code §1668 to the issue, stating that:

> "[I]sofar as the provision in question purports to bar a plaintiff's claim based on the *intentional* wrongdoing of the hospital or its staff, as is alleged in the instant case, Civil Code section 1668 leaves no doubt that the provision is invalid, for the section provides in relevant part: 'All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another... are against the policy of the law.' " (Westlake at p. 479, italics in original.)

> Sections 70701 and 70703 of the California Code of Regulations, title 22, required the Medical center to appoint a medical staff, they [sic] required the medical staff to adopt bylaws, and they [sic] required the medical staff to abide by those bylaws. Clearly, there was no consideration given for the Bylaws – neither the Medical Center nor plaintiff conferred on the other any more than what was required by law. (O'Byrne at 583.)

The court relied on the axiom that "A statutory or legal obligation to perform an act may not constitute consideration for a contract." (Citing Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1985) 65 Cal.App.4th 713, 723, 77 Cal.Rptr.2d 1, disapproved on another ground in Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1123, fn. 10, 81 Cal.Rptr.2d 471.) The "acts" which the medical staff is obligated to "perform" are apparently to enact, enforce, and abide by the bylaws. (22 C.C.R. §70703(b).)

THE ROLE OF MEDICAL STAFF BYLAWS IN THE HOSPITAL SETTING

Medical staff bylaws are an indispensable and binding agreement between the hospital and the medical staff (and its individual members). In essence, the bylaws memorialize the hospital's agreement to allow physicians who become part of the medical staff to admit patients and utilize the facilities, equipment, and other resources of the hospital in exchange for the medical staff members' agreement to work with each other and with the hospital to perform the extensive quality assessment activities requisite to health facility licensure. (*See* 22 C.C.R. §§70701, 70703.) The courts of numerous jurisdictions throughout the country have recognized that medical staff bylaws are integral to the operations of a hospital and medical staff. In specifying the rights and obligations of medical staff members to the hospital and the hospital to them, the bylaws provide a structure and set of expectations upon which the parties may rely and which ensure that the welfare of patients is protected. The bylaws maintain a delicate balance between the duties, needs, and expectations of the physicians on the one hand and the hospital on the other. Maintenance of this balance by requiring adherence to the bylaws accrues to the benefit of the hospital, the medical staff, and their patients.

TITLE 22[4] SPECIFIES ONLY GENERAL CONTENT OF MEDICAL STAFF BYLAWS, AND SHOULD NOT BE CONSTRUED AS IMPOSING "PREEXISTING DUTIES" ON THE MEDICAL STAFF WHICH VITIATES THE ELEMENT OF CONSIDERATION IN FORMATION OF A CONTRACT

The court interprets the concept of "preexisting duty" with too broad a brush. The court's statement that there "was no consideration given for the Bylaws" is simply incorrect.

The Title 22 Requirement that the Medical Staff Bylaws Include Unspecified "Procedures" for Certain Areas of Medical Staff Operations Does Not Create a Preexisting Obligation Imposed by Law

Title 22 specifies requires only that certain *subject matters* be *treated* in the medical staff bylaws. These comprise:

> . . . *formal procedures* for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanism *and such other subjects or conditions which the medical staff and governing body deem appropriate*. (O'Byrne at 583; 22 C.C.R. §70703(b); italics added.)

Therefore, Title 22 requires the medical staff bylaws very generally to include *procedures* for a specified subset of activities of the medical staff (procedures for processing membership applications, assigning clinical privileges, etc.). Title 22 does not specify the particular procedures themselves, however, nor does it set forth specific *content* to be included in bylaw provisions. For example, Title 22 does not dictate inclusion in the medical staff bylaws the general and particular qualifications for membership on the medical staff[5] or categories of membership and privileges available[6]; the information required of each applicant for medical staff membership[7]; the availability of temporary or provisional privileges[8]; the process for initiating and carrying out an investigation regarding the quality of care and the grounds for

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[4] Title 22 of the California Code of Regulations contains a multitude of regulations promulgated by the California Department of Health Services. In short, they serve to set standards for, among other things, the operations of acute care hospitals and other health care facilities in the state.

