1 Civil No. A095942
(consolidated with No. A096115)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION ONE

SHARON B. SIEGEL, M.D.,

Plaintiff and Appellant,

v.

CHW WEST BAY, etc., et al.,

Defendants and Respondents.

Appeal from the Superior Court of San Mateo County
The Honorable Phrasel L. Shelton, Judge
San Mateo County Superior Court Case No. 404485
(Consolidated with No. 408695)

AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF APPELLANT SHARON B. SIEGEL, M.D.

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I. INTRODUCTION

As the administration and delivery of health care in this country has evolved from a patient directed to a managed care 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, such as hospitals and managed care plans. To ensure that physicians not compromise their obligations to their patients, both the California Supreme Court, starting with Rosner v. Eden Township Hospital District (1962) 58 Cal.2d 592 and Willis v. Santa Ana Community Hospital Association (1962) 58 Cal.2d 806, and the California Legislature in Business & Professions Code §2056, recognize that judicial protection for all physicians victimized by improper exclusions/expulsions from hospitals (and medical staffs), managed care organizations and other organizations that effectively control a physician's ability to medicine 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 judicial redress for improper exclusions/expulsions from organizations that, by virtue of their control of important economic interests, are clothed with the public interest. 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 by the courts. Without judicial recourse against wrongful exclusions/expulsions, 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 judicial review of a termination decision, as the Supreme Court and Legislature intended. Here, according to the allegations, following a physician's patient care advocacy, a hospital terminated its agreement with that physician—an agreement that was necessary for that physician's economic survival.[1] This agreement gave her access to perform lifesaving cardiac bypass surgery to "overflow" patients of a large provider group that contracts exclusively with the state's largest managed care organizations—Kaiser Permanente Health Plan. It provided Dr. Siegel's professional lifeline as her practice "consisted almost consistently of treating Kaiser patients at Seton. (JA 793, ¶¶12 and 13)."[2] Thus, for all practical purposes, this case involves the exclusion of a physician from not one but two organizations that can effectively control a physician's ability to practice

[1]CMA takes no position on the facts presented by this case. Rather, CMA submits its amicus curiae brief to discuss the improper interpretation of Business & Professions Code §2056 and the scope of the common law cause of action to redress intentional interference with the right to practice medicine, and the importance of these laws to the integrity of the health care system in California.

[2]*See* Appellant's Opening Brief at p. 9.

medicine—a hospital, *see* Ezekial v. Winkley (1977) 20 Cal.3d 267 (a physician who cannot practice his profession in a hospital as a practical matter is denied the right to fully practice his profession), and a managed care organization, Potvin v. Metropolitan Life Insurance Co. (2000) 22 Cal.4th 1060 (managed care organization's power may be so substantial that the removal of an independent contractor physician from the organization's preferred provider list may significantly impair the ability of that physician to practice medicine).

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 it also wreaked havoc, if not destroyed the physician's professional life and ability to pursue her profession. Yet the trial court deprived Dr. Siegel of the ability to prove that she was terminated for an improper purpose in violation of California's statutory and common law. *See* Willis v. Santa Ana Community Hospital Association (1962) 58 Cal.2d 806 (a common law action for interference with the ability to practice medicine exists where that interference was either by unlawful means or by means otherwise lawful where there is lack of sufficient justification).

These laws recognize the vital functions physicians perform in our society and protect all physicians regardless of their status as employees, independent contractors, or neither of the above, and regardless of the existence of any "termination without cause" provisions. Indeed, as is discussed more fully below, when enacting Business & Professions Code §2056 in 1993, the Legislature

understood that some courts, including the court relied upon by the trial court below in Abrahamson v. NME Hospitals, Inc. (1987) 195 Cal.App.3d 1325, limited relief to aggrieved, but employed, physicians. The Legislature intentionally enacted section 2056 to have the broadest application to protect and provide a judicial remedy to all physicians whose "employment or other contractual relationship" has been terminated or who were "otherwise penalized" as a result of patient care advocacy, even those physicians who purportedly could be terminated "at will" or "without cause". Further, to ensure that physician/patient relationships are not wrongfully disrupted, the courts have ruled unenforceable, as against public policy, "without cause" termination provisions in contracts with organizations that have the practical power to affect substantially a physician's important economic interest. Potvin, *supra*.

