Case No. DO41925

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT
DIVISION ONE**

MARJORIE SHUER,

Plaintiff and Appellant,

v.

COUNTY OF SAN DIEGO,

Defendant and Respondent.

Appeal from Order in *Marjorie Shuer v. County of San Diego*
Superior Court of San Diego County Case No. GIC 794713
The Honorable Wayne L. Peterson, Judge

AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF APPELLANT MARJORIE SHUER

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL ARGUMENT 5

A. The Public's Special Interest In Health Care And The Unique Physician/Patient Relationship Has Resulted In Enhanced Protections For A Physician's Ability To Practice Medicine. 5

1. The Obligations Imposed Upon Physicians To Protect The Public Welfare Transcend Those Involved In Any Commercial Context. 6

2. To Ensure Robust Patient Advocacy And Protect Against Divided Loyalty, It Is Unlawful For Lay Entities To Control Physicians. 9

B. Business & Professions Code §2056 Provides All Physicians, Including Ones That Have Been Employed By Or Are In A Probationary Status With A County To Bring An Immediate Lawsuit Before A Court To Address Retaliatory Discharges 13

C. The Exhaustion Of Administrative Remedies Doctrine Does Not Apply To This Case 19

1. A Common Law Cause Of Action For Wrongful Discharge/Breach Of The Covenant Of Good Faith And Fair Dealing Is Not Subject To Administrative Review 21

2. Cases Challenging The Exercise Of An Agency's Responsibilities As Opposed To Ultimate Decision, Need Not Be Exhausted 22

3. No Internal Remedy Was Provided By The County To Address Appellant's Claims 24

D. Public Policy Considerations Warrant Excuse For The Exhaustion Of Administrative Remedies Doctrine 26

III. CONCLUSION 26

TABLE OF AUTHORITIES

California Cases

Benjamin Franklin Life Assurance Co. v. Mitchell (1936) 14 Cal.App.2d 654 13

Blank v. Palo Alto-Stanford Hospital Center (1965) 234 Cal.App.2d 377, 44 Cal.Rptr. 572 13

California Association of Dispensing Opticians v. Pearle Vision Center, Inc. (1983) 143 Cal.App.3d 419, 191 Cal.Rptr. 762 13

California Physicians Service v. Garrison (1946) 28 Cal.2d 790 13

Cobbs v. Grant (1972) 8 Cal.3d 229, 104 Cal.Rptr. 505 8

Complete Service Bureau v. San Diego Medical Society (1954) 43 Cal.2d 201 13

Conrad v. Medical Board (1996) 48 Cal. App. 4th 1038, 55 Cal.Rptr. 901 13

*Gantt v. Sentry Ins. (*1992) 1 Cal.4th 1083 19

Jones v. Fakeheny (1968) 61 Cal.App.2d 298 7

Karlin v. Zelta (1984) 154 Cal.App.3d 953 24

Khajavi v. Feather River Anesthesia Medical Group (2000) 84 Cal.App.4th 32 .. 22

Lance Camper Manufacturing Corporation v. Republic Indemnity Company of America (1996) 44 Cal.App.4th 194 27

Leibert v. Transworld Systems, Inc. (1995) 32 Cal.App.4th 1693 26

Letsch v. Northern San Diego County Hospital District (1966) 246 Cal.App.2d 673, 55 Cal.Rptr. 118 13

Moore v. Preventative Medicine Medical Group, Inc. (1986) 17 Cal.App.3d 728 .. 9

Pacific Employers Ins. Co. v. Carpenter (1935) 10 Cal.App.2d 592 13

Palmer v. University of California (2003) 107 Cal.App.4th 899 .... 29, 30

Parker v. Board of Dental Examiners (1932) 216 Cal. 285, rehg. den. September 28, 1932 12

People v. Pacific Health Corp. (1938) 12 Cal.2d 156 13

Potvin v. Metropolitan Life Insurance Co. (2000) 22 Cal.4th 1060 6

Rojo v. Kliger (1990) 52 Cal.3d 65 .... 24, 25, 29

Rosner v. Eden Township Hospital District (1962) 58 Cal.2d 592 10

Salimi v. State Compensation Insurance Fund (1997) 54 Cal.App.4th 216 28

Steinsmith v. Medical Board (2000) 85 Cal.App.4th 458, 102 Cal.Rptr.2d 115 14

Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167 .... 19, 25

Tarasoff v. Regents of the University of California (1976) 17 Cal.3d 425 8

Tresemer v. Barke (1988) 86 Cal.App.3d 656, 150 Cal.Rptr. 384 9

Truman v. Thomas (1980) 27 Cal.3d 285 8

Venice Town Council, Inc. v. City of Los Angeles (1996) 47 Cal.App.4th 1547 .. 25, 28

Wickline v. State of California (1986) 192 Cal.App.3d 1630, 239 Cal.Rptr. 810 ... 1, 10, 19

