

**Case No. 09-16122**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**UNITED STATES OF AMERICA ex rel. SADEK R.  
EBEID, M.D.**

**Plaintiff - Appellant,**

**v.**

**THERESA A. LUNGWITZ et al.**

**Defendants - Appellees.**

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On Appeal from the United States District Court- District of  
Arizona  
The Honorable Judge Susan R. Bolton  
U.S. District Court Case No. 2:08-cv-00544-SRB

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**MOTION FOR LEAVE TO FILE AMICUS CURIAE  
BRIEF AND AMICUS CURIAE BRIEF  
OF THE CALIFORNIA MEDICAL ASSOCIATION  
IN SUPPORT OF PLAINTIFF/APPELLANT**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT .....	2

### ARGUMENT

I. CALIFORNIA LAW UNEQUIVOCALLY SAFEGUARDS THE ABILITY OF PHYSICIANS TO ENSURE THAT PATIENTS' MEDICAL NEEDS ARE PARAMOUNT .....	5
A. The Corporate Practice of Medicine Bar Protects Against Lay Interference with Both Business and Clinical Decisions.....	7
1. Clinical Decisions.....	8
2. "Business" and Administrative" Decisions .....	9
i) Lay Entities May Not Share Profits with Medical Practices.....	12
ii) Lay Entities May Not Set Physician Fees .....	13
II. CONCLUSION.....	14

## TABLE OF AUTHORITIES

### California Cases

<i>Blank v. Palo Alto Stanford Hospital</i> (1965) 234 Cal.App.2d 377.....	12
<i>California Association of Dispensing Opticians v. Pearle Vision Center, Inc.</i> (1983) 143 Cal.App.3d 419.....	5, 12
<i>People ex rel. Monterey Mushrooms, Inc. v. Thompson</i> (2006) 136 Cal.App.4th 24 .....	4
<i>People v. Cole</i> (2006) 38 Cal.4th 964 .....	5
<i>Wickline v. State of California</i> (1986) 192 Cal.App.3d 1630 .....	3

### California Statutes

Business & Professions Code §2052.....	5
Business & Professions Code §2400.....	4, 5, 13

### Other Authorities

09 Cal.DailyOp.Serv. 12205, 2009 WL 3082304.....	2
55 Ops.Cal.Atty.Gen. 103 (1972) .....	12, 13
83 Ops.Cal.Atty.Gen. 170 (2000) .....	11, 13

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## **IDENTITY AND INTEREST OF *AMICUS CURIAE***

The California Medical Association (“CMA”) is a non-profit, incorporated professional association of more than 35,000 physicians practicing in the State of California. CMA’s membership includes 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 is vitally interested in this case and has filed before the Courts of California and Attorney General's Office on numerous occasions concerning the need for and application of the corporate practice of medicine bar.

CMA seeks leave to file in its Motion for Leave to File.

## **SUMMARY OF THE ARGUMENT**

While it takes no position on the facts of this case, CMA believes that the corporate practice of medicine bar is vitally important to the appropriate provision of quality health care. As is discussed below, this bar serves to insure against the division of a physician's loyalty to patients and therefore

protects against the provision of unnecessary, and potentially costly and even harmful, medical services. Claims submitted by entities that violate the bar are of necessity fraudulent since the entity fails to meet all state requirements, as required by the Medicare program.

### **THE ARGUMENT**

The California Medical Association submits this Amicus Curiae brief to bring to the Court's attention a discussion of the vitality of the corporate practice of medicine bar and why a violation of it can support an allegation of a false claim under the False Claim Act, 31 U.S.C. §§3729 *et seq.*

While state laws concerning the corporate practice of medicine bar vary in scope, all states have embraced some form of the doctrine to prevent unlicensed entities from practicing medicine.<sup>1</sup> Further, the bar is by no means a "relic of another era" as Appellees have led this Court to believe. Indeed, California's Attorney General just last month reinforced the vitality of the law. See 09 Cal.DailyOp.Serv. 12205, 2009 WL 3082304 (an entity not licensed to practice medicine may not perform professional radiology

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<sup>1</sup> Given the importance of appropriate licensure to patient safety, CMA believes licensure laws should be vigorously enforced throughout the country.

services as part of a medical provider network). See also authorities discussed below.