If the trial court's decision is allowed to stand, neither physicians nor their patients will, or can, have any faith in this system. 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. Siegel with the opportunity to seek judicial recourse as the courts and 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. Fakaheny (1968) 261 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

[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.

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 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. BAJI 6.04. 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] *See also* Business & Professions Code §2056, discussed more fully below (retaliation

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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."

against physicians who advocate for medically appropriate health care for their patients is against public policy).

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, 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. 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.[5]

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[5]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

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

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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 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).)

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.

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.

With managed care, 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. 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.

Managed care 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. 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.

3. The Law Protects All Physicians From Unreasonable Or Unlawful Interference In The Pursuit Of Their Profession, Regardless Of Their Legal Status.

Given the fundamental role that physicians play in an area of great public interest, the fact that the law prohibits lay entities from employing physicians and the fact that even as "independent contractors," physicians' professional judgments nonetheless remain at risk for being compromised, the courts do not look at the technical status of a physician's relationship with an organization that controls his or her important economic interests. The law does not grant

protection to an aggrieved physician based upon whether he/she is an independent contractor or employee, but view the physician's status and activities in a realistic light. Thus, insofar as a physician's right to be free from retaliation as a result of patient advocacy is concerned, Business & Professions Code §2056 on its face applies broadly to protect any "employment or other contractual relationship" or anything else that results in a penalty against a physician. Similarly, the common law protection against intentional interference with the right to pursue the practice of medicine, whether founded in tort or in contract, applies to all physicians, regardless of the nature of his/her relationship with the entity with the practical power to affect a physician's important economic interest.

For example, in Ezekial v. Winkley (1977) 20 Cal.3d 267, a surgical resident in a private teaching hospital sought damages and injunctive relief alleging that he was not accorded "fair procedure" in his dismissal from the residency program. The defendants in that case argued that the resident was not entitled to fair procedure given his employment status, that is, that according to the defendants, common law rights of fair procedures do not apply to an employer/employee relationship nor to the training opportunity by which the resident sought to qualify as a medical specialist. The defendants went on to argue that "unlike an independent physician with hospital staff privileges, plaintiff is merely an employee whose connection with the hospital is terminable at will in the absence of a contrary agreement, and whose only remedy is a claim for money damages for any contractual breach." *Id.* at 275. The Supreme Court held that

notwithstanding the fact that residents are hospital employees, a physician was entitled to fair procedures before being terminated from their residency program given the practical effect the decision would have on his future ability to practice as a surgeon. The court observed:

> In the instant case, we looked beyond plaintiff's immediate status as an employee of Kaiser and examined an entirely distinct interest which also inheres in his residency, namely, his expectation of achieving necessary certification as a surgeon. We conclude that defendants may not defeat application of Marinship-Pinsker (right to fair procedure) principles on the basis alone that plaintiff alone that plaintiff, as a resident, is also necessarily an employee of the hospital.

Ezekial, *id.* at 275-276.

Thus, the key to Ezekial conclusion was not the resident's status as an employee or an "independent" physician, but rather the fact that the residency program wielded the powers to affect substantially an important economic interest. *Id.* at 277.

Like the resident in Ezekial, other courts have recognized that physicians have an interest in retaining their medical staff membership or status as a preferred provider which is distinct from any interests associated with their employment, independent contractor or other status. As a result, other entities which control access to patients, such as medical staffs and medical societies, must not unfairly exclude/expel independent or employed physicians.[6] *See* Pinsker v. Pacific Coast

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[6]In Harper v. HealthSource (S.Ct. N.H. 1996) 674 A.2d 962, the court decided that public interest and basic fairness require that a managed care organization's decision to terminate a physician be made in good faith and not for reasons that are contrary to public policy. In that case, the court recognized that a

Society of Orthodontists (Pinsker I) (1969) 1 Cal.3d 160; Pinsker v. Pacific Coast Society of Orthodontists (Pinsker II) (1974) 12 Cal.3d 541 (medical societies control important economic interests which are clothed with the public interest); Ezekial, *supra*.

More recently, the Supreme Court ruled that managed care plans, like medical staffs and medical societies, should not be able to arbitrarily terminate physicians from provider panels without both a fair procedure and a substantively rational reason for the removal. *See* Potvin v. Metropolitan Life Insurance Co. (2000) 22 Cal.4th 1060. The Potvin court did not make any distinctions as to whether the physician was an "independent contractor," employee, or something in between. Rather, the Supreme Court looked at the practical power of the organization controlling access to patients—the managed care organization—and concluded that a physician's common law right to practice medicine without unlawful interference applied.

