

1 FRANK P. FEDOR, SBN 110915
KATHRYN DOI, SBN 121979
2 CARRIE RAMAGE, SBN 204220
MURPHY AUSTIN ADAMS SCHOENFELD LLP
3 304 "S" Street (95811-6906)
Post Office Box 1319
4 Sacramento, California 95812-1319
Telephone: (916) 446-2300
5 Facsimile: (916) 503-4000
Email: ffedor@murphyaustin.com
6 Email: kdoi@murphyaustin.com
Email: cramage@murphyaustin.com
7

8 FRANCISCO J. SILVA, SBN 214773
LONG DO, SBN 211439
CALIFORNIA MEDICAL ASSOCIATION
9 1201 J Street, Suite 200
Sacramento, CA 95814-2906
10 Telephone: (916) 444-5532
Facsimile: (916) 551-2027
11 Email: fsilva@cmanet.org
Email: ldo@cmanet.org
12

Attorneys for Petitioners & Plaintiffs

13
14 SUPERIOR COURT OF CALIFORNIA
15 COUNTY OF SACRAMENTO
16

17 CALIFORNIA MEDICAL
ASSOCIATION, et al.,

18 Petitioners & Plaintiffs,

19 v.

20 DEPARTMENT OF MANAGED
21 HEALTH CARE, AND LUCINDA
EHNES, in her capacity as DIRECTOR OF
22 THE DEPARTMENT OF MANAGED
HEALTH CARE, and Does 1 through 100,
23 inclusive ,

24 Respondents &
25 Defendants.
26
27
28

Case No. 34-2008-80000059

**OPPOSITION OF PETITIONERS
CALIFORNIA MEDICAL ASSOCIATION
ET AL. TO THE EX PARTE
APPLICATION OF KAISER
FOUNDATION HEALTH PLAN ET AL.
FOR LEAVE TO FILE AN AMICUS
CURIAE BRIEF**

**Assigned for All Purposes:
Hon. Michael Kenny
Dept. 31**

DATE: November 12, 2008
TIME: 9:30 A.M.
PLACE Department 31
ACTION FILED: September 26, 2008
WRIT HEARING November 21, 2008

1 Petitioners California Medical Association, California Hospital Association, California
2 Chapter of the American College of Emergency Physicians, California Orthopaedic Association,
3 California Radiological Society and California Society of Anesthesiologists (collectively,
4 “Petitioners”) hereby oppose the *Ex Parte* Application to File An *Amicus Curiae* Brief by Kaiser
5 Foundation Health Plan, Inc., Kaiser Foundation Hospitals, Southern California Permanente
6 Medical Group and The Permanente Medical Group, Inc. (collectively, “Kaiser”).

7 Kaiser seeks to add another voice to the rising cacophony concerning whether it is good
8 policy to prohibit the practice of balance billing. If this were a debate about the providence of
9 balance billing, Kaiser’s involvement as an *amicus curiae* might be helpful. Had this *Ex Parte*
10 Application been brought weeks ago (or even at the same time when the California Association of
11 Physician Groups (“CAPG”) raised a similar application), less unfairness would result if
12 Petitioners had to respond. Of course, neither is the case: (1) Kaiser comes before this Court in
13 the eleventh hour in the midst of the shortened period Petitioners have to prepare their response to
14 the Department of Managed Health Care’s (the “DMHC”) 41-page opposition brief; and (2) this
15 writ proceeding raises issues under the Administrative Procedure Act and the DMHC’s authority
16 to promulgate the Balance Billing Regulation, none of which entails delving into the broader
17 policy implications of balance billing. Given the extraordinary burdens on Petitioners that would
18 arise and the minimal relevance of Kaiser’s voice to the issues in this writ proceeding, Petitioners
19 urge the Court to deny Kaiser’s *Ex Parte* Application.

20 This is a different situation from CAPG’s request to file its *amicus* brief on Nov. 7, 2008.
21 At this stage – when the DMHC has filed its Opposition and Petitioners are in the midst of
22 preparing their response – it is clear that Kaiser’s proffered *amicus* brief raises points that either
23 are duplicative and already covered by the DMHC or are only addressed to the policy debate
24 surrounding balance billing, which would not be helpful to assisting the Court decide the
25 administrative law issues before it. Kaiser’s proffered brief alleges a perceived “unfairness” of
26 balance billing and urges the Court to take an “approach” to balance billing that is “consistent”
27 with the DMHC’s position. (*See Ex Parte* Application at 1.) Kaiser then spends nearly half of its
28 proffered brief bemoaning a supposed “balance billing campaign” by a single hospital

1 management company before finally addressing the specific regulation that is at issue in this
2 proceeding. (*Id.* at 4-7.) On this final point, Kaiser repeats arguments already raised by the
3 DMHC in its Opposition concerning its authority to promulgate definitions under the Knox-
4 Keene Act. (*Id.* at 7-11; *compare* DMHC’s Opposition at 33-37.) Nothing about Kaiser’s
5 “unique perspective” can further illuminate an understanding of the validity of the Balance
6 Billing Regulation or the statutes the DMHC claims authorize it to prohibit balance billing by
7 non-contracted providers. In some other forum, Kaiser’s proffered *amicus* brief might be helpful,
8 but it does not advance the resolution of the specific issues that now are clearly framed before this
9 Court in this writ proceeding.

10 When CAPG came before the Court on Nov. 7, 2008, seeking leave to file its *amicus*
11 brief, Petitioners already faced a significant burden to prepare a reply to the DMHC’s Opposition
12 brief. The Court granted CAPG’s application and permitted Petitioners a short additional time
13 (until 5 p.m. on Nov. 18, 2008) to respond to the *amicus* brief, in order to alleviate some of the
14 hardship to Petitioners. Although Kaiser clearly had prepared its proffered *amicus* brief by the
15 time that CAPG came before the Court (this *Ex Parte* Application was filed the same day), Kaiser
16 did not come forward with CAPG but instead delayed even further into the time period in which
17 Petitioners had to prepare its responses. In so doing, Kaiser deprived Petitioners and the Court of
18 a full picture of the hardship on Petitioners of responding to *amicus curiae* briefs. Permitting
19 Kaiser leave to file its *amicus* brief in these circumstances would further exacerbate, beyond any
20 measure of fairness, the extraordinary burden Petitioners face in the remaining time prior to the
21 hearing in this matter. Petitioners urge the Court to exercise its broad discretion to disallow
22 Kaiser’s *amicus* brief on the grounds of fairness alone.

23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

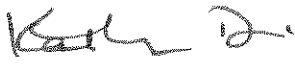
1 **CONCLUSION**

2 For the foregoing reasons, Petitioners urge the Court to deny Kaiser's *Ex Parte*
3 Application For Leave To File An *Amicus Curiae* Brief.

4 Respectfully,

5 Dated: November 11, 2008

MURPHY AUSTIN ADAMS SCHOENFELD LLP

7 By: 

8 FRANK P. FEDOR
9 KATHRYN DOI
10 CARRIE RAMAGE
Attorneys for Petitioners & Plaintiffs
California Medical Association, et al.

11 Dated: November 11, 2008

CALIFORNIA MEDICAL ASSOCIATION

13 By: 

14 for FRANCISCO J. SILVA
15 LONG DO
16 Attorneys for Petitioners & Plaintiffs
17 California Medical Association, et al.

MURPHY AUSTIN ADAMS SCHOENFELD LLP
ATTORNEYS AT LAW

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28