State Statutes

Business & Professions Code §§809.05 et seq. 4

Business & Professions Code §2052 .... 9, 10

Business & Professions Code §2400 .... 9, 10

Business & Professions Code §2408 10

Business & Professions Code §2409 10

Business & Professions Code §2410 10

Corporations Code §§13400 *et seq.* 10

Evidence Code §451 15

Evidence Code §452 15

Government Code §8547.10 24

Health & Safety Code §3125 7

Penal Code §§11165 et seq. 7

Other Authorities

55 Ops.Cal.Atty.Gen. 103 (1972) 10

57 Ops.Cal.Atty.Gen. 231 (1974) 10

63 Ops.Cal.Atty.Gen. 729 (1980) 10

65 Ops.Cal.Atty.Gen. 223 (1982) 10

83 Ops.Cal.Atty.Gen. 170 (2000) 11

Cal. Managed Health Care Improvement Task Force, Rep. to Leg., Dec. 13, 1997, Government Regulation And Oversight Of Managed Health Care, Findings And Recommendations 5

Grumbach, et al., *Primary Care Physicians Experience of Financial Incentives in Managed Care Systems* (Nov. 19, 1998) N. Engl. J. Med 12

Kassirer, *Managed Care and the Morality of the Marketplace* (1995) 333 N. Engl. J. Med. p. 50 12

Robinson, *Decline in Hospital Utilization and Cost Inflation Under Managed Care in California* (1996) 276 JAMA p. 1060 12

Schlesinger, et al., *Medical Professionalism Under Managed Care: The Pros and Cons of Utilization Review.* (1997) Health Affairs Vol. 1601 12

I. INTRODUCTION

As the administration and delivery of health care in this country has evolved from a patient directed to a cost containment system, physicians are often trapped between their ethical and legal duty to remain dedicated to, and vigorously advocate for their patients' health care needs and the practical necessity to protect their relationship with the entities that control their ability to practice medicine and treat patients, such as hospitals and managed care plans, and in this case, a county's juvenile hall. To ensure that physicians not compromise their obligations to their patients, California law places an affirmative obligation upon physicians to become medical whistleblowers, that is—advocate for medically appropriate health care for their patients where they reasonably believe their ability to provide medically appropriate care is impaired. (*Wickline v. State of California* (1986) 192 Cal.App.3d 1630, 239 Cal.Rptr. 810.) To safeguard medical whistleblowers from retaliation, the California Legislature in Business & Professions Code §2056, recognized that **prompt and direct judicial** protection for all physicians victimized by improper terminations or penalties from hospitals, managed care organizations and other organizations that control a physician's ability to treat patients must exist. Without such protections, at best physician/patient relationships are needlessly destroyed; at worst, the provision of quality medical care is jeopardized. The law countenances neither result.

The fundamental societal goal of preserving the proper standards of medical care depend upon a physician's right to seek prompt judicial redress for

improper terminations from organizations that provide physicians with access to their patients. Particularly in this era of cost containment, physicians must be able to speak freely about potentially unsafe conditions or other matters which impact their patients' care. But to be able to speak freely, physicians must also know that their right to do so, and at the same time continue to provide quality medical care, is not illusory. Physicians must know these rights will be safeguarded quickly by the courts. Without judicial recourse against wrongful terminations and other penalties, physicians will never be able to truly and completely fulfill their professional obligations to their patients.

This case demonstrates the need for the right to prompt judicial review of a termination decision, as the Legislature intended. Here, according to the allegations, following a physician's patient care advocacy, a county terminated its agreement with that physician to be the Supervising Psychiatrist in the county's Juvenile Forensics Services Facility.[1] In her first amended complaint, Dr. Shuer alleges that during her employment, she discovered that in large measure, the community standard of care was not being practiced in the Juvenile Forensic Services Facility and, among the things that she discovered and reported to her supervisor and county counsel the following, among other things:

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[1]CMA takes no position on the facts presented by this case. Rather, CMA submits its amicus curiae brief to discuss the proper interpretation of Business & Professions Code §2056, the fact that given the critical public policies served by section 2056, no exhaustion is required in the context of this case, and the importance of this law to the integrity of the health care system in California.

- County psychiatrists frequently failed to obtain informed consent before prescribing psychotropic medicines to minors;
- County psychiatrists failed to perform good faith examinations prior to prescribing potentially dangerous medications and treatments to minors;
- County psychiatrists failed to perform and/or accurately interpret diagnostic laboratory tests and take appropriate medical follow up;
- County physicians practiced below the community standard of care by prescribing inappropriate medications and dosages for minors.

Dr. Shuer claims that she brought these matters to the attention of the psychiatrists that she supervised, but that her directives and memoranda were ignored. In addition, she claims that her supervisors and others in the position to provide assistance ignored her pleas for correction of the dangerous medical practices that were allegedly occurring. Further, she claims that county employees began a campaign to discredit and destroy her reputation, which ultimately resulted in the termination of her employment. (CT 0009-0040.)

Not only did this termination potentially violate the statutorily codified public policy of this state encouraging physicians to advocate for medically appropriate care, as set forth in Business & Professions Code §2056, but if the allegations of the complaint are true, places juveniles at risk of receiving substandard and potentially dangerous medical care. Yet the trial court deprived Dr. Shuer of the ability to protect herself and those juveniles in violation of fundamental public policy as set forth in Business & Professions Code §2056.

