

**In the Supreme Court of the State of California**

**ALWIN LEWIS, M.D.,**

**Petitioner,**

**v.**

**SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, COUNTY OF LOS  
ANGELES,**

**Respondent,**

**MEDICAL BOARD OF CALIFORNIA,**

**Real Party in Interest.**

Case No. S219811

**SUPREME COURT  
FILED**

**JUL 17 2015**

**Frank A. McGuire Clerk**

**Deputy**

Second Appellate District, Division Three, Case No. B252032  
Los Angeles County Superior Court, Case No. BS139289  
The Honorable Joanne O'Donnell, Superior Court Judge

**REQUEST FOR JUDICIAL NOTICE; DECLARATION OF  
KATHLEEN VERMAZEN RADEZ**

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*Attorneys for Real Party in Interest  
Medical Board of California*

## REQUEST FOR JUDICIAL NOTICE

Real Party in Interest, the Medical Board of California (Board), respectfully requests that the court take judicial notice pursuant to rule 8.520(g) of the California Rules of Court and Evidence Code section 452, subdivision (d) of the original motion to dismiss filed with the administrative law judge by Petitioner Alwin Lewis, M.D. and discussed in his Verified Petition for Writ of Administrative Mandamus before the superior court. A true and correct copy of that motion is attached as Exhibit A.

Appellate courts may take judicial notice of any matter subject to discretionary judicial notice by the trial court under Evidence Code section 452. (Evid. Code, § 459, subd. (a).) The motion to dismiss was filed with the administrative law judge on or about February 3, 2012, and is subject to judicial notice pursuant to Evidence Code section 452, subdivision (d). (See *Heston v. Farmers Ins. Group* (1984) 160 Cal.App.3d 402, 413 [judicial notice properly taken under Evidence Code section 452, subdivision (d) of brief filed by opposing party in administrative proceeding].)

The motion to dismiss is relevant to the issues before this court as it was the subject of Lewis's petition for writ of mandate before the superior court. (AR1140, AR1142.) The motion shows that Lewis sought relief in the administrative proceeding solely on the basis of his patients' asserted state constitutional right to privacy in controlled substance prescription records maintained by the Department of Justice. It shows that the arguments he now asserts concerning the Fourth Amendment, his claimed personal privacy interests, and the pharmacy report obtained from CVS Pharmacy were not presented in the administrative proceeding and are therefore waived in subsequent writ proceedings. Review of Lewis's original motion to dismiss will provide the court with additional context

regarding the limited nature of his constitutional claim before the administrative body and regarding the Board's current arguments that Lewis forfeited issues that he did not pursue in the administrative proceedings.

The Board opposed Lewis's petition for writ of mandate in the superior court, in part, because he failed to lodge a complete record. (AR1196, AR1215.) The Board did not, however, seek to augment the record at that time with a copy of Lewis's original motion to dismiss or seek judicial notice of that motion. The motion to dismiss does not relate to proceedings occurring after the order that is the subject of the appeal.

Dated: July 17, 2015

Respectfully submitted,

KAMALA D. HARRIS  
Attorney General of California  
E. A. JONES III  
Supervising Deputy Attorney General  
EDWARD K. KIM  
Deputy Attorney General



KATHLEEN VERMAZEN RADEZ  
Associate Deputy Solicitor General  
*Attorneys for Real Party in Interest  
Medical Board of California*

EXHIBIT A

I, KATHLEEN VERMAZEN RADEZ, declare:

1. I am admitted to practice in the State of California. I am an Associate Deputy Solicitor General, employed by the California Department of Justice, Office of the Attorney General, which serves as counsel for real party in interest, the Medical Board of California, in this matter.

2. Attached to this declaration as Exhibit A is a true and correct copy of Respondent's Motion in Limine and Motion to Dismiss and Declaration of Benjamin J. Fenton in Support Thereof, which I retrieved from the electronic case file maintained by the Attorney General's Office in *In the Matter of the Accusation Against Alwin Carl Lewis, M.D.* (Case No. 17-2006-179794, OAH No. 20091203.) The motion was attached to a facsimile cover sheet addressed to my colleague, Edward K. Kim, dated February 3, 2012, which is omitted from the attached exhibit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed in San Francisco, California, on July 17, 2015.



