

For Immediate Release

September 24, 2007

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Katten Successfully Represents California Surgeon in Precedent-Setting Court Decision

*Court rules that California Department of Health Services may not regulate
physician-owned and operated surgical clinics*

LOS ANGELES - Katten Muchin Rosenman LLP is pleased to announce that it has won a precedent-setting court decision on behalf of California surgeon Daniel A. Capen, M.D. The case revolved around his legal right to wholly own and operate a Southern California surgical clinic at which non-owner physicians also practice, without obtaining a license from the California Department of Health Services (DHS). The ruling, handed down by the California Court of Appeal's Third Appellate District, impacts countless unlicensed group medical practices state-wide by clarifying an ambiguous provision of the California Health and Safety Code governing which medical clinics must be licensed by DHS. Under the interpretation adopted by DHS, many of these practices would have been deemed to be operating illegally.

"A ruling in favor of DHS in this matter would have had dire consequences for numerous California group medical practices since it would have technically barred thousands of currently operating group practices from employing other physicians or nurses without first obtaining a license from DHS," said [Laurence G. Solov](#), counsel for Dr. Capen and a partner with Katten in Los Angeles who concentrates his practice in health care litigation.

Dr. Capen had been engaged in litigation with DHS since 2002, when he sued the regulatory agency after being informed that a license would be required for his clinic, despite language in the California Health and Safety Code that excludes from the definition of a "surgical clinic" requiring licensure by DHS, any clinic owned and operated by one or more physicians in individual or group practice. It also exempts from the licensing requirement any establishment owned and operated by one or more health care practitioners within the scope of their license. Nonetheless, DHS stated that since Dr. Capen's clinic would also be used by physicians who do not share in its ownership and operation, a license was required. Dr. Capen filed suit, claiming that DHS's interpretation of the statutes constituted an underground regulation that was void because DHS had failed to comply with the formal rulemaking requirements of the California Administrative Procedures Act (APA).

In April 2004, the Sacramento Superior Court granted summary judgment and issued a judgment in Dr. Capen's favor, holding that the statutes were ambiguous and voiding DHS's interpretation of them for its failure to comply with the APA. DHS appealed the ruling, and on February 8, 2007, the Court of Appeal's Third Appellate District reversed part of the trial court's decision, determining

that all physicians who practice at an unlicensed clinic must have an interest in that clinic's safe operation, and therefore, a clinic must be licensed by DHS unless all physicians practicing there have a share in its ownership. Dr. Capen petitioned the Court for rehearing and with the help of an amicus brief filed by the California Medical Association (CMA), the request was granted. On September 19, 2007, the Court reversed its prior decision, affirming the trial court's original ruling in favor of Dr. Capen in full.

"We are gratified that the appellate court saw it appropriate to grant rehearing and affirm the trial court's original ruling," added Solov.

In issuing its decision, the Court ruled that physician owned and operated surgical clinics are to be regulated by a division of the California Medical Board when general anesthesia is used, and surgical clinics owned and operated by non-physicians are to be regulated by DHS. Accordingly, the Court concluded that Dr. Capen's clinic is not subject to licensing and regulation by DHS.

A copy of the Court's decision is available upon request.

Katten's national [Health Care Practice](#) provides sophisticated counsel to health care clients in virtually all manner of regulatory compliance and enforcement issues. It routinely advises on physician self-referral laws, fraud and abuse laws, corporate practice of medicine and fee-splitting prohibitions, HIPAA privacy, charitable trust law, private inurement, private benefit and excess benefit restrictions, antitrust, licensure, JCAHO accreditation, Medicare and Medicaid reimbursement, certificate of need/certificate of exemption laws, and medical staff bylaws issues.

Katten Muchin Rosenman LLP (www.kattenlaw.com) is a full-service law firm with offices in the nation's largest centers of business, government, finance and technology and an affiliated entity in London. With over 650 attorneys in more than 40 areas of practice, Katten provides timely and cost-effective counsel to clients in numerous industries. Katten provides advice for a wide range of public and private companies – from entrepreneurial, emerging-growth, and middle market firms to global Fortune 100 corporations – as well as government entities, institutions of higher learning, museums and a host of other charitable and cultural organizations.

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