The trial court's dismissal was predicated on the grounds Dr. Shuer failed to exhaust her administrative remedies before the county. However, Business &

Professions Code §2056 provides for direct access to the courts in this context. In enacting the provision, the Legislature understood the imminent need of physicians to protect their patients from substandard care and thus granted them direct and prompt access to the courts to redress retaliations against whistleblowing. The core of a Business & Professions Code §2056 claim is not the status of a physician with an organization, but that organization's wrongful conduct in (1) creating or maintaining substandard medical conditions, and (2) retaliating against physicians who challenge those conditions. Since the county, not the physician, is being charged with misconduct, it would be antithetical to the purposes of exhaustion to require, let alone allow, the county to decide the charges.[2] Further, the county had no jurisdiction over, let alone expertise, to decide the medical appropriateness of the conduct challenged by Dr. Shuer. No internal remedy was provided for Dr. Shuer to have her whistleblower/retaliation claims redressed. The county had no self-contained and pervasive system to address her concerns. Simply stated, Dr. Shuer had no administrative remedy to exhaust.

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[2] As is discussed below, the Legislature did make it clear that insofar as issues over a physician's competency are concerned, exhaustion is required only in cases governing certain entities required to provide physicians with legislatively circumscribed due process rights pursuant to Business & Professions Code §§809.05 et seq. and Medical Board disciplinary actions. (Business & Professions Code §2056(d)(f)(g).

If the trial court's decision is allowed to stand, neither physicians nor their patients will, or can, have any faith in a system. Physician advocates must have the ability to have their claims heard first and promptly before an independent judiciary as the Legislature intended. If the organization subject to the complaint must first address the charges, no longer will physicians feel safe in zealously acting in their patients' best interests. No longer will critical physician/patient relationships be maintained. No longer will physicians be able to give, and patients be able to receive, unquestionably uncompromised health care. For these reasons, amicus California Medical Association urges that this Court reverse the trial court's judgment and provide Dr. Shuer with the opportunity to seek judicial recourse as the Legislature intended.

II. LEGAL ARGUMENT

A. The Public's Special Interest In Health Care And The Unique Physician/Patient Relationship Has Resulted In Enhanced Protections For A Physician's Ability To Practice Medicine.

There is no debate about the fundamental public interest at stake with respect to the provision of medical services. As the Managed Health Care Improvement Task created by the Legislature observed in its 1997 report to the California Legislature: "Health care has a special moral status and therefore a particular public interest." (Cal. Managed Health Care Improvement Task Force, Rep. to Leg., Dec. 13, 1997, Government Regulation And Oversight Of Managed Health Care, Findings And Recommendations, page 1; *see also Potvin*, *supra*, at 1070.) Because of this special public interest, physicians and their provision of

medical care cannot be considered in the commercial context—it is not "business as usual" when health care is concerned. The judiciary has recognized this fact:

> The medical profession . . . stands in a peculiar relation to the public and the relationship existing between the members of the profession and those who seek its services cannot be likened to the relationship of a merchant to his customer.

Jones v. Fakeheny (1968) 61 Cal.App.2d 298, 305.

1. The Obligations Imposed Upon Physicians To Protect The Public Welfare Transcend Those Involved In Any Commercial Context.

It is no surprise that the singular importance of health care imposes extraordinary obligations upon physicians. Recognizing the unique and fiduciary nature of the physician/patient relationship, the Legislature and the courts have imposed numerous duties on physicians to protect their patients and the public—duties which have no parallel in purely commercial relationships.

First and foremost, California courts have established that there is a fundamental societal interest in encouraging its health care professionals to voice their disapproval of and opposition to substandard health care. Obviously, the consequences of substandard health care are serious. The repercussions are increased morbidity and mortality. Due to the specialization of health care, no one is more qualified to determine whether health care policies, procedures and facilities are sufficient than the physicians themselves.

This policy of societal concern is founded in part upon the physician-patient relationship, whose essential component is trust. The patient must not only

trust that the physician's primary goal is to enhance the patient's well-being, but also that the physician is competent to make clinical decisions and to evaluate correctly the adequacy of the facility in which treatment is to be administered. As the California Supreme Court recognized in *Cobbs v. Grant* (1972) 8 Cal.3d 229, 104 Cal.Rptr. 505, "the patient, being unlearned in the medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician which transcends arms-length transactions." (*Id.* at 242.)[3] Consequently, patients depend on their physicians to help them understand and make critical decisions such as what care and treatment they receive, where they receive treatment, what diagnostic tests are essential, and what therapy is appropriate. *See also Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425 (duty to warn persons foreseeably endangered by a patient's conduct); Health & Safety Code §3125 (mandatory reporting of communicable diseases); and Penal Code §§11165 et seq. (mandatory reporting of child abuse).

In order to promote quality care and recognizing the unique nature of the physician-patient relationship, the courts and the Legislature have imposed numerous additional duties on physicians to protect their patients and even the

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[3]In light of this abject dependence, physicians must obtain their patients' "informed consent" prior to performing most medical procedures, *Cobbs v. Grant*, *supra*, and their informed refusal when the patient refuses to heed the physician's advice. (*Truman v. Thomas* (1980) 27 Cal.3d 285.)

public at large from harm. For example, absent termination of a physician-patient relationship, a physician's relationship with his or her patient is a continuing one that imposes ongoing obligations, such as warning patients of subsequently discovered dangers from prior treatments. *See Tresemer v. Barke* (1988) 86 Cal.App.3d 656, 150 Cal.Rptr. 384 (holding that patient stated a cause of action against a physician who had inserted an intrauterine device on the grounds that the physician, who had seen the patient only once, failed to warn her of its dangerous side effects of which he learned only after its insertion). And if physicians know, or should know, that a patient needs more specialized care, they have a duty to make appropriate referrals. In making the referral, the physician has a duty to inform the patient of the risks of not seeing a specialist. *Moore v. Preventative Medicine Medical Group, Inc.* (1986) 17 Cal.App.3d 728.