Kathleen Vermazen Radez, Declarant

1 HENRY FENTON (State Bar No. 45130)  
2 BENJAMIN FENTON (State Bar No. 243214)  
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8 Attorneys for Respondent Raymond Alwin C. Lewis, M.D.

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**BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

Case No. 17-2006-179794

ALWIN CARL LEWIS, M.D.

OAH No. 200912013

Physician's and Surgeon's  
Certificate Number A 68498

Respondent.

**RESPONDENT'S MOTION IN  
LIMINE AND MOTION TO DISMISS  
AND DECLARATION OF BENJAMIN  
J. FENTON IN SUPPORT THEREOF**

Hearing: Monday, February 13, 2012

**I. INTRODUCTION**

Respondent Alwin C. Lewis, M.D. hereby files this Motion in Limine based upon the Medical Board of California's ("Board" or "Medical Board") violations of fundamental privacy protections guaranteed under state and federal law. The Allegations in the First Amended Accusation against patients W.G., M.U., D.L, M.M, and D.S. are based on records obtained in violation of patient privacy. As a result, these allegations must be dismissed.

On May 10, 2011 the Board filed an Accusation against Respondent, Case No. 17-2008-193243. The Accusation contained allegations pertaining to a single patient, V.C. Subsequently, on

1 June 21, 2011 the Board filed a First Amended Accusation ("FAC") against Respondent. The FAC  
2 contained new allegations and charges related to five (5) more additional patients, W.G., M.U.,  
3 D.L., M.M., and D.S. However, during its investigation, the Board engaged in blatant violations of  
4 the rights of nearly all of Dr. Lewis' patients. Without legal authorization, the Board obtained and  
5 reviewed hundreds of pages of medical records pertaining to well over 500 of Dr. Lewis' patients  
6 going as far back as 2005. These records form the basis of additional charges and allegations against  
7 Dr. Lewis. Because the Board's new charges relate to these improperly obtained documents, the  
8 charges must be dismissed based on violations of patient privacy.

## 10 II. FACTUAL BACKGROUND

### 11 A. Initial Investigation

12 On August 11, 2008 the Medical Board received a complaint from patient V.C. against Dr.  
13 Lewis. Patient V.C. also provided the Board a signed medical release so that the Board could review  
14 her records. (Declaration of Benjamin J. Fenton ¶ 3.) Upon receipt of the patient authorization, Dr.  
15 Lewis forwarded V.C.'s medical records to the Board for review. On October 19, 2009, Dr. Lewis  
16 attended a Board interview with an investigator, a medical consultant and Deputy Attorney General  
17 pertaining to the treatment and care of patient VC. (*Id.* ¶ 3.) The treatment of patient V.C. was sent  
18 to two Board experts for review and opinion. Ultimately, an Accusation was issued regarding the  
19 care and treatment of patient V.C. (*Id.*)

### 21 B. The Board's Improper Second Investigation

22 In November, 2008, the Board initiated a secondary investigation into Dr. Lewis' care as a  
23 physician. This investigation ultimately led to the filing of a FAC. However, the investigation of  
24 this case was based upon substantial violations of the privacy rights of over 500 of Dr. Lewis'  
25 patients over an approximately 5 year period. On November 25, 2008 the Board's investigator  
26 obtained, without authorization, over two hundred (200) pages of Dr. Lewis' CURES records.  
27 (Fenton Decl. ¶ 5.) The CURES records are maintained in a statewide protected databank and  
28

1 contain confidential patient information such as a patient's first and last name, homes address, the  
2 particular medication prescribed, the quantity prescribed, and the location of the pharmacy. Yet  
3 again, on December 16, 2009, the Board's investigator obtained an additional five hundred (500)  
4 pages of CURES records for nearly all of Dr. Lewis' patients. (Fenton Decl. ¶ 5.) In one fell swoop,  
5 the Board improperly reviewed patient records for nearly every patient Dr. Lewis treated. Attached  
6 as Exhibit A to the Declaration of Benjamin J. Fenton are redacted copies of the approximately 700  
7 pages of CURES records obtained without authorization.  
8

