



July 1, 2009

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Re: Compelled Participation of Madison Surgery Center Staff in Late-Term Abortions

Dear Doctors and Administrators,

We are writing on behalf of our clients Dr. Nancy Fredericks, Dr. Susan McMahon, Dr. Mark Hoenecke, Nurse Bette Pankonien, Surgical Technician Kelley Grover, and other employees of the Madison Surgery Center. We write to ask for clarification and assurance from MSC, Meriter Hospital, the UWMF, the UWHC, and the UW School of Medicine and Public Health Department of Anesthesiology, that our clients will not be compelled to participate in, provide assistance to, aid, recommend or perform any procedures for abortion at MSC.

Recently Peter Christman of the UW Medical Foundation wrote a memo to all MSC employees (a copy of the memo is attached to this letter). In the memo Mr. Christman initially stated that "participation in abortion procedures" will not be required of employees. But then he contradicted himself by declaring that employees who are at work while the abortions are being performed would be expected to assist in "emergencies resulting from" the late-term abortions. Mr. Christman analogized emergency complications in late-term abortions to emergency room cases resulting from drunk driving, concluding that "health care professionals of course administer treatment despite their personal views of the reason for injury." As explained below, if Mr. Christman's memo is enforced as official policy, MSC and its controlling entities will be breaking the law and their own public decisions regarding this late-term abortion plan.

Mr. Christman's memo proposes an offensive analogy between emergency complications in elective late-term abortions and drunk-driving accident victims who arrive at emergency rooms. None of our clients, nor any pro-life medical provider, would refuse to provide care to an emergency room patient based on the nature of his injury. But the late-term abortions planned for MSC are not analogous to an emergency room's care for drunk-driving victims. People injured in drunk-driving accidents enter into hospitals as unplanned emergencies. MSC abortions, however, are elective, planned and intentionally scheduled, which gives administrators maximum opportunity to provide willing and competent staff to assist with the procedure and with emergencies that may arise from its inherent risks. Hospitals don't schedule specific drunk-driving accidents in advance, nor do they cooperate with the drivers and victims ahead of time so that the incident will occur "safely." No hospital could legitimately force doctors who oppose drunk-driving to play a role in a planned drunk-driving collision by forcing them to be available to minimize injuries. These differences make employee availability in the abortion plan morally problematic in a way that is not applicable or analogous to emergency room care.

None of MSC's proposed abortions are emergencies, and none of the women coming into MSC will be in a medical crisis. But if and when a medical crisis arises, it will be directly related to the abortion procedures. The late-term abortion process itself poses serious risks, only a few of which include: catastrophic bleeding with possible shock and death, uterine perforation with possible bowel injury, amniotic fluid embolism with cardiac arrest, adverse reactions to medications including anaphylaxis, anesthesia complications, disseminated intravascular coagulation, and live birth of a child in distress (which occurs in a small but significant percentage of late-term abortions and which triggers duties of care for the child under federal and Wisconsin law). MSC is even having to change its policies, including the policy on blood availability, to accommodate the fact that these late-term abortion procedures implicate more serious risks than do MSC's other surgeries.

Mr. Christman implicitly acknowledges that the inherent risks of late-term abortion procedures can place women in crisis. Indeed, Dr. Caryn Dutton's lack of experience in these procedures is an important reason she and others wanted the abortions to be performed in an ambulatory surgery center and near Meriter's emergency room rather than at Planned Parenthood. Dr. Dutton even admitted in an e-mail that Planned Parenthood already possesses "LOW" confidence in her practice of earlier, "safer" abortions.

If Meriter, the UWMF, and the UWHC refuse to spend the resources for willing staff to cover all aspects of these abortion cases, then their actions will not only be unethical, they will violate the law. Wisconsin Statute § 253.09 provides clear, broad protections for employees who choose not to cooperate in MSC's abortion plan. The statute prohibits any employer from penalizing doctors, nurses, technicians, or any persons for their choice not to participate in, provide assistance to, aid, recommend or perform any procedures for abortion.

Mr. Christman's memo threatens the violation of § 253.09 in multiple ways. First, as explained above, late-term abortion carries inherent risks. One of the central reasons that the promoters of this plan want abortion at MSC is because they want to have accessible medical providers who would assist when the inherent risks of the procedures emerge. If MSC accepts these cases it must accept responsibility for their inherent risks. Citizens should expect that MSC's governing

entities would at least fulfill their legal responsibility to commit enough non-taxpayer resources to secure willing and conventionally-trained medical personnel in sufficient numbers to be available to manage these known risks. When MSC administrators schedule these abortions, they will have to make sure, days in advance, that other staff will be present.¹ Those employees who protect against the risks will be providing indispensable assistance to the procedures for abortion. If health professionals with conscientious objections are forced to be available to play that role, then their employers will be forcing them to aid and provide assistance to procedures for abortion in violation of § 253.09.