[5] *See, e.g.*, CMA Annotated Model Medical Staff Bylaws, Article II, Membership.

[6] *See, e.g.*, CMA Annotated Model Medical Staff Bylaws, Article III, Categories of Membership.

[7] *See, e.g.*, CMA Annotated Model Medical Staff Bylaws, Article IV, Appointment and Reappointment.

[8] *See, e.g.*, CMA Annotated Model Medical Staff Bylaws, Article V, Clinical Privileges.

suspension, restriction or termination of privileges or membership on the medical staff[9]; the time lines and methods for securing internal appeal rights in a disciplinary proceeding,[10] nor a whole host of other information, requirements, rules and procedures. Thus, as the O'Byrne court itself stated, the law gives "broad discretion ... [to] the medical staff to adopt appropriate bylaws." (O'Byrne at 584.)

This "broad discretion" permits the medical staff to significantly tailor the bylaws to help it serve its particular members' needs and the needs of the community(ies) it serves, and to do so consistent with its own unique hospital "culture." As a result, there exists great variation in content of different medical staffs' bylaws.[11] These variations can significantly distinguish one hospital medical staff's policies and procedures from another. These distinctions can also substantially affect a physician's analysis whether to apply for membership and privileges at one particular institution rather than another. The medical staff bylaws, therefore, can serve an important part of the medical staff's inducement to bring new candidates onto its staff. A medical staff's formulation of bylaws designed to contain the most beneficial provisions for physicians and with an eye towards delivering the highest quality of care must be viewed as significant consideration benefiting the physicians who choose to practice at any particular facility. Therefore, given the tremendous flexibility the medical staff is afforded in choosing content for the medical staff bylaws, and contrary to the O'Byrne appellate opinion, Title 22's very general requirements affecting medical staff bylaws should not be viewed as "preexisting obligations" rendering medical staff bylaws, as a class, non-contractual in nature.

The Title 22 Requirement that the Medical Staff Bylaws Include "Such Other Subjects or Conditions Which The Medical Staff And Governing Body Deem Appropriate" Does Not Create a Preexisting Obligation Imposed by Law

The Court noted that Title 22 "requires" the medical staff to include in the bylaws "such other subjects or conditions which the medical staff and governing body deem appropriate." (O'Byrne at 584; 22 C.C.R. §70703(b).) This provision simply states the obvious – beyond that which is minimally required by law to be included in the bylaws, the bylaws may also contain whatever matters the medical staff and governing body may decide. The Court appears to interpret this

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[9] *See, e.g.*, CMA Annotated Model Medical Staff Bylaws, Article VI, Corrective Action.

[10] *See, e.g.*, CMA Annotated Model Medical Staff Bylaws, Article VII, Hearings and Appellate Reviews.

[11] To illustrate this fact, CMA's 2001 Annotated Model Medical Staff Bylaws (including footnote annotations) is approximately 125 pages long. The unannotated Model Bylaws prepared by the California Healthcare Association, the trade association representing hospitals and health systems, is approximately 80 pages, and differs in substantial respects from those promulgated by the CMA.

"catch-all" provision to mean that there is *nothing* that can be incorporated into medical staff bylaws that escapes the "preexisting duty" classification.[12] It strains credulity to hold that the medical staff has a "preexisting duty" to include whatever provisions it may "deem appropriate," thereby precluding those beneficial provisions from serving as consideration for a contract between the medical staff or hospital and its physicians. Contrary to the O'Byrne holding, a Title 22 requirement which actually *permits* the medical staff the most flexibility humanly conceivable in crafting its bylaws cannot be viewed rationally as reducing all medical staff bylaws throughout the state to mere rosters of "preexisting duties" of the medical staff.[13]

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[12] The court stated: "Plaintiff does not explain precisely how the [medical staff] Bylaws are more expansive and comprehensive than those provided for by law, in light of the broad discretion given the medical staff to adopt bylaws." (O'Byrne at 584.)