Moreover, the California Supreme Court has recognized that at the heart of the physician-patient relationship lies the physician's right and responsibility to advocate standards pertaining to quality medical care. *See Rosner v. Eden Township Hospital District* (1962) 58 Cal.2d 592, 598, 25 Cal.Rptr. 551 (stating, among other things, "the goal of providing high standards of medical care requires that physicians be permitted to assert their views when they feel that treatment of patients is improper or that negligent hospital practices are being followed.")

More recently, the *Rosner* court's recognition that physicians must be free to advocate on their patient's behalf has been extended by the courts to encompass an affirmative legal duty, on the part of physicians, to speak up and challenge

decisions which jeopardize a patient's health. In the landmark case of Wickline v. State of California (1986) 192 Cal.App.3d 1630, 239 Cal.Rptr. 810, the court strongly suggested that an injured patient is entitled to recover compensation from all persons responsible for the deprivation of care, including physicians and third party payors, when medically inappropriate decisions result from defects in the design or implementation of cost containment programs.

Thus, both legal and ethical standards demand that physicians not sit back and watch conditions that could potentially be harmful to their patients.[4] Business & Professions Code §2056's clear statement that retaliation against physicians who advocate for medically appropriate health care for their patients is against public policy provides physicians with the very protection that is needed—prompt judicial oversight—to ensure that physicians do and are able to vigorously safeguard their patients' best medical interests.

2. To Ensure Robust Patient Advocacy And Protect Against Divided Loyalty, It Is Unlawful For Lay Entities To Control Physicians.

Integrally related to the public policy and laws encouraging physicians to speak freely and exercise their independent judgment in the best interest of their patients is California's strict limitations on the employment or other control of physicians by non-physicians, as set forth in Business & Professions Code §2400,

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[4]According to the American Medical Association's Principles of Medical Ethics, Principle 1, "A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity."

also known as the "corporate practice of medicine bar." This prohibition generally prohibits lay entities from hiring or employing physicians or other health care practitioners, or from otherwise interfering with the physician or other health care practitioner's practice of medicine.[5] 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.[6]

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[5] While counties may lawfully employ physicians given a county's sovereign powers, they nevertheless may not control medical decisionmaking and thus the corporate bar's policies are applicable to the instant case.

[6]The strength of California's policy against permitting lay persons to practice medicine or to exercise control, directly or indirectly, over medical practice cannot be questioned. *See, for example*, Business & Professions Code §§2052, 2400, 2408, 2409, 2410; Corporations Code §§13400 *et seq.*; *Parker v. Board of Dental Examiners* (1932) 216 Cal. 285, rehg. den. September 28, 1932 (lay persons may not serve as directors of professional corporations); *Pacific Employers Ins. Co. v. Carpenter* (1935) 10 Cal.App.2d 592, 594-596 (holding that for-profit corporation may not engage in business of providing medical services and stating that "professions are not open to commercial exploitation as it is said to be against public policy to permit a 'middle-man' to intervene for a profit in establishing a professional relationship between members of said professions and the members of the public"); *Benjamin Franklin Life Assurance Co. v. Mitchell* (1936) 14 Cal.App.2d 654, 657 (same); *People v. Pacific Health Corp.* (1938) 12 Cal.2d 156, 158-159 (same); *Complete Service Bureau v. San Diego Medical Society* (1954) 43 Cal.2d 201, 211 (non-profit corporations may secure low-cost medical services for their members only if they do not interfere with the medical practice of the

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 and clinical control over a physician, to ensure that a physician's medical decisions are not based on commercial interests, but rather on professional medical judgment.

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associated physician); *California Physicians Service v. Garrison* (1946) 28 Cal.2d 790 (same); *Blank v. Palo Alto-Stanford Hospital Center* (1965) 234 Cal.App.2d 377, 390, 44 Cal.Rptr. 572 (non-profit hospital may employ radiologist only if the hospital does not interfere with the radiologists' practice of medicine); *Letsch v. Northern San Diego County Hospital District* (1966) 246 Cal.App.2d 673, 677, 55 Cal.Rptr. 118 (district hospital may contract with radiologists under restriction imposed in *Blank* above); *California Association of Dispensing Opticians v. Pearle Vision Center, Inc.* (1983) 143 Cal.App.3d 419, 427, 191 Cal.Rptr. 762, 767 (Pearle Vision Center, Inc.'s franchise program violates California's prohibition against the corporate practice of medicine); *Conrad v. Medical Board* (1996) 48 Cal. App. 4th 1038, 55 Cal.Rptr. 901 (hospital District may not employ physicians); *Steinsmith v. Medical Board* (2000) 85 Cal.App.4th 458, 102 Cal.Rptr.2d 115 (physician who worked for clinic not owned by licensed physicians as an independent contractor aided the unlicensed practice of medicine). 55 Ops.Cal.Atty.Gen. 103 (1972) (hospital may not control the practice of medicine); 57 Ops.Cal.Atty.Gen. 231, 234 (1974) (only professional corporations are authorized to practice medicine); 63 Ops.Cal.Atty.Gen. 729, 732 (1980) (for-profit corporation may not engage in the practice of medicine directly nor may it hire physicians to perform professional services); 65 Ops.Cal.Atty.Gen. 223 (1982) (general business corporation may not lawfully engage licensed physicians to treat employees even though physicians act as independent contractors and not as employees); 83 Ops.Cal.Atty.Gen. 170 (2000) (management services organization may not select, schedule, secure, or pay for radiology diagnostic services).)

