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COLLABORATE. EDUCATE. ADVOCATE.

USE OF THE PREFIX “DR.” AND OTHER LEGAL ISSUES FOR NPS

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OBJECTIVES

- **Objective 1**

NP will be able to explain why the use of the prefix DR. is a First Amendment violation

- **Objective 2**

NP will be able to list 3 areas of increase liability in practice.

- **Objective 3**

NP will be able to list 3 risk management strategies to prevent disciplinary actions against them.

- **Objective 4**

NP will be able to list 3 ways to evolve into independent practice

HOW IT ALL BEGAN

ANONYMOUS COMPLAINT TO MEDICAL BOARD

Complaint

Nurse Practitioner posing as physician and advertising as physician

California Regulation abuse and fraud:

Business and Professions Code and others can be “borrowed,” including Federal laws. B & P sec. 2054,

“Misrepresentation as Physician” Any person who uses in any sign, business, card, or letterhead, or, in an advertisement, the words "doctor" or "physician," the letters or prefix "Dr.," the initials "M.D.," or any other terms or letters indicating or implying that he or she is a physician and surgeon, physician, surgeon, or practitioner under the terms of this or any other law, or that he or she is entitled to practice hereunder, or who represents or holds himself or herself out as a physician and surgeon, physician, surgeon, or practitioner under the terms of this or any unsuspended certificate as a physician and surgeon under this chapter, is guilty of a misdemeanor.



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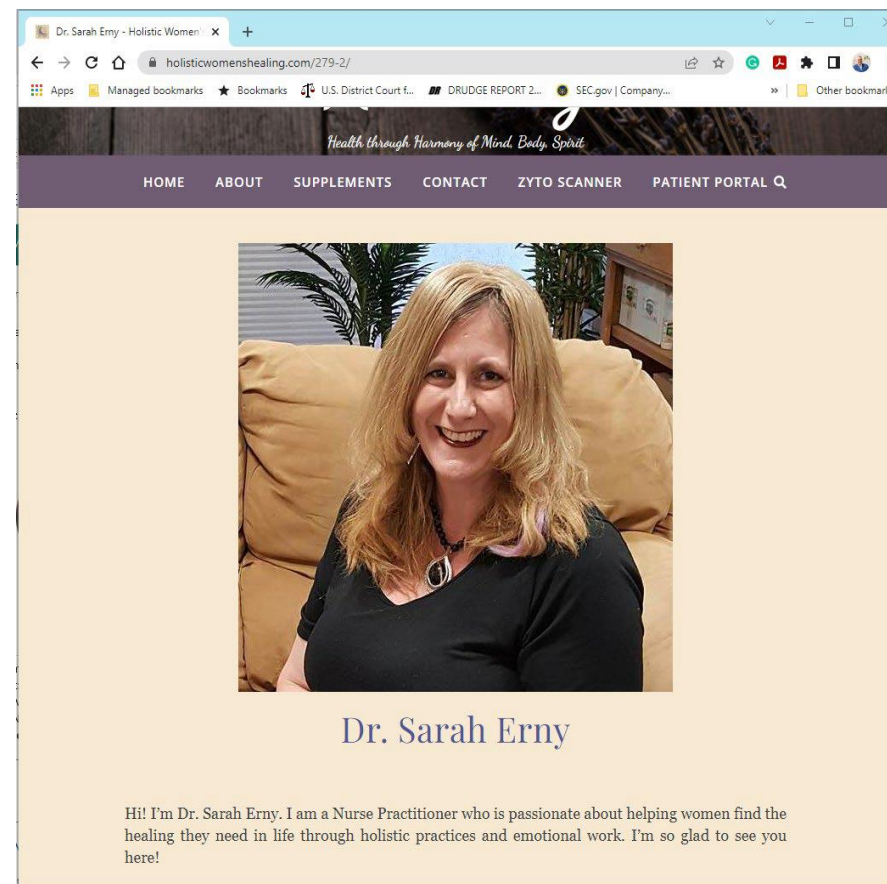
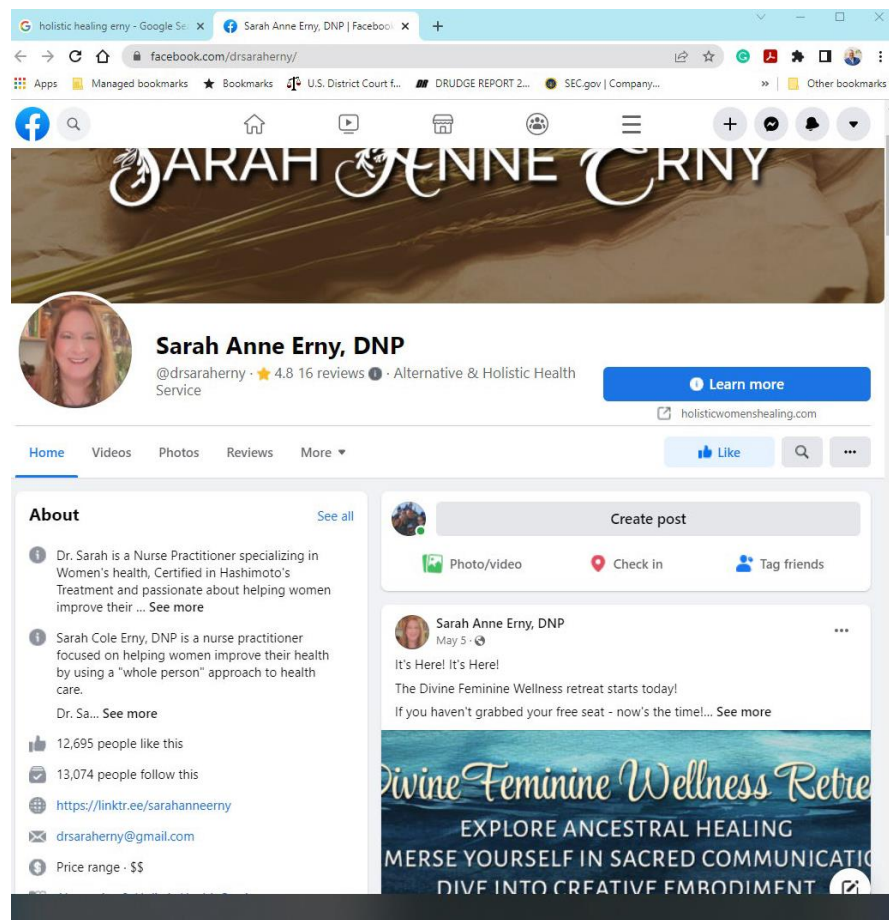
FRAUDULENT USE OF PREFIX DR?

