COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR INITIATIVE 2023-2024 #275

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #275

Alethia Morgan ("Movant"), a registered elector of the City and County of Denver, Colorado, through counsel, Ireland Stapleton Pryor & Pascoe, PC, hereby files this Motion for Rehearing on Initiative 2023-2024 #275 ("Initiative #275").

On April 17, 2024, the Title Board set the Title for Initiative #275 as follows:

> A change to the Colorado Revised Statutes concerning expanding the right of a patient to access information related to an alleged adverse medical incident, and, in connection therewith, expanding patient access to medical records, information, or communications made or received by a physician, other licensed health-care professional, or health-care institution, including staff, management, board of directors, or a quality management committee about an act or omission that caused injury or death of the patient and excluding certain information that is privileged or confidential under Colorado or federal law.

I. Summary

Initiative #275 is a follow-on measure to Proponents' prior measure, 2023-2024 #149, which the Board determined had multiple subjects. While Initiative #275 makes certain changes and carves out exceptions to the right to access medical records, it continues to mandate disclosure of a healthcare provider's internal professional review and quality assurance records.

The only difference between Initiative #275 and Initiative #274 is that Initiative #275 provides a very narrow carveout for recommendations by professional review committees and from quality management programs. But all other professional review and quality management documents and communications currently privileged by state law would no longer be privileged under Initiative #275, meaning that these privileges are still gutted by Initiative #275. Indeed, Initiative #275 is more misleading than Initiative #274 because it makes voters believe these privileges are being protected. This superficial carveout is an implicit recognition of the sweeping changes both Initiatives #274 and #275 make to the privileges afforded to healthcare providers under Colorado law.

Like Initiatives #149 and #274, Initiative #275 also requires disclosure of medical information to a patient even if it contains a different patient's medical information that is protected by the physician-patient privilege. Finally, Initiative #275 overrides Colorado's Candor Act by

mandating disclosure of documents and information that are otherwise privileged by the Candor Act.

All of these changes to Colorado law, which are identified nowhere in the title, are coiled within the folds of a measure that touts itself as an expansion of patient rights when Initiative #275 is actually aimed at eliminating long-held rights of healthcare providers. The Board should therefore reverse its single-subject finding. At a minimum, the title must be revised to reflect what Initiative #275 does.

II. Initiative #275 Violates the Single Subject Requirement.

A. The Title Board Must Sufficiently Examine Initiative #275 to Determine Whether It Has Multiple Subjects.

Movant incorporates her arguments on this point from her Motion for Rehearing on Initiative #274.

B. Eliminating Long-Standing Professional and Peer Review Privileges Is a Separate Subject.

Movant incorporates by this reference her arguments on this point from her Motion for Rehearing on Initiative #274 and addresses the differences from #274 in this section.

Unlike Initiative #274, Initiative #275 includes the following exception to its definitions of medical records, medical information, and medical communications:

> ***[R]ecommendations*** to address any adverse incident made by those professional review committees established in sections 12-30-204 and 12-30-205; or ***recommendations*** to improve a quality management program to reduce risks to patients as referenced in sections 25-3-109 or 25-3.5-904.

Proposed C.R.S. §§ 25-1-804(2)(d)-(g) (emphasis added).

This very narrow carveout does not change the analysis in the Motion for Rehearing on #274. In carving out only recommendations, if any, made by professional review committees and from quality management programs, the measure maintains privilege only for the final work product, but not for any of the documents, communications, or information created along the way.

For example, C.R.S. § 12-30-204(11)(a) provides that, "***the records*** of an authorized entity, its professional review committee, and its governing board are not subject to subpoena or discovery and are not admissible in any civil suit". (Emphasis added). The records subject to protection include, for example: ***interview transcripts, statements, reports, memoranda, and progress reports*** developed to assist in professional review activities. *Id.* at § 202(8) (emphasis added).

Likewise, the Colorado Quality Management statute generally provides:

> ***[A]ny records, reports, or other information*** of a licensed or certified health-care facility that are part of a quality management program designed

> to identify, evaluate, and reduce the risk of patient or resident injury associated with care or to improve the quality of patient care shall be confidential information . . . [and] s***hall not be subject to subpoena or discoverable or admissible as evidence in any civil or administrative proceeding*** ….

C.R.S. § 25-3-109(3), (4) (emphasis added).

