



## Challenging Regulators

---



By John P. Wagner

**Physicians can often win a battle with government — but it's a long, tough and costly proposition.**

*The author is a partner in the Sacramento law office of Nossaman, Guthner, Knox & Elliott.*

Government is not a monolith but a complicated collection of administrative agencies. The legal specialty that deals with them is known as "administrative law."

The two hallmarks of administrative law are that it is complex, with much room for creativity, and that it is technical and detailed. This legal area may seem "dull and boring" but it is precisely through administrative actions that the government operates. If we disagree with what the government wants to do, we must master administrative law - both the creative areas and the "dull and boring" aspects.

As U.S. Supreme Court Justice Antonin Scalia once said: *"Administrative law is not for sissies - so you should lean back, clutch the sides of your chairs, and steel yourselves..."*

### The Players

Defending physicians against actual or threatened governmental action usually means dealing with one or more of the following agencies:

*Reimbursement appeals* - Medicare is run by the federal Department of Health and Human Services (HHS) through its newly-named Center for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Administration. CMS sets overall policy from its Central Office and Regional Offices. It uses "intermediaries," typically large insurance companies, to administer Medicare Part A (inpatient) and "carriers" to administer Medicare Part B (non-inpatient). The HHS Provider Reimbursement Review Board (PRRB) decides Medicare appeals.

Medi-Cal is a state program run by the California Department of Health Services (DHS). The Audits and Investigations Division of DHS makes adjustments to reimbursement and the DHS Office of Administrative Hearings and Appeals (OAHA) hears Medi-Cal appeals.

*Fraud and abuse compliance, investigations, and prosecutions* - Reimbursement has been "criminalized" in recent years. What were once viewed as errors or legitimate disagreements are often now initially viewed as potential crimes. Defending physicians in this arena usually means dealing not only with "regular" Medicare and Medi-Cal divisions, but also with: the federal HHS Office of Inspector General (OIG), the Assistant U.S. Attorneys under the federal Department of Justice, which maintains local U.S. Attorney's Offices throughout the state, the California Medicaid Fraud Control Unit and

Deputy Attorneys General within special units of the California Department of Justice.

*Challenges to professional competence or "unprofessional conduct"* - The Medical Board of California (formerly BMQA - the Bureau of Medical Quality Assurance) has jurisdiction over issues relating to physician competence or criminal convictions. The first phase of a case is conducted by Medical Board investigators, who are California "peace officers" and carry firearms. The Board has area medical consultants who review investigations and decide whether to seek discipline against the physician. If a medical consultant deems a case to have merit, the Board refers it to a special unit of California Deputy Attorneys General for filing of an accusation. While most cases settle, if the case proceeds to trial, specially selected Administrative Law Judges (ALJs) of the Office of Administrative Hearings (OAH) of the state Department of General Services will hear the case and render a Proposed Decision.<sup>1</sup>

### **The Process**

One of the "great lies" in life is "I'm from the government and I'm here to help you." My physician clients are constantly shocked by their treatment by officials and agencies, and have usually lost all faith in the system. Unfortunately, with some notable exceptions, governmental officials frequently have no interest in helping physicians; many times there is no valid basis for having "faith" in the system in the first place.

Physicians frequently complain about the lack of "due process" in administrative proceedings. But courts have consistently held that "due process" does not mean complete and thorough process but merely the giving of that process that is "due" - which a legislature or the courts can decide is very little.

The system is, from the get-go, if not "rigged" at least not independent and neutral. Many initial decisions - for example, whether to seek legal action against a physician, whether to negotiate a settlement, whether to file a discretionary report that may ruin a physician's career - are made by bureaucrats (some well-intentioned, others not) who (a) are not physicians and (b) tend to be jaded. One investigator told me that most physicians are "cheats, liars and crooks," and probably many more think that.

Many governmental agencies take advantage of their economic power. Even with no case or a weak case at best, they know that the physician has limited resources and will probably pay "something," or agree to some discipline, rather than pay an attorney and experts to present his or her side at a hearing.