For the reasons discussed below, Business & Professions Code §2056 as well as the common law cause of action protesting an inappropriate interference with the right to pursue one's profession apply to physicians such as Dr. Siegel.

"contracting physician" is neither an employee nor an independent contractor of the health plan. Rather, the court, consistent with those in California, looked at the important public interest at stake and provided relief as appropriate.

B. Business & Professions Code §2056 Provides All Physicians, Including Ones With "Independent Contractor Contracts" Containing "Without Cause" Termination Provisions To Bring A Private Right Of Action As A Result Of Retaliatory Discharges.

Business & Professions Code §2056 was sponsored by the California Medical Association and enacted by the Legislature to clarify existing law and expressly state 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, 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. The law extends protection against (and judicial recourse to redress) retaliatory termination and/or penalization of physicians, without regard to physician' status as employees, independent contractors, or otherwise, and without regard to any "at will" or "without cause" termination provisions. To limit the application of this law and the public policy it declares to employed physicians would eviscerate the goal of protecting physicians (the vast majority of whom may not be employed as a matter of law) who carry out their duty to advocate for appropriate health care.[7]

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[7]As is discussed above, the corporate practice of medicine bar's strict prohibitions on a hospital's ability to employ physicians, based on the very same policy enunciated in section 2056, preserves the physician's right and duty to exercise professional judgment regarding patient care free from lay interference.

The reason for the statute's breadth is clear. Retaliation (or the credible threat thereof) against the physician by terminating an employment or other contractual relationship, or inflicting some other penalty, can have profound implications on a patient's health. The public must be assured that the physicians who care for them are being open and honest in their recommendations, and are not being unduly influenced by fear of retaliation. As stated earlier, the Supreme Court in Cobbs v. Grant, *supra*, recognized that patients depend upon their physicians to provide them with the necessary information concerning their health care needs. This statement is only more true today than it was in 1972 when the Cobbs decision was decided. Medical technology and pharmaceutical options are becoming increasingly numerous, and medical decisionmaking concomitantly more complex. At the same time, pressures for cost containment are now omnipresent. Patients are simply not in the position to navigate in this environment without the help of their physicians acting as strong advocates. The consuming public, patients, have an overriding interest in protecting their physician/patient relationship and assuring that their physicians are not retaliated against for advocating for appropriate medical care.

1. Business & Professions Code §2056 Protects Independent Contractors

The language set forth in 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 protect all physicians, including those with independent contracts, from

retaliation through the right to judicial relief. As the statute is clear on its face, this Court must presume the Legislature meant what it said. Khajavi v. Feather River Anesthesia Medical Group (2000) 84 Cal.App.4th 32 (Business & Professions Code §2056 clearly applies to protect against retaliation resulting from all patient care advocacy, not just cost containment decisions by a third party payor).

Nowhere in the statute is there any limitation as to which physicians are to be afforded its protections. Rather, the stated purpose and public policy of this provision as set forth in subsections (a) and (b) apply to all physicians who "advocate for medically appropriate health care" and that, pursuant to subdivision (c), the public policy of the statute is violated when any person "terminate[s] an employment or other contractual relationship with or otherwise penalize[s] a physician and surgeon principally for advocating medically appropriate health care." The Legislature was intentionally broad in this language to cover any and all circumstances under which any physician could potentially face retaliation for patient advocacy by anyone by any means, including under the subterfuge of an "at will" or "without cause" termination provision.

In Khajavi v. Feather River Anesthesia Medical Group (2000) 84 Cal.App.4th 32, 100 Cal.Rptr.2d 627, the court understood the breadth of Business & Professions Code §2056. It allowed an aggrieved physician to maintain a wrongful termination suit against his medical group employer, interpreting the scope of Business & Professions Code §2056 to prohibit retaliation against

physicians "for advocating for medically appropriate health care" to apply to any "person" who engages in retaliation prohibited by the statute. In this case, the trial court concluded that section 2056 protection applies only to third party payors and not with respect to retaliatory actions by medical groups, IPAs or other entities that employ or contract with physicians to deliver health care services. The Court of Appeal in the Khajavi case properly rejected the trial court's narrow interpretation. In construing section 2056, the Court of Appeal concluded that the Legislature declared that it was the public policy of this state to encourage two types of advocacy for medically appropriate health care:

- an appeal from a payor's decision to deny payment,
- a protest of a decision, policy or practice that the physician reasonably believes impairs his or her ability to provide medically appropriate health care.

