



## VIOLATION OF FIRST AMENDMENT?? *A Case Prosecuted for a Nurse Practitioner using the "Dr." prefix & its Future Implications*

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## HOW IT ALL BEGAN

- Anonymous Complaint to the Medical Board claim NP introducing herself to patients as a Dr. Sarah Erny
- 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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## HOW IT ALL BEGAIN

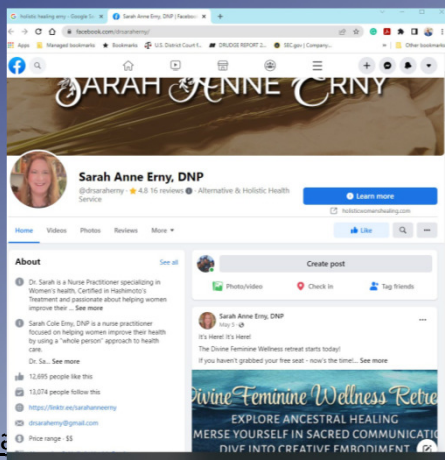
- Fraudulent Use of Prefix Dr.
- To patients—Dr. Sarah, DNP, nurse practitioner
- Webpage—Dr. Sarah Erny, DNP, nurse practitioner
- Blogs—Dr. Sarah Erny, DNP, nurse practitioner

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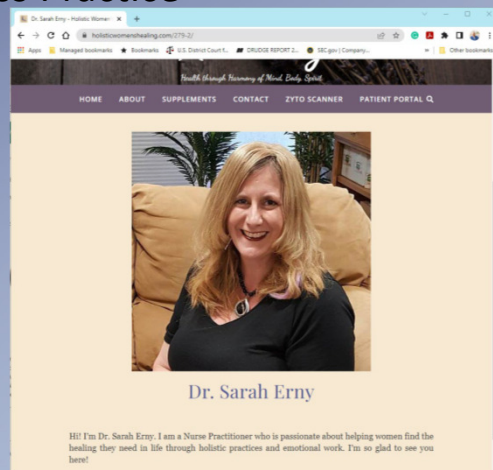


## FROM THE MEDICAL BOARD TO SAN LUIS OBISPO

- 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 EQUITABLE 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](mailto:drsaraherny@gmail.com)
  - Unfair competition—fraudulent
  - Violation of Business & Professions Code Section 2054

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## WHERE IS SARAH ERNY NOW?

- Moved to Washington state
- Licensed as NP in Washington with full practice authority
- Washington state BON was not impressed with California BRN Accusations

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## WHAT NEXT?

- ACCUSATION FILED BY THE BOARD OF REGISTERED NURSING—AUGUST 2022
- Gross Negligence
- Representation of Being a Medical Doctor without Licensure
- Unprofessional Conduct

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## FACTUAL ALLEGATIONS

- Solo practitioner, Holistic Women's Healing
- Dr. Sarah's wellness center, Dr. Sarah's newsletter (in which she stated she is NP)
- 70% of patients received controlled substances (testosterone)—this was in her Standardized Procedures signed by physician
- Supervising physician had practice in CA and in Nevada (she met with physician once a month.
- Office did not have proper medical equipment (not specified)

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## SETTLEMENT OFFER

- SETTLEMENT OFFER
- Surrender license—refused
- TO DATE DISCOVERY 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

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## PROGRESS OF BRN CASE

- CONTINUANCES
- Based on testimony from BRN that they have proof of more accusations
- Twice—No further accusations to date
- Hearing set for February 2024

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## UNITED STATES DISTRICT COURT CENTRAL DISTRICT CA

- **COMPLAINT FOR DECLARATORY AND 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 engage in absent threat of enforcement by Defendants.

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## 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

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## 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 rejected challenges to B&P code Section 2054

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## RESPONSE TO OPPOSITION

- MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFFS’ 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.

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## RESPONSE TO OPPOSITION

- 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

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## OUTCOME OF MOTION TO DISMISS

- Judge decided to dismiss without argument in court

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## 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. Her case will be heard in February.
- Federal case—hopefully I will have more to tell at the Advisory Board meeting as the PP had to be sent in before a response came to the Motion to Dismiss.
- States that don't allow the prefix "Dr." or word doctor for DNPs—Georgia, Missouri, Illinois, Ohio, Oklahoma, California

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- QUESTIONS

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