Concerns which gave rise to the longstanding proscription against the corporate practice of medicine apply with even greater urgency at the present time. There have been profound changes in the financing of both governmental and private health care delivery systems in the last few years. Increasing competition, as well as cost consciousness on the part of both public and private payors, have created an environment rife with potential for jeopardy to quality patient care.

In today's cost containment environment, physicians no longer exercise unfettered discretion in his or her decisionmaking. For example, a large number of utilization review firms "employ practices that undermine professional autonomy in seemingly inappropriate ways." (Schlesinger, et al., *Medical Professionalism Under Managed Care: The Pros and Cons of Utilization Review.* (1997) Health Affairs Vol. 1601.)[7] Cost containment has also had a profound effect on hospitals, with hospitals merging, closing or decreasing in size in response to financial pressures. Health care that was performed in hospitals over the past few decades is now being performed increasingly in outpatient settings.

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[7] Further, managed care organizations control physicians on the most practical basis—financial. For example, most managed care organizations pay physicians under a "capitated rate" which is a fixed, predetermined payment for provision of health care service per patient. If improperly structured, this system of reimbursement may create an incentive for physicians to underutilize care. Unfortunately, incentives that depend on limiting referrals for greater productivity apply selective pressure to physicians in ways that are believed to compromise care. *See* Grumbach, et al., *Primary Care Physicians Experience of Financial Incentives in Managed Care Systems* (Nov. 19, 1998) N. Engl. J. Med.

Robinson, *Decline in Hospital Utilization and Cost Inflation Under Managed Care in California* (1996) 276 JAMA p. 1060. Further, the financial pressures that are changing the role of hospitals are also creating pressures on physicians and their traditional role as advocates for patient care. Kassirer, *Managed Care and the Morality of the Marketplace* (1995) 333 N. Engl. J. Med. p. 50.

Under these circumstances, it is more important then ever that the courts safeguard the right and ability of physicians to vigorously advocate on their patients' behalf.

B. Business & Professions Code §2056 Provides All Physicians, Including Ones That Have Been Employed By Or Are In A Probationary Status With A County, To Bring An Immediate Lawsuit Before A Court To Address Retaliatory Discharges

Business & Professions Code §2056 was sponsored by the California Medical Association and enacted by the Legislature to protect patients by clarifying existing law and expressly stating the state policy in favor of physician advocacy for medically appropriate health care for their patients and against retaliation against physicians for such advocacy. A.B. 1676 (Margolin), Ch. 947, Stats. 1993. This provision recognizes that to assure quality of care, all physicians must be able to speak freely about any and all quality concerns which exist, in any and all settings, regardless of the physician's economic relationships. Patients are simply not in the position to navigate in this environment without the help of their physicians acting as strong advocates. The law extends protection against (and judicial recourse to redress) retaliatory termination and/or penalization of

physicians, without regard to physician' status as employees (probationary or not), independent contractors, or otherwise. To limit the application of this law and the public policy it declares to require physicians to exhaust any administrative remedy before the very entity that created or allowed potentially medically unsafe conditions to continue would eviscerate the statute's dual goals of protecting 1) physicians who carry out their duty to advocate for appropriate health care, and 2) patient care.

The language set forth in and legislative history underlying Business & Professions Code §2056 unambiguously expresses the Legislature's intention to express the public policy of encouraging physicians and surgeons to advocate for medically appropriate care and to provide all physicians, including those with employment or other agreements with counties, with the right to swift judicial relief.

Business & Professions Code §2056 was needed to respond to court decisions which either (1) required physicians to advocate for appropriate patient care if they disagreed with an entity's cost-containment decision or (2) required that in any action alleging a violation of the breach of the covenant of good faith and fair dealing, there be a statutorily codified expression of state policy. Thus, subdivision (a) states the statute's purpose as providing "protection against retaliation for physicians who advocate for medically appropriate care." To achieve this fundamentally critical goal of protecting patient care, subdivision (b)

goes on to provide physicians with a direct right to bring an action for, among other things, a breach of the covenant of good faith and fair dealing by providing:

> It is the public policy of the State of California that a physician and surgeon be encouraged to advocate for medically appropriate health care for his or her patients. (Business & Professions Code §2056(c).)