Some government officials take cases personally, form a dislike of a physician, and actually pressure others in the medical system (nurses, other physicians, hospital and medical administrators) to take inappropriate actions. Some governmental investigators have acted outrageously in attempting to "frame" or "entrap" a licensed professional and to pressure potential witnesses to lie. And fellow physicians in a position to help a colleague unfairly in trouble often may "hide under the table" because they may be a competitor and would love to see the physician leave. Others simply fear "getting involved."

Today, the reimbursement area is especially treacherous. I have heard Medicare fraud officials say that, rather than notifying physicians about an apparent erroneous billing, they deliberately allowed the same error to recur over and over in order to "build a case."

At the administrative law judge level, proceedings are usually much more fair - but not always. ALJs have issued some poorly reasoned decisions. In one notorious case, an administrative law judge actually denied a physician the right to have his attorney even speak or file a motion - an unheard of deprivation of fairness and due process.

Many administrative law judges are excellent and take great pains to write thorough and careful decisions. Even so, theirs are "Proposed Decisions." If a proposed decision is unfavorable to the physician, the agency always adopts it. But if favorable to the physician, the agency may, and often does, "nonadopt" the decision - for any reason at all.

A physician can appeal a Medical Board case or a hospital peer review case to court and many appeals are successful. But they are time-consuming, procedurally complex, and expensive. There are also a series of legal "presumptions" that give great deference to decisions made by the agency. Winning these appeals means mastering both the creative and the "dull and boring details" of administrative law.

But that is not the end of the process. Even when a physician wins in court, the court may just order the Board to "reconsider" its decision. The agency frequently just reissues the same decision, adding that it has indeed "reconsidered" the facts. The physician has to go back to court all over again.

Finally, DHS has begun a series of "strike attacks" at physicians and dentists who do "too much" Medi-Cal work. Investigators, usually accompanied by other law enforcement officers, may sweep into a doctor's office, display their firearms, terrorize the staff and upset patients. They may unlawfully demand records immediately (without a search warrant) or try to interview doctors or other staff without advising them of their rights. Medi-Cal may then, *without any hearing or any other opportunity for the doctor to defend himself or herself*, immediately withhold physician Medi-Cal payments already in the pipeline and "deactivate" the physician's Medi-Cal provider number. For a physician with a large Medi-Cal patient population, this amounts to taking away the physician's medical license - without any authority to do so.

If a physician appeals these actions, DHS has further eviscerated due process by denying the fundamental rights to: have an in-person hearing; present witnesses; cross-examine adverse witnesses; and even to have the case heard by an administrative law judge - who, after all, is a lawyer. Rather, physicians may only submit appeals on paper that are decided not by ALJs but by auditors - who typically have had no legal (or medical) training. Even when a physician does present written evidence showing the Medi-Cal deactivation was wrong, and the auditor does decide the case in the physician's favor, DHS can nevertheless continue to keep the physician on deactivation by "continuing to investigate the case."

A court might very well find some of these tactics to be unconstitutional or otherwise illegal. Unfortunately, most physicians have neither the will nor the means to mount a constitutional challenge.

Physicians *can* win appeals but they must know what they are up against. The results, however, can be brilliantly beautiful.

I will never forget the dentist who had a complicated, but I thought winnable, case after an adverse result from the Dental Board. He was near retirement and I told him he and his wife could take an around-the-world cruise for what it would cost to take the case to court. He knew he didn't do anything wrong and was determined to clear his name. After a long fight, we won at Superior Court. But the Court merely asked the Board to "reconsider" and, surprise (!), the agency re-issued the same negative decision.

We had to launch a whole new court action, but won with flying colors and convinced the judge this time to not issue an equivocal order.

The dentist was completely vindicated. He and his wife told me victory was more satisfying than any cruise or other luxury would have been.

wagner@nossaman.com

1 This Office of Administrative Hearings (OAH) is entirely separate-and has entirely different procedures-from the DHS Office of Administrative Hearings and Appeals (OAHA).

