



HENRY R. FENTON JD

Medi-Cal Providers Latest Targets of Aggressive MBC

There is a disturbing trend in California, perhaps fueled to some extent by media and public pressure, to find fault with the care rendered by physicians. It appears physicians are increasingly placed at risk of having their sincere medical judgments lumped under the categories of "incompetence," "gross negligence," or "repeated acts of negligence" whenever treatment results in morbidity or mortality and when some question exists about the validity of their medical judgment.

Unfortunately, recent legislation may further increase the pressure, specifically on physicians who treat Medi-Cal beneficiaries.

Because of the Medical Board's recent aggressiveness, numerous physicians who deserve to continue practicing have been placed on probation or offered probation as a settlement of charges filed against them. And physicians who are placed on probation in the future could be forced out of business if their practice treats large numbers of Medi-Cal patients, depending upon how this legislation is interpreted and what determinations are made in the Medical Board settlement or hearing processes.

On its face, that legislation — Section 16.01 of the Budget Act of

■

Depending upon how recent legislation is interpreted...physicians who are placed on probation in the future could be forced out of business if their practice treats large numbers of Medi-Cal patients

■

1996, which became effective July 1 — discriminates against physicians who treat low-income patients and arbitrarily imposes severe punishment merely because a physician has been placed on probation.

This statute provides that the Department of Health Services may not pay any Medi-Cal claim for a surgical service or other invasive procedure if the physician in question has been placed on probation due to a

disciplinary action of the Medical Board "related to the performance of that specific service or procedure on any patient, except in any case where the Board makes a determination... that there exists compelling circumstances that warrant continued Medi-Cal reimbursement during the probationary period."

Obvious questions exist about the reach of this legislation and its applicability to particular cases.

The executive director of the MBC has sent letters to physicians with pending accusations notifying them of the law and asking them to review the legislation carefully "to determine if the conditions of this new section...apply to your case." The letters expressly advise physicians to be prepared to address the issue during any settlement negotiations, at any prehearing settlement conference, or at the disciplinary hearing itself.

Unfortunately, when it comes to any investigation by the Medical Board of California (MBC), the benefit of the doubt is rarely accorded to the physician who is under scrutiny.

Too often, the worst motives are attributed to a physician, and the MBC relies upon experts who work hand in hand with plaintiff's attorneys seeking to use the information these investigations uncover to pursue med-

ical malpractice cases. It is not unusual for an MBC investigator to take at face value what has been reported to him or her by a plaintiff's attorney or by a physician employed by a plaintiff's attorney, regardless of how erroneous the statements in questions or judgments may be.

Physicians who have dealt with the Board say their perception is that investigators are not merely seeking the truth but are looking for supporting evidence for the issuance of an accusation.

It seems the practice of the MBC is to inform physicians under investigation that there is no need for them to obtain legal counsel, as the Board is merely seeking the truth about the treatment or conduct in question. The physician is told that he or she is entitled to come into the regional office, meet with the investigator and a medical consultant, and give his or her side of the story.

The physician who complies soon learns that the interview is tape recorded and the accusatory tone and atmosphere of the interview are more akin to a police investigation than the truth-seeking discussion and collegial atmosphere the physician was led to expect. The physician also discovers, often too late, that admissions or concessions to such things as errors in judgment are taken as admissions of guilt and are used as a basis upon which to issue a formal accusation.

A practice increasingly encountered by attorneys is that of Medical Board investigators suggesting that physicians are obliged to provide a written summary of treatment to the MBC under penalty of Medical Board sanction, pursuant to the provisions of the Business and Professions Code. Section 2225.5 of that code states that physicians must surrender to the MBC medical records for which a release has been provided by the patient. Failure to do so may result in civil penalties.

Recently, investigators have sent letters requesting such medical records and also requesting "a typed summary of treatment." Accompanying

MBC LETTER NOTIFYING PHYSICIAN OF IMPENDING INVESTIGATION

Dear Dr. _____:

In accordance with the enclosed Authorization for Release of Medical Records form, the Medical Board of California is requesting a copy of your complete medical record and billing record for patient _____ relative to your treatment. The Medical Board of California is a Regulatory Law Enforcement Agency requesting these records for confidential review.

Do not obtain copies of hospital records in order to comply with this request if these are not already in your possession as these will be ordered directly.

Please provide a typed summary of treatment in order to assist in clarifying the circumstances of this patient case. If you would like to submit additional material on your behalf, please do so at this time as this case will proceed to outside expert review.

IT IS NECESSARY THAT YOU COMPLETE THE BOARD'S ENCLOSED CERTIFICATION FORM AND RETURN THE COMPLETED CERTIFICATION FORM WITH THE COMPLETE COPY OF THE PATIENT'S MEDICAL AND BILLING RECORDS. FAILURE TO PROPERLY FILL OUT THE CERTIFICATION FORM WILL RESULT IN A SECOND REQUEST.

YOU MAY WISH TO PAGINATE (number) THE PAGES OF THIS PATIENT'S CHART BEFORE YOU MAKE THE COPY FOR THE BOARD SO THAT YOU CAN PROPERLY FILL OUT THE CERTIFICATION FORM AND ENSURE COMPLETENESS. YOU MUST NOTE THE NUMBER OF PAGES BEING SUBMITTED.

DO NOT SUBMIT DOUBLE-SIDED COPIES.

PLEASE REMEMBER TO SUBMIT A COPY OF THIS LETTER WITH YOUR RESPONSE.

ALL ITEMS SHOULD BE SENT DIRECTLY TO MY ATTENTION AT THE MEDICAL BOARD AT THE ABOVE ADDRESS AND ARE DUE ON OR BEFORE SEPTEMBER 13, 1996 (OR WITHIN 15 DAYS OF RECEIPT OF THIS LETTER.) YOU ARE RESPONSIBLE FOR SEEING THAT THE REQUESTED RECORDS ARE SUBMITTED WITHIN THIS TIME FRAME.


Be advised that effective January 1, 1994, Section 2225.5(a) was added to the Business and Professions Code. This Section states that failure to comply within 15 days after receiving this request, shall result in a civil penalty of \$1000 per day for each additional day the requested documents are not produced.

Your anticipated cooperation is appreciated.

the request is a warning that failure to comply will result in sanctions. These letters erroneously suggest to the physician that, in addition to the legally required medical records, the code requires that he or she also provide the Board with a summary of treatment within 15 days, and that failure to do so will result in a fine, at the very least.

Today, practicing physicians are under fire from several directions. Not only do they have to deal with the

problems of managed care, pressure exerted by the MBC and legislation designed to sanction errant physicians continues to increase.

It is more important than ever that a physician who is contacted, in any form, by a Medical Board investigator not discuss the case or attempt to deal with the investigation without the aid of an attorney. 

Henry Fenton, a West Los Angeles-based attorney, specializes in the representation of physicians in medical board cases.