Second, many if not most of the dangers of these abortion cases will arise when the abortion is not completed, and therefore if staff are required to assist they would necessarily be required to help complete the performance of the abortions in violation of § 253.09. Third, even for contingencies that arise after an abortion is “performed,” § 253.09 explicitly applies to any kind of aid to procedures for abortion. Post-operative care is an important component of all surgical procedures, and thus § 253.09 covers conscientious objections to post-operative care.

Fourth, some practical ways that this abortion plan is being implemented may cause medical crises to be more frequent and severe than the crises that will already be caused by late-term abortion’s inherent risks. If there are more crises, it will be more likely that unwilling employees might be forced to be available to assist in violation of § 253.09. Patient care will be jeopardized if volunteers are not held to the highest standards of prior operating room experience as has been required for other procedures at MSC. Medical crises may also be more likely if employee volunteers feel indirect pressure to participate, especially if they are inadequately prepared, lack needed experience, or cannot cope with the psychological stress of watching and assisting in the destruction of a 19-22-week-old preborn child.

Fifth, Mr. Christman does not explain what situations he deems to be an “emergency.” MSC’s governing entities have already declared that they consider all these late-term abortions to be beneficial to women. Therefore, what they might claim constitutes an abortion “emergency” is likely to be incompatible with what a pro-life health care professional would believe. *But § 253.09 has no “emergency exception,”* precisely for this reason. The legislature did not want to allow abortion proponents like the UWMF to impose their definition of what constitutes an “emergency” on pro-life providers, thereby creating a giant loophole to the statute’s protection.

Mr. Christman’s memo also violates the explicit authorization of the UWHC Authority Board. When Dr. Nancy Fredericks testified at the board’s February 4 public hearing, she specifically expressed her fear that MSC and its governing entities would do exactly what Mr. Christman threatens, by failing to provide sufficient numbers of willing staff and instead requiring objecting employees to be available to cover the risks of these abortion procedures. The UWHC Authority Board was directly responsive to her concern. The board stated that its approval of this plan was

¹ Alternatively, if the abortions need not take place while other employees are present, then MSC could easily schedule them on weekday evenings or Saturdays, which would resolve nearly all problems of staff potentially being forced to participate. If Dr. Dutton injures a woman during a Saturday, that woman would either have willing backup staff present, or she would be carted to Meriter’s emergency room, or both. There is no reason not to handle emergencies in the same way (without violating anyone’s conscience rights) if MSC insists on scheduling abortions during the work week.

contingent on the UWMF and MSC providing a sufficient number of willing—not unwilling—employees to cover the possibility of emergencies related to these late-term abortions.

Mr. Christman's memo therefore risks violating the MSC's own bylaws and the intent of MSC's voting members. The abortion plan cannot move forward without meeting the conditions imposed by the UWHC and other governing members. Meriter, too, according to emails from its president James Woodward, placed conditions on its approval of this late-term abortion plan, such as the requirement that the plan not cause economic harm. If Mr. Christman is allowed to implement this plan in violation of the UWHC's conditions, then MSC's managers will be acting outside the authority they possess from the MSC board, its members, its bylaws, and the State of Wisconsin's laws governing non-profit corporations.

Requiring unwilling employees to be available for abortion complications may also result in violations of federal law. The Church Amendment, 42 U.S.C. § 300a-7(c), prohibits any entity that receives federal funding under acts such as the Public Health Service Act from discriminating against employees for their choice not to participate in abortion. Just like Wis. Stat. § 253.09, the Church Amendment has no "emergency exception." On January 7, United States Congressmen F. James Sensenbrenner, Jr., and Paul Ryan both wrote a letter to Ms. Katen-Bahensky requesting assurance that MSC's governing entities would fully inform employees of their specific opt-out rights under the law and would honor those rights. Ms. Katen-Bahensky responded on January 9, assuring the Congressmen that "participation . . . will be strictly voluntary," and that "great care is being taken to ensure that the proposal conforms to state and federal laws." Since that time, to our clients' knowledge, employees of MSC have received absolutely no written or detailed information from their administrators about the full extent of their opt-out rights, but have only been told orally and in a cursory manner that they may opt out.² In fact, the only memo that MSC employees have ever received on this subject was the memo at issue here, sent by Mr. Christman and saying that employees would be forced to be available to cover emergencies arising from late-term abortion cases.

Mr. Christman's memo further contradicts all the public statements of MSC's governing entities since this abortion plan was revealed in January. The public affairs office of UWHC has made multiple statements to the general public and in the media, portraying UWHC and UWFMF as completely respecting the law and the consciences of health professionals. On January 7 the office released a memo from Dr. Grossman, Dr. Golden, and Ms. Katen-Bahensky declaring that "Participation by physicians, other care providers, students or trainees will be strictly voluntary." On February 9 various UWHC and UWFMF officials released a "Fact Sheet" insisting that "No physicians, residents, students or staff will be required to participate in any aspect of this procedure if it is against their personal beliefs. Participation is strictly voluntary." Apparently, these officials did not actually mean "any aspect of this procedure," nor "strictly" voluntary, if employees will be forced to be available to protect against emergencies from the abortion cases.

