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The Squeeze on Physician Rights

Physicians have historically faced pressure from the Medical Board of California (MBC) and other regulatory entities. But today, that pressure has greatly multiplied. In addition, with the proliferation of managed care in California, physicians are feeling the increased power and ability of insurance companies and other large entities to affect their practices. With pressures seemingly coming from all sides, doctors are feeling more overwhelmed than ever.

In light of these trends, now is the time for physicians to be extra vigilant in the assertion of their rights of due process and fair procedure.

The MBC and Due Process of Law

It is no secret that Medical Board of California is much more aggressively pursuing disciplinary actions against physicians than ever before and that greater resources have been made available to pursue complaints against physicians than at any time in the past.

Where once rehabilitation of the physician was of paramount importance, it no longer is. The MBC has shifted its focus as the result of legislation (Business & Professions Code §2229), which mandates that "protection of the public shall be the highest priority for the division of medical quality and administrative law judges of the medical quality hearing panel in exercising their disciplinary authority."

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An example of what this has meant is a recently published decision in the case of *Borden vs. Division of Medical Quality*, where the court of appeal upheld a decision by the Medical Board to reject an administrative law judge's proposed decision which placed a physician on probation for a period of 10 years to permit him an opportunity to become rehabilitated. Instead, the Medical Board revoked the physician's license on the basis of the legislative mandate that protection of the public was of paramount importance, above all other concerns, including rehabilitation of the licensee.

The Impact of Managed Care on Physician Rights

Physicians, however, as a group, have as great or a greater need for due process and fair procedure with respect to other actions that are taking place around them in the practice of their profession. As all physicians know, the push toward managed care and system-wide credentialing is placing the rights of physicians in a secondary position to the interests of insurance companies and other large entities in making money and saving costs. Thus, there is widespread talk about the inefficiencies of medical staff proceedings and the need for quick and easy credentialing decisions with the creation and spread of integrated delivery systems.

The focus of discussion has gone from the protection of physician rights to the interest in common information gathering, the standardization of credentialing procedures, and the desire for inexpensive and efficient credentialing. In all of the concern for consolidation and efficiency, too often the rights and interests of the individual physician are forgotten or placed in a secondary position. Some commentators have even recommended doing away with the organized medical staff

and with the notion of vested medical staff privileges.

Currently, one very large problem physicians are facing with the growth of managed care is that they find themselves powerless in the face of decisions by large insurance carriers to cancel their contracts or terminate them as member providers or preferred providers with those insurance companies. So many times a physician is notified that he or she has been terminated from the plan and no reason is given for the termination and the physician feels powerless to do anything about it.

The financial interests of the insurance companies, in the push toward integrated delivery systems and managed care, are to permit such decisions to be made on a system-wide basis so that a physician excluded as a member at one hospital, for reasons related to competence, could also no longer practice in the hospitals that may be part of the integrated delivery system. It is evident that through the push toward integrated delivery systems and managed care that private practice physicians will be far less able to rely upon the individual patient's choice of physicians but will depend almost entirely upon decisions made by insurance companies on behalf of their patient members. Under these circumstances it is crucial to protect, preserve, and extend physician rights and, particularly, to preserve the physician's constitutional right to practice his or her profession.

The Constitutional Right to Fair Procedure

Physicians in the United States have a constitutional right under the United States Constitution and in California under the California Constitution to practice their profession. The California courts have held that as part of the constitutional right to practice one's profession is the right to have medical staff privileges at a hospital. Hence, the California Supreme Court has held that a physician may not be deprived of his or her medical staff privileges unless there is good cause related to patient care and the operations of the hospital. Moreover, the California Supreme Court has held also that physicians, as a matter of fair procedure, are entitled to notice and a hearing and other procedural rights before they can be deprived of medical staff privileges.

Similarly, the California legislature in the enactment of Business and Professions Code §809 et seq has enacted a legislative scheme which guarantees physicians in California the right to fair procedure before they can be deprived of medical staff privileges or disciplined with respect to their medical staff privileges. The constitutional and statutory fair procedure protections should permit physicians represented by competent counsel to resist efforts by integrated delivery systems to short cut and diminish physicians' rights to fair procedure with respect to staff privileges.

The only statutory protections that physicians currently have against arbitrary termination or exclusion by insurance companies from participation as providers are the limited statutory protections of Business and Professions Code §809, et seq, which apply to HMOs and health plans. Pursuant to those statutes, if a physician's membership in a healthcare service plan (HMOs or plans comprised of 25 or more physicians) is terminated or restricted for 30 days or more for a quality or medical disciplinary cause or reason, the physician has a right to notice and a hearing before any such termination or restriction can go into effect. Insurance companies often evade such rights by not setting forth any grounds for terminating membership or indicating that the grounds are not for medical disciplinary cause or reason, although Health & Safety Code §1373.65 requires that a plan specify the quality of care reasons when a physician's contract is terminated for such reasons.

Another statute that can provide a measure of protection to physicians who are terminated from membership in retaliation for medical decisions made by the physician is Business and Professions Code §2056. That section declares that it is the public policy of the state of California that physicians be encouraged to advocate for appropriate healthcare and that a physician not be punished for protesting a decision, policy, or practice if he or she reasonably believes it impairs his or her ability to provide appropriate healthcare to patients.

With the advent of managed care and the far greater impact of insurance companies on the practices of physicians, it is necessary that the fair procedure protections accorded to physicians in medical staff situations be extended to credentialing decisions made by insurance companies with respect to outpatient care.

It is this author's view that some of the same case precedents in California, which guarantee constitutional fair procedure protections to physicians in medical staff cases, also provide physicians with a right to notice and a hearing before insurance companies can make adverse credentialing decisions against them with respect to their status as providers. Because insurance companies collectively will assume a predominant position in the market for outpatient physician services in California, it can be truly said that adverse credentialing decisions by insurance companies have a substantial adverse impact on the right of California physicians to practice their profession. Accordingly, it is essential that before physicians can be adversely affected by insurance company decisions, they must have the opportunity to notice and a fair hearing. A recent decision of the California Court of Appeal, the *Delta Dental Plan* case, supports this interpretation of the law.

In summary, physicians are under pressure from a variety of directions with respect to their right to practice their profession. Constitutional and other protections of physician rights do exist under the law, and attorneys who represent physicians must continue to invoke and extend those protections so that the rights of physicians do not become secondary to the financial and societal pressures that are currently being applied to physicians from every direction. LP

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