The General Assembly has expressly recognized these privileges as forming the foundation of the professional and peer review processes by allowing for candid internal review and analysis of patient care:

> The general assembly hereby finds and declares that the implementation of quality management functions to evaluate and improve patient and resident care ***is essential*** to the operation of health-care facilities licensed or certified by the department of public health and environment pursuant to section 25-1.5-103(1)(a). For this purpose, ***it is necessary*** that the collection of information and data by such licensed or certified health-care facilities be reasonably unfettered so a complete and thorough evaluation and improvement of the quality of patient and resident care can be accomplished.

C.R.S. § 25-3-109(1) (emphasis added); *see also* C.R.S. § 12-30-205 ("The quality and appropriateness of patient care rendered by [licensed healthcare providers] ***so influence the total quality of patient care*** that a review of care provided in a hospital is ineffective without concomitantly reviewing the overall competence of, professional conduct of, or the quality and appropriateness of care rendered by these persons.") (emphasis added).

The Colorado Supreme Court has also recognized the important role of peer review in ensuring high-quality care in holding that the Medical Practice Act "***protects the records*** of a professional review committee from all forms of subpoena or discovery." *Colorado Med. Bd. v. Office of Admin. Courts*, 2014 CO 51, ¶ 7 (emphasis added). The court reasoned that state legislatures across the country, including in Colorado, "provide for confidentiality of professional review committee proceedings and records in order to ensure that committee members are able to openly, honestly, and objectively study and review the conduct of their peers. *Id.* at ¶ 13.

Consequently, the privileges afforded to ***all of*** the records created as part of these programs are integral to their existence. Eliminating all privileges except for final recommendations would gut these programs, just like Initiative #274 does.

Additionally, various other Colorado statutes provide privileges or protections for healthcare providers' professional review records and communications. *See, e.g.*, Medical Practice Act, C.R.S. § 12-240-125(9), *et seq.* (protecting medical board investigations of healthcare professionals consistent with the terms of the Colorado Professional Review Act); *see also* Health-Care Facilities Consumer Information Reporting Statute, C.R.S. § 25-1-124 (requiring licensed healthcare facilities to report information regarding certain adverse incidents to CDPHE to compile data to facilitate consumer choice in medical care and protecting such reports from disclosure or

subpoena). In limiting the exception to only recommendations of committees and programs established under sections 12-30-204 and 12-30-205, it does not appear that Proponents intend for the exception to apply to any other professional and quality management privileges under Colorado law.

Accordingly, Initiative #275 is more misleading than Initiative #274 because it has the same practical effect on professional and quality management review programs, but gives voters the false sense that these programs are somehow being protected. The fact that Proponents went to the effort to submit a measure with this meaningless exception demonstrates (1) unequivocally that Proponents' intent is to eliminate all professional and quality management review privileges under Colorado law; and (2) that this change to Colorado law is so important that it warrants this attempt to downplay it with voters, the Board, and the Colorado Supreme Court.[1] Accordingly, this critical change to Colorado law is not a speculative "effect" and must be considered by the Board as part of its single subject inquiry.

In short, if Proponents want to gut peer and professional review privileges to the detriment of healthcare patients in Colorado, they need to do so in a standalone measure that is comprehensible to the average voter.

C. Modifying the Candor Act Privilege Is a Second Subject.

Similar to the body of law protecting professional review, the 2019 Colorado Candor Act allows healthcare providers to have candid "open discussion communications" with patients who have suffered an "adverse health-care incident". The Candor Act encourages healthcare providers and patients to have open discussions in an effort to fairly and effectively resolve past adverse-incidents short of litigation and to prevent such incidents from happening again. *See* C.R.S. § 25-51-103(4).

While Initiative #275 creates an exception for "documents, statement, or communications ***created during or occurring during an initiated open discussion***" under the Candor Act (Proposed C.R.S. §§ 25-1-804(2)(d)-(g) (emphasis added)), the measure still fundamentally changes the Candor privilege. Under existing law, communications, documents, and ***work product*** that are "***prepared for***, or submitted in the course of or in connection with" Candor open discussion communications are privileged. C.R.S. § 25-51-102(4)(a)(I); C.R.S. § 25-51-105(1)(b) (emphasis added). Candor work product will no longer be privileged and any documents and communications "prepared for" open discussion communications (as opposed to during) will no longer be privileged. These communications would include, for example, internal dialogue between healthcare professionals in preparation for Candor open discussions. Eliminating specific aspects of the Candor Act has no connection to Initiative #275's purported patient-protection theme.

[1] Proponents also stated on the record at the initial hearing that their intent is to eliminate these privileges with Initiative #275. April 18 hearing audio at 1:07:45, a*vailable at* https://csos.granicus.com/player/clip/451?view_id=1&redirect=true.

