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May 4, 2021

Honorable Justices of the Court of Appeal
Fourth Appellate District, Division One
Symphony Towers
750 B Street, Suite 300
San Diego, California 92101

Re: Request for Publication in *Grabowski v. Kaiser Foundation Health Plan et al.*
Appellate Case Number D076968

Dear Honorable Justices:

Pursuant to California Rule of Court, rule 8.1120, we are writing to respectfully request publication of the above-titled case that was filed on April 19, 2021.

We are not affiliated with any party in this action. We are a small firm that specializes in medical malpractice on the plaintiffs' side. That being said, if published, the opinion would not move the needle for the plaintiff or defense bar. Instead, this opinion would rather ensure arbitration proceedings were fair and impartial for *both* sides.

In addition, publication of the opinion is appropriate given that it establishes an existing rule of law to a set of facts significantly different from those stated in published opinions. (Cal. Rules of Court, 8.1105(c)(2).) There are no California published cases involving an arbitrator's duty to disclose an ex parte communication under Code of Civil Procedure section 1286.2(a)(6)(A).¹

As this Court recognized, all prior decisions regarding improper ex parte communication warranting vacating an arbitration award involved the arbitrator's receipt of ex parte communication on non-arbitrative matters to which the opposing party could not respond. (See, e.g., *Maaso v. Signer* (2012) 203 Cal.App.4th 362, 371; *Baker Marquart LLP v. Kantor* (2018) 22 Cal.App.5th 729, 740; *A.M. Classic Const., Inc. v. Tri-Build Development Co.* (1999) 70

Indeed, these were the decisions that the trial court relied upon in finding that the communications were "improper and unethical" but also did not believe that the communications impacted the outcome of the arbitration.

¹ While *A.M. Classic Const., Inc. v. Tri-Build Development Co.* (1999) 70 Cal.App.4th 1470, 1478 made a passing reference that "the arbitrator should have advised appellants' counsel of the ex parte communication," that decision still focused primarily on whether the "award was procured by corruption, fraud, or other undue means" under section 1286.2(a).

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In contrast, the nature of the ex parte communication in this case was different. This case involved ex parte banter exhibiting significant potential bias. As aptly explained by this Court “It is not primarily a matter of Grabowski's inability to respond; it is the arbitrator's failure to disclose a potentially disqualifying matter.” If published, this would be the first opinion that addressed an arbitrator’s failure to disclose an ex parte communication in violation of Code of Civil Procedure section 1286.2.

Medical malpractice cases often involve the same arbitrators and the same counsel that have encountered each other over years. In the relaxed, informal setting of arbitration, this may lead to the unfortunate and prejudicial ex parte banter that occurred here. (See also *Cox v. Bonni* (2018) 30 Cal.App.5th 287, 297 [affirming defense award in a medical malpractice action despite acknowledging “actions by the neutral arbitrator that understandably could cause someone to question his impartiality.”].)

It would be greatly beneficial for both claimants and respondents to have a published opinion to help ensure that the type of conduct that occurred in this case. Medical Malpractice actions often involve catastrophic injuries or death. Arbitration awards in favor of a claimant based on a physician’s conduct must be reported to the California Medical Board. (Bus & Prof Code § 801.01(b)(2). Particularly given the lack of appellate remedies in relation to an arbitration award, both sides would benefit from ensuring that the process is fair and impartial. The misconduct that occurred here was discovered by pure happenstance and publication of this opinion would be valuable to the entire arbitration process.

Very truly yours,

HODES MILMAN IKUTA, LLP

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cc: All counsel in the action and Plaintiff in Pro Per

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