To patients—Dr. Sarah, DNP, nurse practitioner

Webpage—Dr. Sarah Erny, DNP, nurse practitioner

Blogs—Dr. Sarah Erny, DNP, nurse practitioner

COMPLAINT BY SAN LUIS OBISPO COUNTY FALSE ADVERTISING AND UNFAIR BUSINESS PRACTICE



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FROM THE MEDICAL BOARD TO THE COUNTY OF SAN LUIS OBISPO

COMPLAINT FOR INJUNCTION, CIVIL PENALTIES & OTHER EQUIPTABLE RELIEF

Name Holistic Women's Healing, no Fictitious Name Permit required by Medical Board for Medical Corporation

Unfair Business practices

False Advertising

(Initially criminal filings of fraud as a misdemeanor were going to be filed but those were dropped



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FINAL OUTCOME

SETTLEMENT

DA costs \$3750 Fine \$16,000

Basis of settlement

- No valid business license

- No Fictitious Name Permit from Medical Board (client was a solo practitioner)

- Deceptive advertising and email drsaraherny@gmail.com

- Unfair competition—fraudulent

- Violation of Business & Professions Code Section 2054

WHAT NEXT?

ACCUSATION FILED BY BON AUGUST 2022

Gross Negligence

Representation of Being a Medical Doctor without Licensure

Unprofessional Conduct

REVOKING LICENSE

SETTLEMENT OFFER

Surrender license—refused

Discovery from defendant includes:

- Excel sheet with names of 50 professionals in area who use prefix Dr. including Naturopaths, Optometrists, Physical Therapists, Psychologists (Chiropractors have their own law allowing them to use prefix Dr.