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.

The court also concluded that Business & Professions Code §2056 was clear in its scope and purpose. "Far from limiting its application to disputes with a

third party payor or over cost containment," the court found that the policy set forth in Business & Professions Code §2056:

> is violated whenever 'any person' decides to terminate or penalize a physician 'principally for advocating for medically appropriate health care'–expresses an unambiguous legislative intent to apply the statute broadly–to protect physicians' exercise of their professional judgment in advocating for medically appropriate health care, without limitation over the basis of the dispute. *Id.* at 47.

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

Similarly, in this case, by extending the protection to "employment or other contractual relationships" or any other activity that "penalize[s] a physician and surgeon," the Legislature understood that it could have limited the application of the statute, but chose not do to so.

The legislative history of Business & Professions Code §2056 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, employed, contracted, or otherwise, 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

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[8]A true and correct copy of the entire 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.

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. California (1986) 192 Cal.App.3d 1360.
- 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.
- concluded that a wrongful discharge action in violation of public policy does not exist outside the employment situation, and thus does not protect independent contractors whose contracts can be terminated without cause. Harris v. Atlantic Richfield Co. (1993) 14 Cal.App.4th 70; Abrahamson v. NME Hospitals, Inc. (1987) 195 Cal.App.3d 1325.

The Legislature understood that A.B. 1676 was needed to:

> codify state public policy (a) that physicians advocate for appropriate health care for their patients, and (b) that physicians not be terminated from group practices or other contractual or employment relationships for advocating appropriate health care.

See Assembly Committee on Insurance Analysis for Hearing, May 18, 1983, Bate stamped at p. 31. *See* Assembly Third Reading, Health Committee, April 20, 1993, Bate stamped at p. 39.

These analyses, as well as all other analyses supporting the bill explained that the provision was intended to apply to independent contractors, and that as a result of the Gantt decision, the state policy encouraging physicians to advocate for medically appropriate health care needed to be in statute. Further, the background material from the legislative bill file of the Senate Committee on

Business & Professions on A.B. 1676, as well as the material from the legislative bill file of Assemblymember Burt Margolin—the author of the bill—contains a memorandum detailing why A.B. 1676 was needed to overrule both the Tameny and Abrahamson decisions limiting wrongful discharge suits in violation of public policy to employment situations and dismissing lawsuits by independent contractors who were retaliated against for patient advocacy but terminated pursuant to "without cause" terminations. *See* Legislative materials Bate stamped at pp. 49-53 and 130-134.

Given the statute's clear language and legislative history, Business & Professions Code §2056 unquestionably provides protection against retaliation for all physicians, including those with independent contracts containing without cause termination provisions. When enacting Business & Professions Code §2056, the Legislature intentionally declared the public policy of this state to encourage physician patient care advocacy. Thus, it intentionally (1) overturned the ruling in the Abrahamson case, that an independent contractor physician could not challenge the without cause termination of his contract on the ground that the hospital acted in retaliation for his refusal to acquiesce in the hospital's failure to provide patient care, and (2) rendered void as against public policy any contractual provisions which limited the right to seek redress for retaliatory discharges. The trial court conclusion that this case was somehow barred by the Abrahamson decision gives absolutely no effect of either the plain language of Business &

Professions Code §2056 or the Legislature's clear knowledge and intent to overrule the Abrahamson decision.

2. Business & Professions Code §2056 Provides A Private Right Of Action For Physicians Aggrieved By Retaliating Discharges In Violation Of Public Policy

Similarly, the Legislature knew and understood that A.B. 1676, to be useful, needed to provide physicians with the right to 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 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).

See Senate Committee Analysis, Bate stamped pp. 44-45; *see also* Third Reading in Senate for Analysis for Hearing of August 24, 1993; *see also* Senate Rules Committee Analysis of Third Reading, August 30, 1993 at p. 119. Even the professional association representing hospitals, the California Association of Hospital and Health Systems, admitted in their opposition to the bill that the bill would allow for lawsuits to remedy abusive practices. *See* Bate stamped at pp.