9 On January 7, 2010, after having reviewed over seven hundred (700) pages of CURES  
10 records, the Board's investigator then began to contact Dr. Lewis' patients to try to obtain patient  
11 authorization. In total, six patients were contacted – patients, D.L., W.G., D.S., M.C., M.M. and  
12 M.U. (Fenton Decl. ¶ 5.) From these facts, one can infer that the investigator determined which  
13 patients should be contacted based on the patient information contained in CURES records, which  
14 the Board had no legal authorization to review. Notably, not one of the patients contacted had  
15 submitted any complaints or complained about Dr. Lewis' care in any way.  
16

17 Over the next several months, the Board obtained, either through authorization or subpoena,  
18 medical records of each of the patients discussed above. Ultimately, the Board brought accusations  
19 with respect to five of the six patients contacted. It is evident, however, the Board's investigation  
20 began with improper review of confidential the patients' confidential CURES records.  
21

### 22 III. ARGUMENT

#### 23 A. The Board's Conduct Infringed on the Right to Privacy

24 The Board's conduct in this case infringed on the right to privacy of nearly all of Dr. Lewis'  
25 patients. California courts have long held that a patient's right to the privacy over his or her medical  
26 records are of the utmost importance. In *Division of Medical Quality, Bd. of Medical Quality Assur.*  
27 *v. Gherardini* (1979) 93 Cal.App.3d 669, 679, the Court of Appeal held as follows:  
28

The matters disclosed to the physician arise in most



1 sensitive areas often difficult to reveal even to the  
2 doctor. Their unauthorized disclosure can provoke  
3 more than just simple humiliation in a fragile  
4 personality. The reasonable expectation that such  
5 personal matters will remain with the physician are  
6 no less in a patient-physician relationship than  
7 between the patient and psychotherapist. The  
8 individual's right to privacy encompasses not only  
9 the state of his mind, but also his viscera, detailed  
10 complaints of physical ills, and their emotional  
11 overtones. The state of a person's gastro-intestinal  
12 tract is as much entitled to privacy from  
13 unauthorized public or bureaucratic snooping as is  
14 that person's bank account, the contents of his  
15 library or his membership in the NAACP. We  
16 conclude the species of privacy here sought to be  
17 invaded falls squarely within the protected ambit,  
18 the expressed objectives of article I, section 1 [of  
19 the California Constitution]. While the amendment  
20 does not prohibit all incursions into individual  
21 privacy, "any such intervention must be justified by  
22 a compelling interest" [citation] and any statute  
23 authorizing invasion of such area of privacy must be  
24 subject to strict scrutiny.

25 93 Cal.App.3d at 679 (emphasis added).

26 The Court in *Gherardini* required that the Medical Board obtain a prior showing of good  
27 cause (in the form of an affidavit to a tribunal) justifying issuance of an administrative subpoena, in  
28 order to get access to patient records. Subsequent law makes it clear that prior notice to the patient  
and an opportunity to object is also required.

Further, C.C.P. § 1985.3 requires that subpoenas duces tecum for production of personal  
records (which include medical records) must be served on the person whose records are being  
sought, at least 10 days before the date for production specified in the subpoena duces tecum. In  
*Sehlmeyer v. Department of General Services (Stempf)* (1993) 17 Cal.App.4th 1072, which is  
directly on point, the Court held that the state constitutional right to privacy requires that such  
notice be given in administrative actions, even though administrative actions are not referred to in  
C.C.P. § 1985.3:

According to Stempf [the psychologist whose  
license was at issue], the Legislature's failure to  
mention Code of Civil Procedure section 1985.3 in  
subdivision (a) of section 11510 of the Government

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Code demonstrates a specific intent to exclude administrative subpoenas from the operation of section 1985.3. We do not engage in the somewhat sticky statutory analysis required to resolve this point... because even if Stempf is correct, there still exists a constitutional and common law right to privacy which resolves the underlying issue against Stempf.

17 Cal.App.4th at 1077.

In *Sehlmeyer*, a disciplinary action against a psychologist was brought by the Department of General Services, based on a complaint by a patient (Ms. Sehlmeyer). The psychologist, Dr. Stempf, served administrative subpoenas for the patient's medical records from other providers. Citing Article I, Section 1 of the California Constitution and *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656, the Court held that the constitutional right to privacy required that the psychologist first give prior notice to the patient to allow his to assert his privacy rights:

[W]e conclude that before confidential third party personal records may be disclosed in the course of an administrative proceeding, the subpoenaing party must take reasonable steps to notify the third party of the pendency and nature of the proceedings and to afford the third-party a fair opportunity to assert her interests by objecting to disclosure, by seeking an appropriate protective order from the administrative tribunal, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered.

