ACLU
AMERICAN CIVIL LIBERTIES UNION of SOUTH CAROLINA

March 5, 2012

[redacted]

VIA FAX AND HAND DELIVERY

[redacted]

VIA FAX

RE: [redacted]

Dear Sirs and Madams:

We have become aware of an emergent situation concerning [redacted], an obstetric patient of your practice. It is our understanding that Ms. [redacted] has communicated to you her wish for a trial of labor for her fourth child, rather than a scheduled cesarean surgery. We further understand that, although you initially indicated that Ms. [redacted] is a suitable candidate for a trial of labor despite having had two previous cesarean surgeries, you have subsequently informed her that she will not be permitted a trial of labor.

These circumstances raise the troubling possibility that Ms. [redacted] may be required to undergo surgery against her will. Specifically, Ms. [redacted], whose expected due date is [redacted], was scheduled by your practice for cesarean surgery to take place today, [redacted], despite your knowledge that she does not wish to have the procedure performed. When Ms. [redacted] called to cancel the procedure, she was required to reschedule it for [redacted], and was refused any later date. Previously, on [redacted], Ms. [redacted] had been informed by a doctor in your

practice that if she refused to schedule cesarean surgery, but instead were to appear at the hospital in labor, the doctors in your practice "will not touch" her. Ms. [redacted] was subsequently told by a doctor in your practice, in reference to the mandated surgery, "I know you don't want to do this," confirming that you are aware that Ms. [redacted] does not wish the mandated and possibly unnecessary cesarean surgery to go forward. Ms. [redacted] had previously been derided by another doctor in your practice, who repeatedly characterized her decision to attempt a trial of labor as "stupid" while consulting with Ms. [redacted] and in the presence of her children.

We hope that this situation can be resolved in a manner which respects Ms. [redacted]'s rights, and achieves a positive medical outcome for Ms. [redacted] and her child. To that end, we write to apprise you of the law and standards relevant to this situation, and ask that you conform your behavior to these norms.

Standards Relating to Physical Integrity and Informed Consent

Legal standards relevant to Ms. [redacted]'s case concern individuals' right to physical integrity, as well as patients' right of informed consent, particularly the right to refuse medical intervention. As articulated in a New York decision that has been cited across jurisdictions: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[1] The constitutional right to refuse medical interventions applies even to lifesaving medical treatment.[2]

Courts have specifically held that these rights apply to pregnant women, including in later stages of pregnancy. In the case *In Re A.C.*, an appeals court stated that "in virtually all cases the question of what is to be done is to be decided by the patient – the pregnant woman – on behalf of herself and the fetus."[3] In so holding, the court rejected the defendant hospital's arguments that the fear of liability or the state's interest in potential life overrode the pregnant patient's bodily integrity and autonomy in making her health care decisions. The court expressed doubt as to whether there could ever be a situation extraordinary enough to justify an intrusion as great as a cesarean surgery against a person's will.[4] Similarly, in the case *In re Baby Boy Doe*, a state appeals court affirmed a pregnant woman's right to refuse cesarean surgery, notwithstanding the belief on the part of the mother's doctor and hospital that failing to perform such surgery would cause the child to be stillborn or impaired.[5] The court stated unequivocally that "a woman's competent choice to refuse medical treatment as invasive as a cesarean section during pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus."[6] Indeed,

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[1] *Schloendorff v. Soc'y of N.Y. Hospital*, 105 N.E. 92 (N.Y. 1914).
[2] *Cruzan v. Dir. Mo. Dept. of Health*, 497 U.S. 261 (1990).
[3] 573 A.2d 1235, 1237 (D.C. App. 1990).
[4] *Id.* at 1252.
[5] 632 N.E. 2d 326 (Ill. App. Ct. 1994).
[6] *Id.* at 393. *See also, In re Fetus Brown*, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997) (overturning a court-ordered blood transfusion of a pregnant woman); *Stallman v. Youngquist*, 531 N.E.2d 355, 359-61 (Ill. 1988) (refusing to recognize the tort of maternal prenatal negligence, holding that granting fetuses legal rights in such a manner "would involve an unprecedented intrusion into the privacy and autonomy of the [state's female] citizens").

no appellate court in the nation to rule on a full record has ever upheld forced or coerced surgery on a pregnant woman.[7]

In addition to the courts, the American Congress of Obstetricians and Gynecologists (ACOG) has provided clear statements of the applicable ethical standards, consistently affirming a pregnant woman's right to refuse medical intervention as a part of her basic right to privacy and bodily integrity. ACOG's Committee on Ethics has stated that "[p]regnancy does not obviate or limit the requirement to obtain informed consent."[8] In the context of court-ordered medical treatment, the American Medical Association (AMA) has also recognized that performing a medical procedure against a pregnant woman's will violates her right to informed consent and her constitutional right to bodily integrity.[9] ACOG has described the consequences of infringements of these rights, stating that "actions of coercion to obtain consent or force a course of action limit maternal freedom of choice, threaten the doctor/patient relationship, and violate the principles underlying the informed consent process."[10]

