



Would You Settle?

Executive Director's Message



By Bill Sandberg

There will be a huge impact on physicians if confidential settlements are made public.

On March 8, 2002, Sacramento Superior Court Judge Morrison England, Jr., issued a temporary restraining order (TRO) against the Medical Board of California, blocking release of thousands of malpractice settlement records. Judgments are already public record.

The TRO means California physicians and professional liability carriers are assured - but only temporarily - that the records will not be released to the public.

The San Francisco Chronicle had sought the records through the California Public Records Act. Settlement agreements frequently contain confidentiality clauses that would, of course, be violated if this case were to be won by the Chronicle.

The California Association of Professional Liability Insurers, Medical Insurance Exchange of California, Norcal Mutual Insurance Company, and SCPIE Indemnity Company brought the petition for a restraining order. The California Medical Association filed an amicus curiae brief, and there were numerous accompanying declarations from physicians, defense attorneys and insurance executives.

Under California law, every insurer providing professional liability coverage to physicians must send a complete report to the Medical Board on any settlement over \$30,000, or an arbitration award or judgment of any amount arising from claims or actions for damages. The law also applies to self-insured entities.

The current policy of the Medical Board is not to disclose settlements, only judgments. In fact, in 1993 the Medical Board specifically decided not to disclose "malpractice settlements where there have been private arrangements between litigants and no admission of liability."

The amazing aspect of the potential release of settlement information is that so few realize how devastating the impact would be to physicians and liability carriers. In California, a case can be settled only after the physician gives his or her permission.

In his declaration, Scott Gassaway of the Sacramento law firm, Wilke Fleury Hoffelt Gould & Birney, LLP, stated:

"In representing cases of alleged medical malpractice (alleged professional negligence), many cases are dismissed voluntarily, a few are concluded by dispositive motions, a few proceed to trial and many are settled. Cases are settled for a number of reasons, many of which must be considered unique to the facts of the situation and the physician. Some of the factors commonly considered include: the estimated chances of prevailing at trial; the ability of the physician to present well as a witness; the range of the likely amount of

damages at issue if the case is lost; the uncertainties of trial; the costs of going to trial; the costs to the physician of being away from his/her practice together with the impact on patient care; witness availability; the venue in which the case will go to trial; the emotional/sympathy appeal of a plaintiff's case; the importance of the physician being 'vindicated'; and the concern about adverse publicity if the case proceeds to trial, even if there is an outcome favorable to the defendant. Somewhat unique to malpractice litigation, however, is the personal nature and impact on the individual defendant."

In her declaration, Lorraine Painter, Vice President of Claims of Norcal Mutual, said that, as required by law, the company has filed more than 750 reports with the Medical Board over the past five years. Approximately \$70 million was spent by the company to defend all claims during that period. The cost to defend a case that settled ranged from \$25,000 to \$35,000, and the cost to defend a case tried to verdict is in the \$25,000 to \$50,000 range; \$250 million was paid out in settlements or judgments. The average settlement was \$120,000 and the average judgment is \$550,000.

Painter predicts that if just 100 physicians refused to settle a claim, knowing that the settlement would be made public, and chose to go to trial, the cost to the company would be an additional \$15 million over five years in defense costs - an increase of 21 percent. Settlements and judgments would increase by \$53.75 million or 22 percent. Declarations by the other companies contained similar numbers.

Settlements are not an admission of guilt, and they should remain confidential. Physicians, patients, insurers and attorneys have many reasons for choosing settlement as an option to a jury trial. If the rules of disclosure change, more physicians will be forced to seek a trial, deserving patients will face considerable delays, the courts will be burdened with frivolous cases and premiums will escalate, adding additional costs to an already expensive system.

Someone once said, "If it ain't broke, don't fix it." This is a case in point.

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