The legislative history of Business & Professions Code §2056, A.B. 1679, Margolin (1993), demonstrates that the Legislature intended to codify in statute the public policy encouraging physicians to advocate for medically appropriate care for their patients precisely so that all physicians would have a right to judicial recourse in the event such retaliation took place. As the materials attached to the Declaration of Astrid G. Meghrigian reveal,[8] the legislative history leaves no question that Business & Professions Code §2056 was a direct response to a series of court decisions which:

- provided that physicians may be held liable for their failure to protest decisions which they believe to be erroneous. *Wickline v. State of California* (1986) 192 Cal.App.3d 1630.
- concluded that at-will employees may bring a wrongful discharge action if the termination violates a public policy. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.
- ruled that to bring an action based upon violation of public policy, the public policy must be codified in either the statutes or constitution. *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083.

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[8]A true and correct copy of the relevant portions of legislative history of Business & Professions Code §2056 as added in 1993 and compiled by Legislative Intent Service is attached to the Declaration of Astrid G. Meghrigian. Amicus curiae California Medical Association respectfully requests that this Court take judicial notice of these materials pursuant to Evidence Code §§451 and 452.

See Assembly Committee on Insurance Analysis for Hearing, May 18, 1993, (Exhibit A). *See* Assembly Third Reading, Health Committee, April 20, 1993, (Exhibit B).

Similarly, the Legislature knew and understood that A.B. 1676, to be useful, needed to provide physicians with the right to direct judicial recourse in the event they were subject to discharge in violation of public policy, either as an employee, contractor, or otherwise. Put another way, the Legislature was fully aware and intended that the provision would be used in lawsuits to enforce physicians' rights. As the analysis of the Senate Committee on Business & Professions for Hearing dated August 17, 1993 provides:

> CMA argues that this bill's provisions are intended to provide physicians with some viable protection against employment or other contractual termination or penalties by employers or third party payors because the physician has protested or challenged their U.R./cost containment decisions. **The sponsor notes that the physician would still have the burden of proving, in a lawsuit brought on the basis of wrongful termination of contract in violation of the covenant of good faith and fair dealing, that the termination or penalty was primarily the result of his or her advocacy for medically appropriate care (e.g., U.R. protest).** (Emphasis added.)

See Senate Committee Analyses, July 12, 1993, (Exhibit C); *see also* Third Reading in Senate for Analysis for Hearing of August 24, 1993 (Exhibit D); *see also* Senate Rules Committee Analysis of Third Reading, August 30, 1993 (Exhibit E).

By clearly stating the public policy of the state, the Legislature clearly understood that the bill provided physicians with direct access to the courts for

violation of the statute's policy. In fact, there was substantial opposition to this bill on the grounds, among others, that "the bill will create more costly and frequent litigation—over a physician's employment protection rights—. . ." *See* Senate Committee on Business and Professions, July 12, 1993 (Exhibit C). Even the professional association representing hospitals, the California Association of Hospital and Health Systems (CAHHS), admitted in their opposition to the bill that the bill would allow for lawsuits to remedy abusive practices. *See* Senate Committee Analyses (Exhibit C) and CAHHS Opposition (Exhibit F). *See also* "Association of California Life Insurance Companies" opposition memorandum dated July 8, 1993 (Exhibit G), stating:

> A.B. 1676 will lead to more litigation and undermine one of the true cost containment mechanisms being employed in health insurance today—utilization and peer review.

Thus, the Legislature clearly knew that it was granting providers with the ability to seek immediate judicial review, with the exception of three circumstances. The Legislature was careful to carve out from the scope of the statute's protection only reimbursement determinations and those areas where a physician's competency (not advocacy) was at issue by an entity that is subject to statutorily prescribed due process mechanisms assuring the physician will receive a fair hearing. Thus, the statute provides, in part:

> (d) This section shall not be construed to prohibit a payer from making a determination not to pay for a particular medical treatment or service, or to prohibit a medical group, independent practice association, preferred provider organization, foundation, hospital medical staff, hospital governing body acting pursuant to Section 809.05, or payer from enforcing

> reasonable peer review or utilization review protocols or determining whether a physician has complied with those protocols.
>
> and
>
> (f) Nothing in this section shall be construed to prohibit the governing body of a hospital from taking disciplinary actions against a physician and surgeon as authorized by Sections 809.05, 809.4, and 809.5.
>
> (g) Nothing in this section shall be construed to prohibit the Medical Board of California from taking disciplinary actions against a physician and surgeon under Article 12 (commencing with Section 2220).

Thus, in each of these cases, exhaustion before the administrative body, be it the hospital medical staff, managed care plan, or medical board, makes sense since (1) those organizations are not charged with medical wrongdoing, but rather the physician is, and (2) those entities have the special expertise necessary to determine a physician's fitness to practice medicine.

When making those specific exceptions limiting a physician's direct right to bring a lawsuit under Business & Professions Code §2056, the Legislature made clear that it knew how to restrict a physician's ability to go to court and chose not to extend that restriction to other contexts. *See also, Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32 (allowing a private right of action by an aggrieved physician to proceed with lawsuit challenging discharge violated public policy. When ruling that the right to advocacy was broad and not limited to third party payors, the court noted that the right to advocate was comprised of two disjunctive parts, and that by juxtaposing the right to appeal a third party's decision with a policy or practice that impairs the physician's ability

to provide medically appropriate health care, the Legislature showed that it knew how to limit the right to advocate to those decisions that deny payment, but chose not to do so.)