[13] Consistent with this argument, the O'Byrne court's citation to Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1985) 65 Cal.App.4th 713, 77 Cal.Rptr.2d 1, does not support its holding. In Mission Oaks, a developer's proposed project was denied by the County of Santa Barbara in reliance on the environmental impact report prepared by the county's hired consultant. The developer, alleging that the EIR was erroneous, sued the county for breach of a duty under the county's fee agreement contract with the developer to prepare a proper EIR. The appellate court affirmed the trial court's ruling sustaining the county's demurrers, stating that the contract provided, consistent with the California Environmental Quality Act ("CEQA"), that final responsibility and authority as to quality and content of the EIR is entirely within the discretion of the County. Therefore, the Mission Oaks court stated, "these statutory obligations may not be the consideration for a contract or promises, nor may the County bargain away its constitutional duty to regulate development." (Id. at 723.) The Mission Oaks case has no relevance to the O'Byrne situation. The contract provision at issue properly mirrored a provision of CEQA, namely that the County is responsible for the quality of the EIR and the extent of payment therefor. This "mirroring" of provisions between CEQA and the contract at issue in Mission Oaks cannot be analogized to this case; provisions of medical staff bylaws required by Title 22 cannot "mirror" the regulations because the regulations are deliberately broad in requiring only certain categories of information to be included in the bylaws, namely unspecified "procedures" in certain categories of medical staff operations. Most importantly, it would be contrary to public policy to improperly constrain a county's discretion to disapprove a development project based on an EIR by threatening it with potentially ruinous contract damages if it were to do so. Enforcing the terms of medical staff bylaws through a contract action, on the other hand, does not put the hospital or medical staff members between such a rock and a hard place. The mandate that there be medical staff bylaws containing procedures in certain areas of medical staff operations cannot be undermined by a contract action for enforcement of specific bylaw provisions, in the way that the mandate to a county to properly evaluate development projects based on EIRs and on behalf of the public can be undermined by a contract action which would improperly influence the county's discretion to disapprove a project. Indeed, perhaps the

The Requirement that the Medical Staff Must "Abide" by the Bylaws Does Not Create a "Preexisting Duty" Under the Law

Title 22 also explicitly requires the medical staff and its members to *abide by the bylaws*. This requirement is nothing more than what bylaws themselves inherently require. The reality for contract-analysis purposes, however, *is that a physician does not have to comply with the medical staff bylaws* if the physician does not view them as attractive enough to cause the physician to join the medical staff in the first place. The physician's decision to *apply to and join* the medical staff, in return for the medical staff's offering of acceptable bylaws in all their aspects, among other things, *is the point at which the consideration by the parties is exchanged and the contract is made*. This is a point that the court in O'Byrne failed to observe.

TREMENDOUS SPECIFICITY PRESCRIBED BY LAW FOR CONTRACTS EXECUTED BY CALIFORNIA HMOS DOES NOT VITIATE THE CONSIDERATION ELEMENT REQUIRED FOR THE FORMATION OF THOSE CONTRACTS.

Title 22 does not prescribe the specific content of medical staff bylaws, and to the degree it does prescribe content, it cannot match the specificity required by the Knox-Keene Health Care Service Plan Act of 1975[14] for the content of health plan contracts with health plan enrollees, subscribers and health care providers. Yet, Knox-Keene plan contracts are undoubtedly treated by the courts as contracts between plans and enrollees, subscribers and providers. If the Legislature can prescribe plan contracts with such specificity and not foreclose contract actions for a plan's breach of contract, the much more general requirements of Title 22 (regulations promulgated by the Department of Health Services) should not foreclose such actions with respect to breaches of the medical staff bylaws.