125-126. *See also* Khajavi, *supra* (allowing a private right of action by an aggrieved physician to proceed).

Further, California common law and equitable principles leave no question that Business & Professions Code §2056 provides a private right of action. Given California's general principle that "for every wrong there is a remedy," Civil Code §3523, California law presumes that a violation of a statute "gives to any person within the statute's protection a private right of action to recover damages caused by its violation." *See* Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist. (1976) 65 Cal.App.3d 121, 131 (even though statute provided no specific remedy for a violation of a prohibition involving the establishment and purchase of a proposed transit service or system, an award of damages to taxi cab companies against the offending transit district was affirmed). California courts recognize that a private right of action is an appropriate remedy when it is "needed to assure the effectiveness of the provision." Middlesex Ins. Co. v. Mann (1981) 124 Cal.App.3d 558 (holding that Insurance Code provisions describing fiduciary obligations of insurance agents who receive premium payments provided a private right of action even though it did not provide a civil remedy for violations). There is no question that Business & Professions Code §2056 was intended to protect physicians from inappropriate and retaliatory discharges for advocating for

medically appropriate care. As such, California law provides a private right of action to enforce and give meaning to Business & Professions Code §2056.[9]

C. A Cause Of Action For Intentional Interference Of The Right To Practice Medicine Lies Even Where There Is A Termination Of A Contract To Participate In A "Closed Panel" To Provide Care To Managed Care Organization Patients.

Even assuming Business & Professions Code §2056 does not create a private right of action, it clearly nullifies any contractual defense to a claim of unlawful interference with the practice of a profession. California courts have long protected physicians from arbitrary expulsion from organizations that, by virtue of their control of important economic interests, are clothed with the public interest, such as hospitals in Rosner v. Eden Township Hospital District (1962) 58 Cal.2d 592, and most recently, managed care organizations. Potvin v. Metropolitan Life Insurance Co. (2000) 22 Cal.4th 1060. These entities maintain important economic relations by acting as gatekeepers between the physicians and patients. Given the public concerns imparted by these institutions' power as gatekeepers, particularly when that power may disrupt profoundly significant relationships such as that between a physician and his or her patients, the courts have barred such organizations from acting unlawfully or arbitrarily and capriciously in exercising their control.

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[9]Similarly, under the federal Court v. Ash (1975) 42 U.S. 66 standards, Business & Professions Code §2056 similarly provides a private right of action as (1) physicians constitute the class whose especial benefit the statute was enacted, (2) the Legislature intended to create a private right of action, (3) a private right of action is "consistent" with the underlying purposes of the legislative scheme, and (4) the cause of action is one traditionally relegated to state law.

To redress improper intrusions on a physician's ability to practice medicine, the courts initially granted a common law tort action to physicians whose practice of their profession was unlawfully interfered with by entities who have the practical power to affect substantially an important economic interest. Willis v. Santa Ana Community Hospital (1962) 58 Cal.2d 806. The courts later extended that remedy by also allowing physicians a right to fair procedure to ensure that the decision to interfere with the physician's pursuit of his/her profession was rendered following a fair process. *See* Pinsker v. Pacific Coast Society of Orthodontists (Pinsker I) (1969) 1 Cal.3d 160 and Pinsker v. Pacific Coast Society of Orthodontists (Pinsker II) (1974) 12 Cal.3d 541 (stating the common law principle "that whenever a private association is legally required to refrain from arbitrary action, the association's action must be both substantively rational and procedurally fair."). All California hospitals, regardless of size, are now subject to this fair procedure requirement. *See* Westlake Community Hospital v. Superior Court (1976) 17 Cal.3d 465.

These organizations can significantly control a physician's profession (and thus are constrained to protect against arbitrary exclusion/expulsion), even though alternatives for the physician to practice medicine may exist. For example, the availability of staff privileges at other hospitals does not defeat a physician's common law right to be free of unlawful or improper interference with the pursuit of his/her profession. *See* Ascherman v. San Francisco Medical Society (1974) 39 Cal.App.3d 623, 650, fn. 6. Because of the importance of the physician/patient

relationship and the public interest at stake, courts have steadfastly protected physicians from arbitrary exclusions. This case provides no exception.

