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Managing the Multiple Layers of Physician Oversight

Rick D. Barton

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Managing the Multiple Layers of Physician Oversight

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Richard D. Barton
Partner
Procopio, Cory, Hargreaves & Savitch LLP
rick.barton@procopio.com
Health Care Providers Operate in a Complex and Overlapping Regulatory Environment

- **Federal**
  - CMS
  - Department of Justice
  - DEA

- **State**
  - Medical Board of California (MBC)
  - California department of Public Health (CDPH)
  - Tort System
  - Criminal Justice System- Attorney General
Health Care Providers Operate in a Complex and Overlapping Regulatory Environment (cont’d)

• Providers
  – Hospitals
    • *Smith v. Selma*
  – Physician Groups

• Associations
  – ABMS
  – AMA
  – Other Specialty Group

• Health Plans
Medical Staff Role

• Evaluation of Significance of Action by Regulatory Bodies
  – Medical Staff Bylaws Contain Provisions Which Allow for Action Based on Discipline or Restrictions
    • MBC
    • DEA
    • Conviction of a Felony
    • Other Licenses or Certification
    • Is Physician “In Good Standing”? 
  – Questions
    • How to Interpret Actions?
      – Is a Conclusion by a Court, Agency or Entity Determinative of the question of whether Corrective Action is Required?
    • When does duty for independent investigation arise?
Medical Staff Role (cont’d)

• Response to Requests for Information from Regulatory Agencies
  – Subpoenas
  – Protection of Privileges - Evidence Code § 1157
  – Sharing Agreements – CA B&P Code § 809.08
Medical Board of California (MBC)

- Enforcement Division - California Business & Professions Code Sections 2200 et seq
  - Responsibilities
    - Receive, Review and Investigate Complaints
    - Review Proposed Decisions - Can Adopt or Non-Adopt
      - Stipulated
      - Decisions following administrative hearings
    - Carry out disciplinary actions pursuant to final decisions
    - Administer probation program
– MBC Receives Information From
  • Complaints - any source
  • Mandatory Reports
    – Death in Outpatient Surgery Setting – CA B&P Code § 2240(A)
    – Peer Review/Health Facility Reporting - 805
    – Insurer's Report of Settlement, Judgment, Arbitration Award – CA B&P Code § 801.01
    – Report of Charge of Felony, or Conviction of Felony or Misdemeanor
Medical Board of California (MBC) (cont’d)

- Investigations
  - Complaints or reports of violations of Medical Practice Act
  - Unprofessional Conduct is Defined in CA B&P Code § 2234 as:
    - Gross Negligence - defined as “the lack of even scant care or an extreme departure from the ordinary standard of conduct.” *(Kearl v. Bd. of Med. Quality Assurance (1986) 189 Cal. App. 3d 1040, 1052.)*
    - Repeated acts of Negligence - simple negligence only
    - Incompetence
    - Commission of any act of dishonesty or corruption that is substantially related to the qualifications, functions or duties of a physician and surgeon.
    - Any action or conduct that would have warranted the denial of a license
Medical Board of California (MBC) (cont’d)

• Potential Actions by the MBC - See Manual of Model Orders and Disciplinary Guidelines
  – Nothing
  – Public Letter of Reprimand
  – Citation and Fine
  – Suspension
    » includes Interim Suspension Order
  – Placing Physician on Probation- with conditions such as:
    » psychiatric treatment
    » additional clinical training or education
    » practicing under supervision
    » evaluation by organizations
  – Restricting or Limiting Scope or Type of Practice
  – Revocation
Medical Board of California (MBC) (cont’d)

• Process
  – Interview of physician
  – Review of Medical Records
    » MBC has Administrative Subpoena Power
    » *Arnett v. Del Cielo* - Evidence Code § 1157 does not apply
  – Attorney General's Office then decides whether to:
    » Close
    » Public Letter of Reprimand
    » Accusation- Physician Can Challenge in Administrative Hearing Before Administrative Law Judge
      ❖ Settlement is by Stipulated Decision and Order
      ❖ Decision of ALJ
      ❖ BOTH must be adopted by Medical Board
      ❖ Both Stipulated Decisions and ALJ Discipline will be phrased as Physician License is "Revoked, Stayed by Probation..."

  – Action is Not Final Until MBC Issues Effective Date
Medical Board of California (MBC) (cont’d)

– Physician Responsibility to Medical Staff

• Report any Action Taken By MBC

• Comply with any conditions of probation including restrictions

• Questions regarding hospital/Med Staff obligation to provide proctors/monitors?
Civil Actions Against Physicians and Hospitals

• Basics of Civil Litigation
  – Complaint
    • Causes of Action
    • Causation
    • Damages
  – Answer
    • Denial
    • Affirmative Defenses
  – Discovery
    • Interrogatories
    • Depositions
Civil Actions Against Physicians and Hospitals (cont’d)

• Settlement vs. Trial
  – Settlement
    • Any settlement over $30K must be reported to the MBC – CA Bus & Prof Code § 801.01 (a)(1).
    • Any settlement must be reported to National Practitioner Date Bank - 45 CFR § 60.5; 60.7.
    • All settlements will contain release denying liability
    • Settlement itself may or may not indicate issue with quality
  – Trial
    • Any judgment in civil case must be reported – CA Bus & Prof Code § 801.01 (a)(1).
Civil Actions Against Physicians and Hospitals (cont’d)

• Actions Against Physicians
  – Causes of Action
    • Negligence
    • Lack of Informed Consent
    • Fraud/Misrepresentation
  – Causation
    • Was physician’s conduct a substantial factor in causing the harm?
    • Physician can prevail at trial even if jury concludes care was below standard of care.
Civil Actions Against Physicians and Hospitals (cont’d)

• Actions against hospitals for failure to adequately perform oversight of physician quality care in hospital
  – *Elam v. College Park Hospital* – Corporate negligence
  – Hospital defense counsel must understand Evidence Code § 1157
    • Hospital will need to decide if going to asset § 1157
  – Overlapping actions – JRC + civil trial