To illustrate, the Legislature has mandated a multitude of requirements to be included in Knox-Keene health care service plan ("plan") contracts with enrollees, subscribers and providers. Notwithstanding these "preexisting" requirements of the law, it is well established that health plans are subject to actions for breach of contract for violations of contract requirements imposed by those legislative mandates. (*See, e.g.,* Erikson v. Aetna Health Plans of California, Inc. (1999) 71 Cal.App.4th 646, 84 Cal.Rptr.2d 76 [breach of contract and other claims against HMO subject to mandatory arbitration under Federal Arbitration Act]; Blue Cross of California v. Anesthesia Care Associates Medical Group, Inc. (1999) 187 F.3d 1045 [medical providers' claims against Blue Cross health plan for breach of contract are not preempted by ERISA].) For example, the Knox-Keene Act requires each health plan contract to provide subscribers and

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legal principle more applicable to this aspect of the Mission Oaks case is that contracts which are contrary to public policy are void.

[14] Health & Safety Code §1340 *et seq.*

enrollees "all of the basic health care services" as defined.[15] If the O'Byrne ruling applied to plan contracts, it would not permit an enrollee or subscriber to sue for breach of contract based on the plan's failure to provide these services because they would be considered "preexisting duties" required by law.

The law also requires every plan to "furnish services in a manner providing continuity of care and ready referral of patients to other providers at times as may be appropriate consistent with good professional practice." (Health & Safety Code §1367(d).) If the rationale of O'Byrne applied here, the requirement to provide appropriate continuity of care and proper referrals would be preexisting duties of the plans which do not support contract actions for breach of a contract provision to that effect. Therefore, under that rationale, there could be no contract action against a plan arising from the failure to provide necessary care or to make appropriate referrals to specialists.

Further, the fact that these and many other requirements must be included in health plan contracts constitutes an implicit statement by the Legislature that health plans are required to create contracts to do business, just as medical staffs are explicitly required to create and enact bylaws.

Lastly, as Title 22 requires of medical staffs and their bylaws, the Knox-Keene Act also requires plans to abide by their contracts and to provide a method of enforcement of their contracts. The law requires each plan to provide contracts with providers, enrollees and subscribers that are "fair, reasonable, and consistent with the objectives" of the Knox-Keene Act. (Health & Safety Code §1367(h)(1).) To that end, the Legislature requires each plan to provide a "fast, fair and cost-effective dispute resolution mechanism" under which providers may submit disputes to the plan. (Id.)

Admittedly, and unlike the express language of the regulation in 22 C.C.R. §70701(b), the Knox-Keene Act never explicitly states, "The plan shall abide by and enforce the terms of its contracts with enrollees, subscribers, providers and others." Given the requirements imposed by the Knox-Keene Act discussed above, however, it is simply inconceivable that the Legislature could have intended otherwise. Yet, there are no cases found which foreclose breach of contract actions to plaintiffs or providers against health plans based on the "preexisting" nature of the duties embodied in the Knox-Keene act, or the lack of consideration to support a contract based on such preexisting duties.

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[15] These services include physician services, including consultation and referral; hospital inpatient services and ambulatory care services; diagnostic laboratory and diagnostic and therapeutic radiologic services; home health services, preventive health services, emergency health care services and hospice care. (Health & Safety Code §1345(b).)

The Title 22 requirement that the medical staff enact bylaws, abide by them and enforce them is legally indistinguishable from the Legislature's requirement that health plans under Health and Safety Code sections 1340 *et seq.* contain certain provisions in their contracts with subscribers, enrollees, and providers; to operate under such contracts; and to abide by and enforce them. The analysis of the court in O'Byrne is flawed for these reasons and the opinion should be depublished.

THE O'BYRNE COURT IMPROPERLY ANALYZED THE "LEGISLATIVE INTENT" UNDERLYING AN AMENDMENT *TO A BILL* REGARDING MEDICAL STAFF BYLAWS.