Standards Relating To Patient Abandonment

The statement made to Ms. [redacted] that the doctors in your practice "will not touch" her if she appears at the hospital in labor suggests that standards concerning patient abandonment may also be relevant to this situation. The AMA's Council on Ethical and Judicial Affairs has established that, once a patient-physician relationship has begun, a physician is under an ethical and legal obligation to continue providing services as long as the patient needs them.[11] A physician who wishes to withdraw his or her services must not do so at a critical stage of care, and must provide sufficient notice to permit the patient a reasonable opportunity to find an equally qualified replacement.[12] Appropriate steps to terminate the professional relationship between a physician and a patient include providing written notice, providing a valid reason for the termination, continuing treatment for a reasonable period, such as thirty days, to allow the patient to secure

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[7] A Georgia Supreme Court decision has sometimes wrongly been cited as having affirmed forced medical interventions. *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981). Because the decision was reached on an emergency basis without the benefit of research, written briefs, or participation of expert amicus, because subsequent Georgia court rulings have rejected the argument that a pregnant women may be held liable for endangering a fetus inside of her, and because this case provides a well-known example of doctor's predictions of harm being wrong, this decision does not have precedential value, even in Georgia. *See*, State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992) (authority contradicting *Jefferson*); Hillman v. State, 503 S.E.2d 610 (Ga. Ct. App. 1998) (same); Robert N. Berg, Georgia Supreme Court Orders Cesarean Section – Mother Nature Reverses on Appeal, 70 J. MED. ASS'N GA. 451 (1981) (doctor's prediction inaccurate).

[8] ACOG Committee on Ethics, Committee Opinion No. 321 ("Maternal Decision Making, Ethics, and the Law") (2005).

[9] Helene M. Cole, M.D., *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663 (1990).

[10] ACOG Committee on Ethics, Committee Opinion No. 55 ("Patient Choice: Maternal-Fetal Conflict") (1987).

[11] AMA Code of Ethics, Opinion 8.115 ("Termination of the Physician-Patient Relationship"). *See also*, American Medical Association, "Ending the Patient-Physician Relationship," http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/ending-patient-physician-relationship.page (accessed March 5, 2012); *Stibbe v. Bailey*, No. C8-88-2628 (Minn. Ct. App. filed May 2, 1989) (Courts employ expert testimony to establish the applicable standard of care and breach of that standard in cases of negligent termination of treatment by a physician).

[12] *Id.*

alternative care, assisting the patient in obtaining alternative care, and offering to transfer all relevant records to the newly-designated physician.[13]

Application of Legal and Ethical Standards to Ms. [redacted] Case

In light of the foregoing legal and ethical standards, your practice appears to be moving in a potentially problematic direction in relation to Ms. [redacted]'s care. Ms. [redacted] has stated clearly and repeatedly, to multiple doctors in your practice, that she wishes to attempt a vaginal birth rather than undergo scheduled cesarean surgery that may be unnecessary. Ms. [redacted]'s decision to attempt a trial of labor is consistent with ACOG guidelines. According to a recent ACOG Practice Bulletin, attempting a vaginal birth after cesarean (VBAC) is a safe and appropriate choice for most women who have had a prior cesarean delivery, including women who have had two previous low-transverse cesarean incisions, as Ms. [redacted] has.[14] ACOG has noted that sixty to eighty percent of appropriate candidates who attempt VBAC will be successful, thereby avoiding major abdominal surgery, as well as enjoying a lowered risk of hemorrhage and infection, and a shorter postpartum recovery.[15] Consequently, ACOG has emphasized the importance of thorough counseling of the benefits and risks, and respect for patient autonomy, in connection with trials of labor following cesarean surgery.

Moreover, given that Ms. [redacted]'s due date is [redacted], a refusal to treat her at this point would likely constitute patient abandonment under the AMA standard. Indeed, Ms. [redacted] was told that, if she refuses cesarean surgery, it is precisely at the point when she arrives at the hospital in active labor that the doctors in your practice will refuse to "touch" her. Certainly, for an obstetric patient, labor represents a critical stage of care. Moreover, the timing of the statement, [redacted], was far too late to permit Ms. [redacted] to secure an alternative source of care for her delivery.

Accordingly, we ask that you honor Ms. [redacted]'s informed medical decision to labor naturally, and proceed with a trial of labor when she presents herself to you for your care. You may, if you wish, request that Ms. [redacted] sign a form acknowledging that she has been informed of the risks and is proceeding with a trial of labor in any event. We further ask that if there arises a genuine medical indication that cesarean surgery is necessary to Ms. [redacted]'s health or that of her child, Ms. [redacted] be advised of the benefits and risks of such an intervention, as well as any alternative treatments available, and that her fully informed decision be respected.

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[13] AMA, "Ending the Patient-Physician Relationship," *supra* note 11.
[14] ACOG Practice Bulletin No. 115 ("Vaginal Birth After Previous Caesarian Delivery") (2010).
[15] ACOG, "Ob Gyns Issue Less Restrictive VBAC Guidelines," http://www.acog.org/About_ACOG/News_Room/News_Releases/2010/Ob_Gyns_Issue_Less_Restrictive_VBAC_Guidelines (accessed March 5, 2012).

Please do not hesitate to contact us if you have any questions or would like to discuss this matter further. Telephone for Susan Dunn is 843-720-1425. Her email is sdunn@aclusouthcarolina.org.

Sincerely,

Susan Dunn
Legal Director
ACLU of South Carolina

Mie Lewis*
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cc: [redacted]