Under these circumstances, the trial court incorrectly dismissed Dr. Shuer's claim of wrongful discharge based on a violation of public policy expressed in section 2056.

C. The Exhaustion Of Administrative Remedies Doctrine Does Not Apply To This Case

In the First Amended Complaint for Damages and Injunctive Relief, Dr. Shuer brought a number of causes of action challenging not only the ultimate determination to excuse her from her responsibilities with the County, but also the County's conduct, including the fact that the County breached the implied the covenant of good faith and fair dealing—the very cause of action that Business & Professions Code §2056 was designed to provide. The Amended Complaint also sought a request for permanent injunction in order to prevent irreparable harm to children under the care of the County requiring the county psychiatrists in the juvenile forensic program from taking a number of the challenged actions, such as practicing below the community standard of care and failing to perform good faith examinations on children and adolescents prior to treating them with psychotropic medications. These are the very types of issues which the courts on a number of occasions have held are inappropriate for resolution by the administrative agency.

Rojo v. Kliger (1990) 52 Cal.3d 65 summarized the policy considerations underlying the exhaustion doctrine as furthering a number of important "societal and governmental interests, including: (1) bolstering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise and exercise statutorily delegated remedies; (3) mitigating damages; and (4) promoting judicial economy." (*Id.* at 86 (employees did not have to exhaust administrative process under Fair Employment Practices Act (FEPA) before resort to judicial relief for non- statutory cause of action for breach of the covenant of good faith and fair dealing).)

The court in *Rojo* recognized that the exhaustion doctrine serves important public policy considerations but nonetheless understood that the exhaustion doctrine could only be applied depending upon the "context" of the case, which depended upon, among other things, a case-by-case basis analysis with "concentration on whether a paramount need for agency expertise outweighs other factors." (*Id.* at 87 (quoting *Karlin v. Zelta* (1984) 154 Cal.App.3d 953).)

Indeed, as applied by the courts, the doctrine of administrative exhaustion has not "hardened into administrative dogma" but contains a number of exceptions including where the matter "lies outside the administrative agency's jurisdiction, when pursuit of an administrative remedy would result in irreparable harm, when the administrative remedy cannot grant an adequate remedy, and when the aggrieved party can positively state what the particular administrative agencies

would be in this particular case." *See, Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547.

For the reasons set forth below, the exhaustion of administrative remedies doctrine has no application to this case.

1. A Common Law Cause Of Action For Wrongful Discharge/Breach Of The Covenant Of Good Faith And Fair Dealing Is Not Subject To Administrative Review

In *Rojo, supra*, two women employees brought an action against male co-employees and their employer for sexual harassment in violation of the Fair Employment Practices Act (FEPA) and common law theories pertaining to wrongful discharge in violation of fundamental public policy pursuant to *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167. The *Rojo* court concluded that the plaintiffs were not required to exhaust FEHA administrative remedies prior to pursuing their *Tameny* cause of action since the policy considerations underlying the exhaustion doctrine were not furthered by its application. According to the *Rojo* court:

> . . . The FEHA does not have a 'pervasive and self-contained system of administrative procedure' [citation omitted] for general regulation or monitoring of employer/employee relations so as to assess or prevent discrimination or related wrongs in the employment context, nor are the factual issues in an employment discrimination case of a complex or technical nature beyond the usual competence of the judicial system. Rather, a judge or jury is fully capable of determining whether discrimination has occurred. . . . These are not cases having such a paramount need for specialized agency fact-finding expertise as to require exhaustion of administrative remedies before permitting an aggrieved person to pursue his or her related non-statutory claims and remedies in court. (*Id.* at 87-88.)

Under those circumstances, the court concluded that the women's *Tameny* claim was not barred for failure to exhaust administrative remedies. *See also, Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693 (despite exclusive remedy provision of workers' compensation law, former employee's allegation that employer harassed and discharged him because of his sexual orientation and *Tameny* cause of action for wrongful termination and violation of public policy was not barred for failure to exhaust administrative remedies).

Similarly, in the instant case, the county contained no "pervasive and self-contained system of administrative procedure" to assess medical whistle blowing and redress violations of fundamental public policy set forth in state statute. While the county may have had a procedure designed to deal with certain employee termination decisions, this is not a case where there is the need or desire for specialized agency fact-finding expertise. Under these reasons, Dr. Shuer's common law tortious causes of action and statutory claim pursuant to Business & Professions Code §2056 should be allowed to be pursued through the courts.

2. Cases Challenging The Exercise Of An Agency's Responsibilities As Opposed To Ultimate Decision, Need Not Be Exhausted

Consistent with the decisions guaranteeing an aggrieved person's right to challenge tortious and unfair actions of an agency before the courts without having to resort to an administrative process, the courts similarly have concluded that in other cases where what is at issue is an agency's improper implementation of its responsibilities, immediate judicial review should lie.