Rosner v. Eden Township Hospital District, *supra*, was one of the first California Supreme Court cases recognizing that the refusal of a hospital to allow a physician access to its staff could "have the effect of denying to a licensed doctor qualified to practice in California the right to fully exercise his profession." *Id.* at 598. The court, with remarkable prescience, understood the real potential for the arbitrary application of standards to physicians given the fact that "in asserting their views as to proper treatment and hospital practices, many physicians will become involved in a certain amount of dispute and friction." *Id.* But the court recognized the need for protecting vocal physicians, explaining that:

> 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. Considerations of harmony in a hospital must give way where the welfare of patients is involved, and a physician by making his objections known, whether or not tactfully done, should not be required to risk his right to practice medicine. *Id.*

In light of the court's recognition of the need for physicians to advocate, the court found excluding the physician from a practice due to his or her inability to get along with others was an insufficient ground as a matter of law.[10] As a result,

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[10]In the same vein, other courts have not found an "abrasive personality" to be a sufficient reason to exclude a physician from a medical staff. *See* Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614 (a bylaw which allows exclusions solely on the basis of a physician's ability to work with others invalid; the challenged behavior must have a demonstrable nexus with the effect of that ability on the quality of patient care provided); *see also* Pick v. Santa Ana-Tustin

the Supreme Court issued a writ of mandate compelling the hospital board to admit Dr. Rosner to membership on the medical staff.

That same year, the California Supreme in Willis v. Santa Ana Community Hospital, *supra*, confirmed a tort action for physicians subject to unreasonable and arbitrary interferences with their professions such as was the case in Rosner. In Willis, an excluded osteopathic physician and surgeon charged that a hospital association, three osteopathic physicians and two allopathic physicians, entered into a conspiracy to dominate the practice of medicine by licensed osteopaths in Orange County and to prevent some osteopaths from acquiring memberships on the medical staffs in that area.[11] The Willis court described the tort action as follows:

> There is an established principle of common law that an action will lie where the right to pursue a lawful business, calling, trade, or occupation is intentionally interfered with either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification. (Citations omitted.) Whether there is justification is determined not only by applying precise standards but by balancing, in the light of all the circumstances, the respective importance to society and the parties of protecting the activities interfered with on the one hand, and permitting the interference on the other.

Community Hospital (1982) 130 Cal.App.3d 970 (abrasive personality or not getting along with others is not, standing alone, sufficient ground for denial of application).

[11]The Willis court denied relief pursuant to the Cartwright Act (Business & Professions Code §§16700 et seq.) on the grounds that the Act did not apply to "the professions." This aspect of the Willis ruling was overruled in Cianci v. Superior Court (1985) 40 Cal.3d 903. Under these circumstances, the Cartwright Act, as well the Unfair Competition Act pursuant to Business & Professions Code §17200, would be options for Dr. Willis and other wrongfully excluded physicians today.

Id. at 810.

The court then held that a cause of action was stated where it was alleged that "a physician of the highest qualifications is denied access to necessary hospital facilities as a result of a conspiracy designed to restrain competition and deprive him of his practice in order to benefit competing members of the conspiracy." *Id.* The court rejected the suggestion that in order to "maintain professional standards," hospitals must have "absolute discretion to exclude" physicians without any possibility of a lawsuit for damages resulting from that exclusion. The California Supreme Court in Westlake Community Hospital v. Superior Court (1976) 17 Cal.3d 465 reaffirmed the Willis holding allowing an aggrieved physician's right to institute a tort action for damages as a result of an unlawful exclusion/expulsion.[12]

Thus, the Willis balancing test requires the consideration of a number of factors for the fact finder to consider. To apply the Willis balancing test, the importance to society of Seton's actions must justify or balance the massive interference with Dr. Siegel to pursue her chosen profession and the rights of patients, including those that "overflow" from the Kaiser system, to obtain her

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[12]Westlake also concluded that the exhaustion of administrative remedies doctrine applies to actions seeking damages for an allegedly wrongful termination or an exclusion from membership in a hospital. The court noted, however, that even though the allegations in Willis were similar to those in the case before it, in Willis, it was simply alleged, as here, that membership had been terminated "without any hearing" and that there was no indication that any internal remedy was available under the hospital's bylaws. *See* Westlake, at 477, note 5.