The corporate practice of medicine bar prevents lay entities from directly or indirectly practicing medicine and, for the most part, automatically condemns certain arrangements because of the potential for patient harm, such as lay employment or contractual agreements with physicians for the provision of medical services. The corporate practice of medicine bar provides a fundamental patient protection by preventing lay individuals and entities from exploiting medical practice for their own commercial ends and from exercising undue influence over professional practice decisions. Put another way, the bar assures that the patient receives the medical care that the patient's physician deems is in her/his best medical interests and that the patient is not subjected to needless, and potentially painful and costly, medical procedures in order to boost profits for a corporate entity. The need for this protection is particularly acute given the ubiquitous cost-containment measures in today's environment that can have the potential to harm patient care. See *Wickliffe v. State of California* (1986) 192 Cal.App.3d 1630 (physicians can be liable when they comply without protesting defects in cost-containment system).

While the goal of the corporate practice of medicine bar is to protect patients first and foremost, "clinics" operating in violation of the bar not only jeopardize patient safety by allowing lay individuals to control medical practice, but also effectuate fraud upon the public and third party payors as they:

- Typically make and represent themselves as operating medical clinics in compliance with applicable laws;
- Are formed for the purpose of acquiring patients in need and reaping profits at patients' expense;
- Often in fact certify to the Federal Centers for Medicare and Medicaid Services that they meet "all federal and state requirements" to bill Medicare when completing the Medicare Enrollment Application form CMS-855B;
- Lead the public to in fact believe that the services are provided by a lawfully organized medical clinic.

Accordingly, as they represent that the services are provided by an entity engaged in the lawful practice of medicine, claims from such fraudulently operated clinics do constitute a false statement or fraudulent cause of conduct for the purposes of federal law. See, for example, *People ex rel. Monterey Mushrooms, Inc. v. Thompson* (2006) 136 Cal.App.4th 24 (false claims conviction upheld under California law against sham medical clinic).

**I. CALIFORNIA LAW UNEQUIVOCALLY SAFEGUARDS THE ABILITY OF PHYSICIANS TO ENSURE THAT PATIENTS' MEDICAL NEEDS ARE PARAMOUNT**

Recognizing the potential for improper invasions into the physician-patient relationship and the need for deference to the physician's professional judgment, the California courts and Legislature have protected physicians and their patients from the pressures of the commercial marketplace for many years. See Business & Professions Code §2400. As was succinctly restated in *California Association of Dispensing Opticians v. Pearle Vision Center, Inc.* (1983) 143 Cal.App.3d 419:

Pearle by its franchise seeks to engage in the corporate practice of a profession. The rules against such practice should not be circumvented by technical agreements concerning the manner optometrists are engaged, designated or compensated by the franchiser. **The confidential health care relationship requires the professional's undivided responsibility and freedom from commercial exploitation. This relationship is essential. The public would be jeopardized if a large corporation with pecuniary profits as its principal goal were allowed to dominate the field.**

(*Id.* at 434.) (Emphasis added.) See also, most recently, *People v. Cole* (2006) 38 Cal.4th 964 (recognizing purposes of the corporate practice of medicine bar and holding that the Knox-Keene Act did not exempt HMOs

from statutes restricting certain commercial relationships between providers).<sup>2</sup>

California's corporate practice of medicine bar is designed to ensure that a physician's judgment in the provision of medical care will not be compromised by a lay entity, either directly or indirectly. *See* Business & Professions Code §2052 and 2400. The Bar protects against:

- (1) a division of the physician's loyalty between a lay entity and the patient;
- (2) the dangers of commercial exploitation of the medical profession; and
- (3) lay control over the physician's professional judgment.

All of these threats to a physician's professional autonomy undermine the profound public policy that physicians, who deal with the most intimate bodily functions, the most personal mental processes, and most profound life and death issues, will devote their entire professional judgment and training to the furtherance of their patients' best interests. For this reason, the law provides a structural safeguard which prohibits lay economic or clinical control over a physician, to ensure that a physician's medical decisions are

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<sup>2</sup>Significantly, in its opinion, the California Supreme Court on a number of occasions, expressly relied on and agreed with the amicus curiae brief filed by the California Medical Association.

not based on commercial interests, but rather on professional medical judgment.