The O'Byrne opinion incorrectly concluded that the California Legislature has determined that medical staff bylaws do not constitute a contract. The O'Byrne Court noted that Assembly Bill 405 (1997-1998 Reg. Sess.) introduced in 1997 initially provided that the bylaws of organized medical staffs of acute care hospitals would "constitute a binding contract between the health facility, organized medical staff as a whole, and, to the extent the bylaws impose duties upon or grant rights to them, the individual members of the medical staff." (O'Byrne at 584.) That provision was stricken from the bill, however, by amendment in the Assembly and, ultimately, the bill was *vetoed* by the governor.

By focusing on the deletion of a provision from a bill *that was never passed into law*, the O'Byrne court concludes that:

> it appears the Legislature *did not believe* at the time AB 405 was introduced that medical staff bylaws would 'constitute a binding contract between the health facility, organized medical staff as a whole, and, to the extent the bylaws impose duties upon or grant rights to them, the individual members of the medical staff.' Further, by *deleting that provision of AB 405, the Legislature retreated from the notion that such bylaws ought to constitute a binding contract between the health facility and its staff.* (O'Byrne at 584; italics added.)

The O'Byrne Court cites a rule that states, "in general, 'a substantial change in the language of a statute ... by an amendment indicates an intention to change its meaning.' " (O'Byrne at 584, citation omitted.) First, because AB 405 was vetoed by the Governor, there was no change, much less a "substantial change," to any statute brought about by AB 405. Secondly, AB 405 would have *added* the relevant medical staff bylaws provision as a *new* statute, Health & Safety Code §1250.04. There was no intention by the drafters of AB 405 to make a "change in the language of a statute ... by an amendment ...." Had AB 405 passed the Legislature and been signed by the governor with the relevant medical staff bylaws provision intact, it would have been the first time the Legislature had spoken on the issue.

Lastly, the O'Byrne Court turns the rules of analysis of legislative intent on their collective head. The correct rule to apply in this case relates more closely to the failure to enact a proposed provision of a *new statute*, and not failure to enact a proposed amendment to an *existing statute.* In Arnett v. Dal Cielo (1996) 14 Cal.4th 4, 56 Cal.Rptr.2d 706, the Supreme Court was very clear that the Legislature's failure to enact a proposed provision of a new statute that is deleted from a bill before passage does not mean the Legislature rejected the proposal on its merits. The Court stated:

> [T]he Legislature might equally well have been motivated instead by considerations unrelated to the merits, not the least of which is that it might have been believed the provision was unnecessary because the law already so provided.... Indeed, when as here a provision is dropped from a bill during the enactment process, the cause may not even be a *legislative* decision at all; it may simply be that its proponents *decided to withdraw the provision on tactical grounds.* (Dal Cielo at 28, italics added.)

The O'Byrne Court simply had no basis to conclude that the Legislature affirmatively did not believe medical staff bylaws should constitute a binding contract.[16] Moreover, the language in the opinion will improperly restrict discretion of legislators to propose and amend legislation by requiring that they consider not only the impact of language that they affirmatively enact into law, but also the potential inferences the state's courts may draw from language they propose but ultimately do not enact.

For the foregoing reasons, CMA and AMA respectfully request that this court depublish the opinion in O'Byrne v. Santa Monica Hospital.

DATE: February 15, 2002

Respectfully submitted,
CALIFORNIA MEDICAL ASSOCIATION
AMERICAN MEDICAL ASSOCIATION
CATHERINE I. HANSON (State Bar #104506)
GREGORY M. ABRAMS (State Bar #135878)

By:_____
Gregory M. Abrams

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[16] AB 405 as introduced was drafted by CMA. Indeed, CMA, as the proponent of the bill, assented to the deletion of the medical staff bylaws provision purely "on tactical grounds," and its deletion was not a result of any assessment by the Legislature that medical staff bylaws do not constitute a contract.

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