- Copies of webpage and blog where defendant uses prefix Dr. with DNP after her name

- Expert witnesses on hormone replacement therapy

- 100 affidavits from patients stating she always said she was a nurse practitioner, not a physician

PROGRESS OF BRN CASE

CASE SETTLED

Probation for 3 years

Costs of \$10,000

REASONS FOR NOT GOING TO HEARING

NP had no malpractice/disciplinary insurance so cost \$25000 or more

UNITED STATES DISTRICT COURT CENTRAL DISTRICT CALIFORNIA

COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF

Plaintiffs—Jacqueline Palmer, DNP, Heather Lewis, DNP, Rodolfo Jaravata-Hanson, DNP

Defendants—Rob Bonta, AG, Kristina Lawson, President Medical Board, Loretta Melby, Executive Officer BRN

CAUSE OF ACTION—VIOLATION OF PLAINTIFFS' FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH

First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, protects the truthful, non-misleading speech that Plaintiffs have engaged in absent threat of enforcement by Defendants.



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FIRST AMENDMENT SECTION 1

- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of the life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FOURTEENTH AMENDMENT

- No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COMPLAINT CONTINUED

VIOLATION OF FIRST AMENDMENT RIGHTS

The application of section 2054 to those who truthfully use the title “Dr.” or the word “doctor” burdens their right to free speech.

Content-based and speaker-based restriction to freedom of speech

Not appropriately tailored to serve a substantial government interest, much less a compelling one

Plaintiffs have no adequate remedy at law to compensate for the loss of this fundamental freedom and will suffer irreparable injury absent an injunction restraining Defendants’ enforcement of the titling restriction found in section 2054

RESPONSE TO COMPLAINT

MOTION TO DISMISS AND MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT

Plaintiffs Lack Standing—they have not suffered injury for using Dr., fear is not sufficient

Declaratory Relief Claim Is Not Ripe—A generalized threat of prosecution does not satisfy ripeness requirement. It is not a genuine threat: 1) there is no “concrete plan” to violate, 2) prosecuting authorities have communicated a specific warning or threat, 3) history of past prosecution or enforcement under the challenged statute

Plaintiffs Fail to State a Free Speech Claim—cite a case that D.O. could not use M.D. Court held in *Brandwein* that one’s academic and professional qualifications on which public may rely in selecting a physician constitutes commercial speech and misleading commercial speech is not protect by the right to free speech

CA courts have consistently rejection challenges to B&P code Section 2054



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RESPONSE TO OPPOSITION

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFF" OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

SUMMARY OF ARGUMENT

Plaintiffs have standing and their claim is ripe. Section 2054 was enforced against Sarah Erny so there fear is justifiable.

Standing requirements do not ask that Plaintiffs wait for an enforcement action

Case can only be dismissed when Plaintiffs claims can not be supported.

First Amendment challenge, injury-in-fact is established by the chilling of speech due to a well-founded fear.

Plaintiffs need only allege their intent to engage in the proscribed conduct but for the challenged law.

RESPONSE OF OPPOSITION CONTINUED

MEMORANDUM OF POINTS & AUTHORITIES

Defendants state the Plaintiffs can use a myriad of acronym available including APRN-CP, RN and NP but did not include a reference to Plaintiffs' doctorates (DNP)

Sole issue is whether Section 2054 violates the First Amendment is a legal one that will not require substantial factual development.

The prefix "Dr." or term "doctor" by one possessing a DNP is not false or inherently misleading. Other providers veterinarians, dentists, pharmacists, naturopaths, university professors, etc. use this prefix.

Dr. is a generic term

RESPONSE TO OPPOSITION

COURT'S DECISION

California Medical Board wrote an amicus brief.

Judge decided on September 18, 2023 to deny case without being heard in court.

Expectations next of Summary Judgement Motion. Will need Amicus Briefs.

WHAT IS NEXT?