services. As is recognized repeatedly by the courts, there is a tremendous public interest at stake with the respect to the provision of medical services. *See* , *supra.* So does Dr. Siegel have an overwhelming interest in protecting her ability to seek overflow patients in California, particularly given the highly specialized nature of her practice, the fact that her practice consists mostly of "Kaiser overflow patients" and the fact that the Kaiser health system exerts substantial market power in the relevant geographic area. These interests, particularly when juxtaposed to the interests of society and the hospital to terminate Dr. Siegel's contract "without cause," that is, without any reason whatsoever, justifies maintenance of a cause of action for intentional interference with the right to practice medicine. Any doubt is removed by Business & Professions Code §2056, which both voids any contractual waivers of retaliation claims, and further establishes the conclusive presumption that where retaliation for patient advocacy is proven, the balance must be struck in favor of the physician. Dr. Siegel has the right to let the trier of fact view the evidence and make an appropriate finding.

Significantly, even though this is not an "exclusive contract" case,[13] as Appellees appear to maintain, even exclusive contract cases engage in a "balancing test"—something Dr. Siegel was deprived of. *See* Lewin v. St. Joseph's Hospital of Orange (1978) 82 Cal.App.3d 386. The Lewin court applied

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[13]Generally speaking, arrangements such as these involve two agreements—one between the health plan and physician for the provision of professional services, such as was the case in Potvin, and the other between the hospital and health plan for institutional services.

the Willis factors to a hospital's decision to operate its chronic renal dialysis health facility on an exclusive basis. After looking at the nature of the hospital's conduct, the object sought to be accomplished and the interest sought to be advanced by the hospital's contract, and the extent of the hardships imposed on the physician, the court upheld the hospital's legislative decision to operate the hemodialysis unit on an exclusive basis as it would enhance the quality of patient care and reduce its costs—objectives which the court deemed worthy of advancing important societal interests. Thus, even under the "closed staff" cases, which are not applicable here, Dr. Siegel had a right to a balancing of factors.[14] And indeed, since the enactment of Business & Professions Code §2056, even physicians with exclusive contracts are protected against retaliation for patient care advocacy—the

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[14]The "exclusive contract" or "closed staff" cases are inapplicable for a number of reasons. First, Dr. Siegel did not hold an exclusive contract. As a matter of law, California hospitals, such as Seton, which hold Medi-Cal contracts are prohibited by law from having exclusive contracts except with respect to the anesthesia, pathology and radiology services. *See* Welfare & Institutions Code §14087.28. Further, while that statement may have been true had she had an exclusive contract to perform all of the cardiac surgery at the hospital, or even all of the Kaiser "overflow," she didn't. Rather, she was merely one of four physicians on a closed panel of surgeons that had the opportunity to operate on Kaiser "overflow" patients. Moreover, the exclusive contract cases generally deal with the legislative decision to close an entire portion of the medical staff, that is, they are not directed at a specific individual, but they involve a rulemaking or policy making decision to close a particular service to a particular group of physicians. This case does not involve a decision to close a panel, or even to replace a panel, or any other structural matter pertaining to the hospital; it involves a termination of an individual physician based on her personality. In cases involving actions directed at a specific physician, such as the case here, courts have traditionally protected physicians, whereas "cases in the latter category have often balanced the equities in favor of hospitals." Redding v. St. Francis Medical Center (1989) 208 Cal.App.3d 98.

Legislature has done the balancing and concluded such retaliation is against public policy.

D. Neither Abrams v. St. John's Hospital And Health Center Nor Dr. Siegel's Contract Precludes Maintenance Of A Tort Action For Damages Resulting From An Unlawful Exclusion/Expulsion

The court below relied upon Abrams v. St. John's Hospital and Health Center (1994) 25 Cal.App.4th 628, and Abrahamson v. NME Hospitals, Inc. (1987) 195 Cal.App.3d 1325 as grounds for granting a motion for summary judgment against Dr. Siegel for her cause of action for interference with the right to practice medicine. As is discussed above, by enacting Business & Professions Code §2056, the Legislature expressly overruled Abrahamson's holding that independent contractors, including those with contracts containing without cause termination provisions, could not bring a wrongful discharge claim for violation of public policy. Neither does the Abrams case provide any support for the trial court's ruling. Abrams has no application here, has been overruled by subsequent Supreme Court cases, and in any event, was wrongly decided.