D. Overriding the Physician-Patient Privilege Is a Separate Subject.

As part of the professional review and quality assurance processes, healthcare providers typically collect records and information of similar adverse medical incidents as an important component in understanding risks and trends. In fact, CDPHE regulations require "quality management programs" for licensed health facilities, which include the review of negative patient outcomes, errors, and potential for errors reported by staff. 6 CCR 1011-1:2-4.1 (privileging reports created as part of a quality management program at 4.1.5).

Yet, even after such records are compiled into any collective report or memorandum, they would fall within the broad scope of Initiative #275 and be subject to any single patient's "right" to access those records. Nothing in the definitions of "medical record", "medical information", or "medical communication" limits these terms to be patient-specific, and, like Initiative #149, Initiative #275 makes no exception for records otherwise protected by the physician-patient privilege.

In requiring the production of records that are not patient specific, Initiative #275 overrides the physician-patient privilege codified at C.R.S. § 13-90-107(1)(d). This privilege was "adopted to achieve the purpose of placing a patient in a position in which he or she would be more inclined to make a full disclosure to the doctor and to prevent the patient from being humiliated and embarrassed by disclosure of information about the patient by his or her doctor." *Cmty. Hosp. Ass'n v. Dist. Court In & For Boulder Cnty.*, 570 P.2d 243, 244 (Colo. 1977).

Thus, for example, Patient/Voter A would be surprised to learn that Initiative #275 requires the disclosure of her medical information to Patient/Voter B in contravention of the physician-patient privilege. Requiring such disclosure is not rationally related to the purported purpose of expanding patient "rights", and thus constitutes a separate subject.

III. The Title Is Unfair, Inaccurate, and Incomplete.

Ballot titles must clearly express a measure's single subject. Colo. Const. art. V, § 1; C.R.S. § 1-40-106.5. Titles must also:

> allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal. Thus, in setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear.

Matter of Title, Ballot Title & Submission Clause for 2015-2016 #73, 2016 CO 24, ¶ 22.

Here, the Title set for Initiative #275 highlights and exacerbates the problem with setting a ballot title for a measure that has multiple, distinct purposes hidden with its folds. The title reads:

> A change to the Colorado Revised Statutes concerning expanding the right of a patient to access information related to an alleged adverse medical incident, and, in connection therewith, expanding patient access to medical

> records, information, or communications made or received by a physician, other licensed health-care professional, or health-care institution, including staff, management, board of directors, or a quality management committee about an act or omission that caused injury or death of the patient and excluding certain information that is privileged or confidential under Colorado or federal law.

As constructed, the title inaccurately makes it sound as if: patients have an existing right to access records that have never been considered a patient's in the first place; this so-called right has been suppressed; and therefore this right must be expanded.

To avoid this misleading characterization, the word "expanding" should be stricken in both places in the title, which is consistent with what the Title Board did with Initiative 2023-2024 #228. Proponents of Initiative #275 are incorrect that Initiative #228 does not create access to any records that patients do not already have, and it is not appropriate for this board to weigh in on the extent to which one measure expands access versus the other. Inserting the word "expanding" in one measure but not the other would be significantly and unfairly prejudicial if both measures get on the ballot.

Additionally, the title ends with the notion that Initiative #275 protects certain "privileged or confidential information under Colorado or federal law" when the measure actually eliminates or overrides critical privileges, including peer review and quality management privileges, the physician-patient privilege, and the Candor Act privilege. The only way for the measure to be accurate on this point is to identify those privileges that are being eliminated or changed. Otherwise, the title misleadingly insinuates that these privileges are being preserved and protected.

Thus, the title must reflect that disclosure is required even if records, information, and communications are privileged or confidential under various state laws providing for peer and professional review. Additionally, the title must reflect the change to the Candor Act privilege. Finally, the Title must reflect that disclosure is required even if records, information, and communications include information related to other patients that is protected by the physician-patient privilege. The Board need "not engage in the prediction of doubtful future effects to reach [the] conclusion" that the measure will eliminate or change these privileges, and therefore these critical aspects of the measure must be addressed in the title. *In re Ballot Titles 2001-2002 #21 & #22 ("English Language Education")*, 44 P.3d 213 (Colo. 2002).

WHEREFORE, Movant respectfully requests that the Title Board reverse the title setting for Initiative #275 because it violates the single subject requirement, or, alternatively, correct the deficiencies with the Title.

Dated: April 24, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the foregoing **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #275** was sent this 24th day of April, 2024, via first class U.S. mail, postage pre-paid or email to:

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