17 Cal.App.4th at 1080-81.

There is no special exemption for state agencies from these requirements; the constitutional right to privacy fully applies to state agencies as well. *Lantz v. Superior Court (County of Kern)* (1994) 28 Cal.App.4th 1839, 1852.

In the present case, the Board's ran roughshod over the privacy rights of Dr. Lewis' patients. Without any authorization to do so, nor any notice to any of the patients at issue, the Board reviewed confidential patient records of over 500 of Dr. Lewis' patients. Dr. Lewis' patients have a fundamental right to privacy with respect to their medical records. In this case, the CURES records

1 contained confidential information identifying Dr. Lewis' patients, their address and all prescription  
2 issued to them. The Board must not be permitted to callously violate these patients' rights.<sup>1</sup>

3 **B. All Evidence Derived The Improperly Obtained Cures Records Should Be**  
4 **Excluded From the Hearing**

5 The exclusionary rule permits a court to exclude evidence obtained in violation of patient's  
6 right to privacy. *Emslie v. State Bar* (1974) 11 Cal.3d 210. The exclusionary rule applies in  
7 administrative actions, on a case-by-case basis, as set forth in *Emslie*. Therein, the court stated that  
8 "a balancing test must be applied in [administrative] proceedings and consideration must be given to  
9 the social consequences of applying the exclusionary rules and to the effect thereof on the integrity  
10 of the judicial process." *Id.* at 229. In *Emslie*, the determinative fact used by the court to reject the  
11 applicability of the exclusionary rule in that case was as follows:  
12

13 In applying the exclusionary rules to attorney  
14 disciplinary proceedings we find practically no  
15 deterrent effect upon any law enforcement officer  
16 who might be tempted to use unconstitutional  
17 methods to obtain evidence for use in a criminal  
18 trial.

19 11 Cal.3d at 229.

20 The present case is readily distinguishable from *Emslie*. Here, there is a very practical  
21 deterrent effect that should be applied, in light of the manner in which the Board trampled over the  
22 privacy rights of Dr. Lewis' patients. Here, the Board evaded the requirements of the California  
23 constitutional right to privacy, as set forth in cases like *Wood v. Superior Court* (1985) 166  
24 Cal.App.3d 1138, 1147, and *Board of Medical Quality Assurance v. Gherardini* (1979) 93  
25 Cal.App.3d 669, 678, by collecting hundreds of pages of confidential CURES records without  
26 making any effort to first obtain patient consent. It is precisely this type of egregious conduct that  
27 must be deterred if the constitutional right to privacy is to be given any substance at all. See, e.g.  
28 *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (value and purpose of the exclusionary rule "is to deter-to

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1 There is no doubt that a physician has standing to assert patients' privacy interests on their behalf. As the Court noted in *Wood v. Superior Court (Board of Medical Quality Assurance)* (1985) 166 Cal.App.3d 1138, 1145, "Where the constitutionally protected privacy interests of absent patients are coincident with the interests of the doctor, the doctor must be permitted to speak for them."


1 compel respect for constitutional guaranty in the only effective way-by removing the incentive [of  
2 overly zealous law enforcement agents] to disregard it." (citing *Elkins v. United States*, 364 U.S.  
3 206, 217 (1960)).

4  
5 **IV. CONCLUSION**

6 For the above mentioned reasons, Dr. Lewis requests that the allegations pertaining to  
7 patients W.G., M.U., D.L, M.M, and D.S be dismissed from the FAC as the Board failed to comply  
8 with basic rights to privacy with respect to those patients' medical records.

9 Dated: February 3, 2012

FENTON NELSON, LLP

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12 By:   
13 Benjamin J. Fenton  
14 Attorneys for Respondent  
15 Alwin C. Lewis, M.D.  
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**DECLARATION OF BENJAMIN J. FENTON**

I, Benjamin J. Fenton, declare as follows.

1. I am an attorney licensed to practice law before all of the courts of the State of California. I am one of the attorneys for Respondent Dr. Alwin C. Lewis. Unless stated on information and belief, the following is based on my personal knowledge and if called upon to testify I could competently do so.