At issue in Abrams was a hospital's termination of an exclusive contract with a professional medical corporation to perform pathology services—a contract that required that the physician waive his hearing and review rights pursuant to the medical staff bylaws upon termination. The defendant exercised its rights to terminate the plaintiff pursuant to the contract's "without cause" provisions, but based upon the facts set forth in the opinion, the termination most likely resulted from the hospital's dissatisfaction with the physician's inaccurate testimony in a

deposition, and was not related to any matter concerning patient advocacy or any other public interest. The court there concluded that the agreement to waive medical staff rights upon termination would be generally enforceable "unless a contrary result is required by certain provisions of the Business & Professions Code."[15] Hoping to prevent a termination of the contract, the plaintiff sued alleging causes of action for, among other things, breach of contract, slander, and negligent misrepresentation. It does not appear that the plaintiff brought a cause of action for wrongful termination in violation of public policy, or that the facts would have supported such a claim. Based on the facts and conclusions of law in this case, Abrams does not serve as a basis to deny relief in this case for a number of reasons.

First, the facts of Abrams are inapposite. Unlike here, Abrams truly involved an exclusive contract case, where the courts tend to provide aggrieved physicians less procedural protections in return for their being provided a "monopoly." Second, unlike this case, there is absolutely no suggestion that Dr. Abrams' termination was a result of his advocating for medically appropriate care. Had that been the case, as is the case here, Business & Professions Code §2056 would have provided Dr. Abrams with a remedy. Third, Dr. Abrams was seeking

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[15]Under Business & Professions Code §§809 et seq., physicians who are terminated for a "medical disciplinary cause or reason" are entitled to a fair hearing as set forth by statute as a matter of law.

injunctive relief, not damages. Indeed, the Abrams court notes the availability of a damages remedy as one basis for upholding the denial of the injunction. *See* fn. 2.

Further, the Abrams decision was in effect at least partially overruled by Potvin v. Metropolitan Life Insurance Co., *supra*. In that case, the California Supreme Court firmly rejected the argument that independent contract relationships between physicians and entities that had the power to affect important economic interests (such as hospitals and managed care organizations) may trump a physician's common law rights to be free from intentional interference, notwithstanding the existence of "without cause" termination provisions. Extending the Supreme Court's prior principles concerning a physician's right to be free from unreasonable and arbitrary interferences in his or her practice of medicine to independent contractors of managed care organizations, *see* Pinsker, *supra*, and Ezekial, the Potvin court properly concluded that the public policy considerations supporting the common law right to fair procedure (which emanated from the Willis balancing test) renders a "without cause" clause unenforceable.[16] Under these circumstances, the "without cause" type provision in Abrams could not be enforceable in a "post-Potvin"

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[16]The public policy considerations invalidating "without cause" termination provisions are similar to those supporting Business & Professions Code §2056. For example, in a report entitled "Managed Care: Explicit Gag Clauses Not Found in HMO Contracts, But Physician Concerns Remain" (GAO-HEHS-97-175, August 1997), the U.S. General Accounting Office concluded that termination without cause provisions in managed care contracts "make physicians feel constrained from speaking openly with their patients."

world, at least to the extent it applies to preclude a claim of termination in violation of public policy.

Alternatively, to the extent it appears to uphold a contractual waiver of "any and all other legal rights to challenge or appeal the suspension or termination of ... medical staff membership and privileges," Abrams was wrongly decided.[17] Even apart from Potvin's invalidation of without cause terminations by organizations controlling significant economic interests, allowing a party to exempt itself contractually from responsibility for a tort action, such as a cause of action against the intentional interference with the practice of medicine, is also against the public policy and thus unlawful. *See* Civil Code §1668; Westlake Community Hospital v. Superior Court (1976) 17 Cal.3d 465. Thus, to the extent a hospital or any other organization clothed with the public interest that wields such power enters into contracts which exempt themselves from responsibility for wrongful interference with the right to practice a profession, such an action violates Civil Code §1668.

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

[17]As noted above, the opinion appears somewhat inconsistent in that it both appears to uphold this waiver, yet also conclude that money damages may still be available. *See* Abrams at n. 2.

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.

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: June 11, 2002

CATHERINE I. HANSON
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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 8014 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 June 11, 2002, in San Francisco, California.

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