The proscription against the corporate practice of medicine provides a fundamental protection against the potential that the provision of medical care and treatment will be subject to commercial exploitation. See *People v. Cole*, supra. As such, the corporate practice bar ensures that those who make decisions which affect, generally or indirectly, the provisions of medical services (1) understand the quality of care implications of those decisions; (2) have a professional ethical obligation to place the patient's interest foremost; and (3) are subject to the full panoply of the enforcement powers of the Medical Board of California, the state agency charged with the administration of the Medical Practice Act.

**A. The Corporate Practice of Medicine Bar Protects Against Lay Interference with Both Business and Clinical Decisions**

Because of the overlap between business and medical issues, courts look at the entire picture to see whether as a whole, the arrangement results in a corporate bar violation. Indeed, contrary to Appellee's suggestions, it is impossible in the health care area to isolate "purely business" activities from those affecting the quality of care. See *Marik v. Superior Court* (1987) 191 Cal.App.3d 1136 (lay entity may not select medical equipment).

## 1. Clinical Decisions

There is no doubt that the corporate practice of medicine bar protects against lay entities controlling, directly or indirectly, the clinical aspects of the practice of medicine. In fact, because of the Medical Board of California's (MBC) concern that, with the changes in the health care industry, there is even a greater potential that a physician can no longer exercise independent professional judgment, it adopted the "Medical Board of California's Perspective to Provide Guidance on the Prohibition against the Corporate Practice of Medicine." This Guidance identifies a number of clinical and "business" decisions that may only lawfully be made by a physician. With respect to clinical decisions, the Medical Board statement reads, in part, that:

The policy expressed in Business & Professions Code §2400 against the corporate practice of medicine is intended to prevent unlicensed persons from interfering with or influencing the physician's professional judgment. The decisions described below are **examples of some** of the types of behaviors and **subtle controls** that the corporate practice doctrine is intended to prevent. From the Medical Board's perspective, the following health care decisions should be made by a physician licensed in the State of California and would constitute the unlicensed practice of medicine if performed by an unlicensed person:

- Determining what diagnostic tests are appropriate for a particular condition.
- Determining the need for referrals to, or consultation with, another physician/specialist.

- Responsibility for the ultimate over-all care of the patient, including treatment options available to the patient.
- Determining how many patients a physician must see in a given period of time or how many hours a physician must work.<sup>3</sup>

This list, as the Medical Board expressly cautioned, does not and cannot serve to be all-inclusive given the litany of tasks and decisions physicians make each and every day.

## 2. "Business" and Administrative" Decisions

Moreover, the corporate practice of medicine bar is interpreted broadly, consistent with its protective purpose, to encompass "business" and "administrative" decisions which may have medical implications. Notably, in holding that a provisional director of a medical corporation was required either to be a physician or other qualified licensed person, the *Marik* court, supra, recognized that "business" decisions in the practice of medicine

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<sup>3</sup> See also 55 Ops.Cal.Atty.Gen. 103 (1972) (agreement with hospital and physicians requiring physicians, among other things, to be present in the hospital during such hours as hospital deems necessary and proper, and requiring physicians to be responsible for furnishing to members of the medical staff consultation on patients treated by the department as may be required, unlawful).

necessarily have an impact on medical decisionmaking and correctly observed:

For example, the prospective purchase of a piece of radiological equipment could be implicated by business considerations (cost, gross billings to be generated, space and employee needs), medical considerations (type of equipment needed, scope of practice, skilled levels required by operators of the equipment, medical ethics) or an amalgam of factors emanating from both business and medical areas. The interfacing of these variables may also require medical training, experience, and judgment.

*Marik, supra*, fn. 4 at 1140.

The Court in *California Association of Dispensing Opticians v. Pearle Vision Center, Inc.* (1983) 143 Cal.App.3d 419, 191 Cal.Rptr. 762, similarly concluded that under the facts, when taken together, a franchise agreement violated the corporate practice bar based on seemingly business matters. In that case, the Court held that the controls exercised by the franchiser over the business aspects of optometry practice were in violation of the state's corporate practice doctrine. The provisions in the franchise agreement which were cited in reaching this conclusion were, among other things, (i) control over office location and specifications, (ii) control over inventory and supplies, (iii) required use of the corporation's name and business and advertising, (iv) required submission of periodic reports, and (v) payment to the corporation of a percentage of gross revenue. The Court stated that by exerting these types of controls over licensed professionals, the corporation

itself was engaging in the profession, in violation of the corporate practice laws.