2. I am in receipt of the Medical Board of California's ("Board") Investigation Report ("IR") in this matter. The following recitation of facts is based on the Board's IR.

3. Based on information and belief on August 11, 2008 the Board received a complaint from patient V.C. against Dr. Lewis. Patient V.C. also provided the Board a signed medical release so that the Board could review her records.

4. Based on information and belief on October 19, 2009, Dr. Lewis attended a Board interview with an investigator, a medical consultant and Deputy Attorney General. The only patient discussed in the interview was V.C. Ultimately an Accusation was issued regarding the care and treatment of patient V.C.

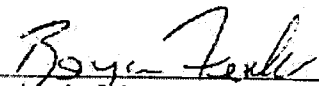
5. Based on information and belief on November 25, 2008 the Board's investigator obtained, without authorization, over two hundred (200) pages of Dr. Lewis' CURES records. Based on information and belief on December 16, 2009 the investigator on the case obtained a CURES report for Dr. Lewis which contained over 500 pages. This report was provided to the Board's medical consultant for review.

6. Based on information and belief on January 7, 2010, after obtaining the CURES records, the Board's investigator sent medical releases to six of Dr. Lewis' patients, D.L., W.G., D.S., M.C., M.M., M.U. Over the next several months, the Board obtained, either through authorization or subpoena, medical records of each of these patients.

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7. Attached hereto as Exhibit A is a true and correct copy of the approximately 700 pages of CURES records the Board reviewed without authorization as produced in discovery. Patient names and addresses have been redacted for patient privacy. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and accurate.

Date: February 3, 2012

  
Benjamin J. Fenton

**PROOF OF SERVICE**  
**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of 18 and not a party to the within action. My business address is 11835 West Olympic Boulevard, Suite 925, Los Angeles, California 90064.

On February 3, 2012, I served on the interested parties in this action the document(s) described as

**1) RESPONDENT'S MOTION IN LIMINE AND MOTION TO DISMISS AND DECLARATION OF BENJAMIN FENTON IN SUPPORT THEREOF**

By transmitting the original or a true and correct copy thereof to the addressee(s) as follows:

Edward K. Kim  
Office of the Attorney General  
300 S Spring St Ste 1702  
Los Angeles, CA 90013

*Facsimile: 213-897-9395*

       **VIA U.S. MAIL:**

I caused such sealed envelope(s) to be deposited in the mail at Los Angeles, California with postage thereon fully prepaid. I am readily familiar with this firm's practice of collecting and processing correspondence for mailing. It is deposited with the U.S. Postal Service the same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

  **X**   **VIA FACSIMILE:**

Such document(s) were transmitted to the facsimile number(s) listed above. The facsimile machine I used complied with Rule 2.306 and no error was reported by the machine.

  **X**   **VIA OVERNIGHT MAIL (FEDERAL EXPRESS):**

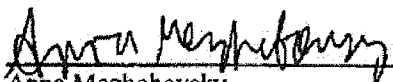
The document(s) were delivered to the overnight mail service in a sealed envelope(s) or package(s) addressed to the person(s) listed above.

       **VIA EMAIL:**

I transmitted the document(s) listed above via electronic mail to the e-mail address(es) set forth above.

  **X**   (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

       (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

  
Anna Mezhebovsy

**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **ALWIN CARL LEWIS, M.D. v. MEDICAL BOARD**  
No.: **S219811**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 17, 2015, I served the attached **REQUEST FOR JUDICIAL NOTICE; DECLARATION OF KATHLEEN VERMAZEN RADEZ** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Benjamin J. Fenton, Esq.  
Fenton Law Group, LLP  
1990 South Bundy Drive, Suite 777  
Los Angeles, CA 90025  
  
*Attorney for Petitioner Alwin Carl Lewis,  
M.D.*

Clerk of the Court  
Second District Court of Appeal,  
Division Three  
Ronald Reagan State Building  
300 S. Spring Street  
2<sup>nd</sup> Fl. North Tower  
Los Angeles, CA 90013

The Honorable Joanne B. O'Donnell  
Los Angeles County Superior Court  
Stanley Mosk Courthouse  
111 North Hill Street  
Department 86  
Los Angeles, CA 90012-3014

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 17, 2015, at San Francisco, California.

Elza C. Moreira  
\_\_\_\_\_  
Declarant

  
\_\_\_\_\_  
Signature