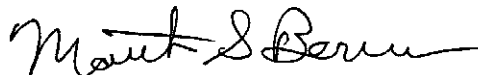
² In e-mails that the UWFMF released to ADF under a public records request, Mr. Christman and Ms. Wilson indicate that they drafted a written communication to employees about employee rights, but were choosing for political reasons not to release that information to employees. In another e-mail, the UWFMF's attorneys at the Michael Best law firm said that they were going to change their memo on employee rights to reflect President Obama's proposed rescission of conscience protections for health care employees.

Finally, Mr. Christman's memo violates the assurance that our clients Drs. Fredericks, Hoenecke, and McMahon received from Dr. Robert Pearce, their Chair in the UW-SMPH's Department of Anesthesiology. All three doctors submitted written forms to MSC administrators and to Dr. Pearce (because they are employees of both the UWMF and the Department) exercising their rights under § 253.09 not to participate in any aspects of the abortion cases, including their right not to serve as available staff to cover possible emergencies. Dr. Pearce sent each of these doctors a short letter indicating that their written exercise of rights would be respected. This will no longer be true if Mr. Christman's memo is enforced as MSC policy.

As a result, we ask that Meriter, the UWHC, the UWMF, the UW Department of Anesthesiology, and MSC send us written assurances that they will honor their promises to obey the law and to fully respect the conscience rights of our clients and all employees at MSC. We ask that they specify that Mr. Christman's memo is not MSC policy, and that employees will not be required to be available to cover emergencies arising from abortion cases, nor for "any aspect" of those cases. We ask that the UWHC Authority Board review its approval of this late-term abortion plan, and that its board members insist that the plan not move forward until the board's explicit conditions are honored by requiring willing, not unwilling, staff to be provided to protect against possible emergencies. We ask that Meriter and UWMF also insist that this late-term abortion plan not be carried out in violation of the law and of MSC's bylaws.

We request written assurances on these issues by Wednesday, July 15, 2009. There are some reports that the late-term abortions may begin as soon as September. The above issue must be resolved well before Mr. Christman's threat of employee participation becomes imminent.

Yours truly,



Matthew S. Bowman
Glen Lavy (Wis. Bar No. 1001467)

MSB/lp

cc: United States Congressman F. James Sensenbrenner, Jr.
United States Congressman Paul Ryan
Wisconsin Senator Glenn Grothman
Donna Katen-Bahensky, President & CEO, UW Hospital and Clinics
Peter Christman, Executive Vice President & COO, UW Medical Foundation
Claudia Jane Sanders, Vice President of Legal Services, UW Medical Foundation
David G. Walsh, Chair, UW Hospital and Clinics Authority Board
Patrick G. Boyle, PhD, Vice Chair, UW Hospital and Clinics Authority Board
Pablo Sanchez, Member, UW Hospital and Clinics Authority Board
Humberto Vidaillet, MD, Member, UW Hospital and Clinics Authority Board
James L. Woodward, President & CEO, Meriter Hospital

Attachment: Peter Christman memo

ATTACHMENT

----- Original Message -----
Subject: Ad expected to appear in May 28 Wisconsin State Journal
From: "UW Health Public Affairs" <publicaffairs@uwhealth.org>
Date: Wed, May 27, 2009 5:37 pm
To: undisclosed-recipients: Undisclosed recipients;

To: Madison Surgery Center Faculty and Staff
From: Pete Christman, UWMF Executive Vice President and COO
Re: Ad expected to appear in May 28 Wisconsin State Journal

According to the Wisconsin Right to Life web site, the attached ad will appear Thursday, May 28, in the Wisconsin State Journal. We thought you might appreciate seeing it in advance.

We know that publicity around the decision to offer second-trimester abortions at MSC has been difficult at times and want to thank you for the very professional way you are conducting yourselves. The heated public debate and misleading allegations do not change the reasons for our decision - to fulfill our obligation as a safety net provider of health care and to ensure that women in our area have safe access to the full continuum of reproductive care.

I also want to assure you again that participation in abortion procedures will be strictly voluntary and that no faculty or staff will be coerced in any way. The ad implies coercion of employees to assist in an emergency following an abortion. That rare circumstance would be no different from assistance in emergencies resulting from activities such as drunk driving or drug/alcohol abuse, when health care professionals of course administer treatment despite their personal views of the reason for injury.

Again, thank you for your professionalism and continuing focus on excellent care and service for our patients.

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