Lance Camper Manufacturing Corporation v. Republic Indemnity Company of America (1996) 44 Cal.App.4th 194 demonstrates this principle. There, an insured employer sued his workers' compensation and employers' liability insurer for breach of contract, breach of the covenant of good faith and fair dealing, unfair practices and unjust enrichment, challenging, among other things, that the insurer failed to (1) reasonably evaluate the claims made against the employer before settling its reserve amount and (2) conduct timely and competent claims evaluation. There, the court concluded that the employer was not required to pursue its exhaustive administrative remedies before the Department of Insurance or other regulatory agencies since the employer was not challenging the rates and reserves themselves as being unfair and unreasonable, that is, the insurer's ultimate decision, but rather, the handling practices that increased the insurer's reported losses, which resulted in higher premiums, higher reserves and lower dividends. Thus, the insured's claim was not one that was subject to administrative review. (*Salimi v. State Compensation Insurance Fund* (1997) 54 Cal.App.4th 216 (employer charging State Compensation Insurance Fund with wrongful refusal to defend and indemnify impending workers' compensation action not required to exhaust administrative remedies afforded by Workers' Compensation Appeals Board or Department of Insurance prior to bringing action).)

Similarly, in *Venice Town Council v. City of Los Angeles* (1996) 37 Cal.App.4th 1547, the town council, neighborhood association, and tenants sought

relief against city and apartment building owners who received a permit to convert apartment units into commercial units alleging that the city was interpreting inappropriately the Mello Act, Government Code §§65590 et seq.—a provision whose purpose it is to preserve residential housing units occupied by low or moderate income persons or families in a coastal zone. Because the towns there were challenging not the city's land use decisions, but rather, sought judicial review to correct the city's overreaching policies and implementation of the requirements of the Act, the court concluded that the appellants were not required to exhaust their administrative remedies prior to suit.

Likewise, here, Dr. Shuer seeks judicial review of the County's overreaching and inappropriate control over the practice of medicine. Like the agencies at issue in the authorities discussed above, the County had no jurisdiction to decide in the first instance whether its exercise of responsibilities was harmful. As such, exhaustion of administrative remedies is not required.

3. No Internal Remedy Was Provided By The County To Address Appellant's Claims

Rojo v. Kliger, *supra*, even in the context of a tortious non-statutory cause of action for breach of the covenant of good faith and fair dealing, did state that where the agency provides an "internal remedy" exhaustion may be required. Thus, for example, in *Palmer v. University of California* (2003) 107 Cal.App.4th 899, a plaintiff's action against a university for wrongful termination in violation of public policy against retaliation for reporting unlawful activity was dismissed

on the grounds that the employee was required to exhaust all administrative remedies prior to bringing that wrongful discharge action. However, in that case, the "context" required exhaustion. The public policy setting forth the protection for the employee there, the California Whistleblower Protection Act, Government Code §8547.10, unlike Business & Professions Code §2056, expressly provides that any action for damages shall not be available for an injured party unless the injured party first filed a complaint with the University and the University failed to reach a decision regarding the complaint within the time limits established by the Regents. In light of the statute's mandate that the University have a complaint resolution process for whistleblowers, UCLA in fact had a manual governing procedures for reporting whistleblowing complaints which involved a confidential complaint process and the enlistment of a "whistleblowing advisor."

None of the attributes of the whistleblowing complaint and remedy process at issue in the *Palmer* case is present here. There is no statute mandating that entities that provide physicians with access to their patients have a whistleblowing resolution process, as was the case in *Palmer*. Nowhere in Business & Professions Code §2056 requires that the county or any other entity subject to section 2056 have such a process in place. Nor should they given what is at stake—the need to get prompt judicial resolution in order to protect the public health. Given the fact that there is simply no "internal remedy" by which Dr. Shuer had the ability to exhaust her administrative remedies, the doctrine again is inappropriate.

D. Public Policy Considerations Warrant Excuse For The Exhaustion Of Administrative Remedies Doctrine

Finally, given the fact that the issues presented by Business & Professions Code §2056 are of significant public interest and prompt resolution of the issues are necessary, the exhaustion of the administrative remedies should not be required. Thus, Amicus incorporates the authorities cited by Appellant.

III. CONCLUSION

Neither law nor public policy tolerates (1) retaliation against physicians who advocate for appropriate medical care for their patients and protest policies which undermine quality health care or (2) any termination of the physician/patient relationship for an improper reason. The physician-patient relationship, and the advocacy role of physicians are critically important to the provision of high quality medical care, and to the health and safety of the public. Especially in the current economic environment, which may not give appropriate weight to the importance of the physician/patient relationship, the laws protecting the practice of medicine must be interpreted as the Legislature intended.

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For the foregoing reasons, CMA respectfully requests that this Court protect physician/patient relationships which are so critical to the provision of quality care and reverse the trial court's judgment.

Dated: September ___, 2003

CATHERINE I. HANSON
ASTRID G. MEGHRIGIAN

By: ______________________________
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Certification Under Section 14 of the California Rules of Court

I, Astrid G. Meghrigian, am an attorney at law licensed to practice before all courts of the State of California. I am Counsel of Record for amicus curiae herein, the California Medical Association. I hereby certify that the word counting feature on the computer word processing program with which this brief was written indicates that the actual text of this brief, excluding the cover page and addresses of counsel, the Table of Authorities, the Table of Contents, this certification, and the Proof of Service, is ______ words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and that this Declaration was executed on September ___, 2003, in San Francisco, California.

____
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