WHAT IS THE IMPACT OF THESE CASES

Sarah Erny has been constantly be contacted by the Washington Post and other news media which she refuses to speak to. She practices in WA with no restrictions.

Federal case—In the process of getting discovery from Defendants.
May need Amicus Briefs

States that don't allow the prefix "Dr." or word doctor for DNPs—
Georgia, Missouri, Illinois, Ohio, Oklahoma, California

WHAT CAN NPS DO?

Support this case

- Find out what their state laws are & try to change

 - Through legislators

 - Through state and NP organizations

How can NP have their voices heard?

- Become active in state NP organizations

- Write articles

- Meet with state and U.S. legislators

WHY IS DISCIPLINARY INSURANCE IMPORTANT & QUESTIONS TO ASK

Sarah Erny had no insurance so could not pay an attorney. Attorney took on case pro bono so was very limited in funds to fight case.

Always carry your own so you get your own representation by an attorney

Ask insurance company if you are covered for disciplinary coverage

Ask insurance company if you can choose your own attorney

Ask insurance company what support system they have, advisory board, education

Always make sure you get occurrence insurance which is not available to physicians

An increase in practice authority, the high insurance rates

Nurses Service Organization (CANP endorses) only insurance company that has Advisory Board made up of NPs, educators, and administrators and provides attorneys through the American Association of Nurse Attorneys all qualified in representing NPs and nurses

TOP THREE ALLEGATION IN MALPRACTICE AND DISCIPLINARY COMPLAINTS

Failure to diagnosis

- Are factors present that do not align with diagnosis
- Are there elements that cannot be explained
- Are there symptoms that are inconsistent with the current diagnosis
- Why are these symptoms not indicative of another diagnosis
- Is there a life-threatening condition with similar symptoms that has not been considered
- Is it possible that there are multiple issues going on

Failure to refer

Medication Errors

- Failure to recognize known contraindications /adverse reactions
- Improper prescribing/management or anticoagulants and controlled drugs

Treatment and Care Management

- Inappropriate treatment
- No follow up
- Non adherent patient

OTHER LEGAL ISSUES FOR NPS

Areas of increased liability in practice

HRT—hormone replacement therapy

Sarah Erny case

IV infusions

Medically necessary

Virtual Exams

Non FDA approved use of drugs

OTHER LEGAL ISSUES FO NPS

Areas of increased liability in practice

- Telehealth

- Licenses you may need

- State

- DEA

Locations you can practice from

- Medically zoned

OTHER LEGAL ISSUES FOR NPS

Areas of increased liability in practice

Collaborative agreements. One size does not fit all.

Depends on specialty area. Is it the same?

How are services being provided?

Collaborative Physician companies

Where is the physician located?

What does the contract state?

Who has control?

OTHER LEGAL ISSUES FOR NPS

Areas of increased liability in practice

1099s

An independent NP cannot practice as a 1099

Possible reasons

Government does not get the normal deductions

As 1099, NP does not have to belong to a union

Solution

Nursing corporation set up with W2 payment from corporation to NP

RISK MANAGEMENT STRATEGIES TO PREVENT DISCIPLINARY ACTION

Proper use of Standardized Procedures

Don't let companies write NP SPs

Make sure all non FDA procedures or any not “recognized” procedure is signed off by physician, even if 103 status much safer to have these procedures or drugs signed off by physician

Review top three areas of complaints failure to diagnosis, medication errors and failure in treatment and management and areas to question

Document, document, document

EVOLVING INTO INDEPENDENT PRACTICE

Get 103NP status as soon as possible

Form a Medical Corporation now, which can be amended to a nursing corporation once 104 NP status is law

Hire an attorney who is familiar with NP practice to help you in the process

QUESTIONS????

REFERENCES

California Business and Profession Code Section 2054.

Nurse Practitioner Professional Liability Exposure Claim Report: 5th Edition. <https://www.nso.com/Learning/Artifacts/Claim-Reports/Minimizing-Risk-Achieving-Excellence>

United States Constitution: First Amendment, Fourteenth Amendment. <https://uscode.house.gov/static/constitution.pdf>