In addition, from the Medical Board's perspective, the following "business" or "management" decisions and activities resulting in control over the physician's practice of medicine should be made by a physician licensed in the State of California and not by an unlicensed person or entity:

- Ownership is an indicator of control of a patient's medical records, including determining the contents thereof, and should be retained by a California licensed physician.
- Selection (hiring/firing as it relates to clinical competency or proficiency) of professional, physician extender, and allied health staff.<sup>4</sup>
- Setting the parameters under which the physician will enter into contractual relationships with third-party payers.
- Decisions regarding coding and billing procedures for patient care services.
- Approval of the selection of medical equipment for the medical practice.<sup>5</sup>

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<sup>4</sup> See also 83 Ops.Cal.Atty.Gen. 170 (2000) (stating that the selection of radiological personnel best suited for the performance of the diagnostic radiology study, as well as the selection of the qualified radiologist to view and interpret those films, would involve professional judgment as part of the practice of medicine).

<sup>5</sup> See also *Marik v. Superior Court, supra, California Association of Dispensing Opticians, Inc., supra*. See also 83 Ops.Cal.Atty.Gen. 170

Under these circumstances, additional "business" decisions have also been found to constitute the practice of medicine as follows.

**i) Lay Entities May Not Share Profits with Medical Practices**

Financial agreements between physicians and others must be directly related to the fair market value of the services, or at least commensurate to the expenses incurred. If a lay entity has a financial interest in the physician's professional income, the lay entity stands to gain financially from the provision of medical services and thus has a direct interest in and the ability to control the medical side of the business. This is illegal. See *California Association of Dispensing Opticians v. Pearl Vision Center* (1983) 143 Cal.App.3d 419 (franchiser illegally practicing medicine). Put another way, to allow a lay entity to share in a physician's "net income" would allow the lay entity to "control" how a physician allocates the gross earnings for clinical matters. See, for example, *Blank v. Palo Alto Stanford Hospital* (1965) 234 Cal.App.2d 377. See also 55 Ops.Cal.Atty.Gen. 103 (1972) (net revenue sharing agreement between medical director of

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(2000) (stating "the selection of a radiology site with appropriate equipment and operational personnel . . . would involve the exercise of professional judgment and evaluation as part of the practice of medicine").

electroencephalography department in hospital constitutes the unlawful practice of medicine).

Profits are not commensurate with the lay entity's expenses incurred in connection with the furnishing of "administrative services" and thus are illegal.

**ii) Lay Entities May Not Set Physician Fees**

There is no question that where a lay entity sets a physician's fees, or has any control over the receipt and collection of such fees, including but not limited to, through the negotiation and management of managed care contracts, it is practicing medicine in violation of the Business & Professions Code §2400. See, for example, 55 Ops.Cal.Atty.Gen. 103 (1972) (an agreement between a physician and a hospital constituted the unlawful practice of medicine where, among other things, the physician neither set his own fees nor had any control over the receipt and collection of such fees). See also Medical Board Perspective (providing that "parameters under which physician will enter into contractual relationships with third party payors" must be made by a physician, and not an unlicensed entity or person). See also 83 Ops.Cal.Atty.Gen. 170 (2000) (concluding that a management service organization paying for radiology services and profiting

by adding a fee for its own management services further intrudes into the physician/patient relationship).

## **II. CONCLUSION**

The concerns which gave rise to the longstanding prescription against the corporate practice of medicine apply with even greater urgency at the present time. There have been profound changes in financing of both government and private health care delivery systems in the past few years. Particularly given the quest for profit in today's economy, it is crucial that those involved, directly or indirectly, in the delivery of professional medical services, be licensed as a physician and surgeon and have a thorough understanding of medical practice for quality patient care.

Dated: October 23, 2009

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, Appellants hereby certify that the attached Amicus Curiae is proportionately and has a typeface of 14 points. The brief, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, and the Proof of Service, contains 2,540 words based on a count by the word processing system at the California Medical Association.

Dated: October 23, 2009

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