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Court Further Limits Physician Rights in Disciplinary Cases

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A recent case involving the Medical Board of California (MBC) reflects the conservative approach of California appellate courts to physician rights. In the case of *Kenneally vs. Medical Board of California,* the California Court of Appeal rejected the contention that physicians should be entitled to at least as much procedural protection as lawyers in the face of disciplinary proceedings.

The California Court of Appeal reversed a decision of a Superior Court that Dr. Kenneally had the right to take depositions in an MBC administrative proceeding charging him with gross negligence and incompetence.

The law currently provides that physicians facing disciplinary proceedings before the MBC are entitled to notice and an evidentiary hearing, but are entitled to only limited rights of discovery to prepare for the hearing. In contrast to cases involving attorney discipline, where all the rights of civil discovery are accorded, in physician disciplinary cases, only the limited right -to discovery provided under the Administrative Procedure Act is available. Thus, for example, there are no interrogatories, requests for admission, or the unlimited right to take depositions (such as those physicians are familiar with in the defense of medical malpractice cases).

Essentially, a deposition can only be taken in MBC cases when it can be shown that a witness would be out of state or otherwise unavailable for the hearing. There are advantages to this, however. The attorney general representing the MBC has no authority to depose the physicians against whom the charges are pending, yet the charged physician is entitled to investigative and expert witness reports that are the basis for the charges contained in the MBC Accusation.

In Dr. Kenneally's case, he sought to take depositions of the MBC's two expert witnesses and investigator, seven members of the MBC, and another individual. Although such depositions are ordinarily unavailable to physicians charged by MBC accusations, the Superior Court has held that it was a denial of equal protection to deny Dr. Kenneally the right to take such depositions since lawyers facing license revocation proceedings were given the right to take pre-administrative hearing depositions.

In a published opinion, the Court of Appeal reversed the Superior Court. The decision of the Court of Appeal was in conformity with the conservatism displayed by the California Supreme Court and California appellate courts in recent years. For a variety of reasons, California appellate courts have been far more interested in protecting the public

against a perceived danger from errant physicians than in preserving individual rights of due process of law.

In the Superior Court, Dr. Kenneally had contended that the equal protection clause in the United States Constitution required that persons similarly situated be treated similarly unless the disparity was justified. In conformity with constitutional doctrine, Dr. Kenneally contended that the law that deprived physicians of the right to take depositions but permitted attorneys under similar circumstances to take depositions was subject to strict scrutiny by the courts, since it impinged on a fundamental right, namely the right to practice one's profession. Under a long line of authority created by the United States Supreme Court, when laws treat similarly situated groups of people differently, the challenged law is subject to strict scrutiny if it impinges on a fundamental right. In previous cases, the California Supreme Court had held that the right to practice one's profession constitutes a fundamental right. On that basis, the Superior Court applied the strict standard of review, found that there was no compelling state interest for making the distinction between physicians and lawyers, and determined that physicians, just as lawyers, should be entitled to take depositions in the course of disciplinary proceedings.

The Court of Appeal in the *Kenneally* case saw things quite differently, despite the fact that there had been a line of precedent-setting cases in California which held that physicians have a fundamental right to practice their profession entitling them to special procedural protection in the event of disciplinary proceedings designed to restrict or take away that right. Thus, the appeals courts had held that since the right to practice medicine was a fundamental interest, superior courts reviewing decisions of the MBC must independently review the evidence in the hearing to determine whether or not the findings of the MBC were supported by the evidence.

In the K*enneally* case, the Court of Appeal retreated from this basic principle and limited the principle. The court held that the right to practice medicine was "fundamental" only in the sense that an administrative decision relating to a physician's license to *practice* medicine deserved independent judicial review, but not fundamental, such that in an equal protection constitutional analysis, strict scrutiny was to be applied.

Thus, the court held that the distinction made by the legislature between physicians and lawyers would be upheld so long as there was a rational basis for that distinction. In constitutional terms, it is very easy to post a rational basis for almost any statute and it is almost impossible to invalidate a legislative classification or distinction between different groups of people on the basis of the rational basis test.

Predictably, the Court of Appeal thus held that there were sufficient differences between the legal and medical professions such that the limitations on depositions in physician disciplinary eases were rationally related to the governmental purposes of reducing delay and costs in such proceedings. Accordingly, held the Court of Appeal, the government code section which limited the right of a physician to conduct depositions "as not violative of the physician's constitutional right to equal protection of the laws."

The significance of this opinion to the profession is that it underscores the conservative approach the appellate courts are taking and their current philosophical tendency to limit individual rights while protecting what they perceive as the rights of the public. Thus, the court of appeal in the course of its opinion significantly stated as follows:

"The medical profession is technically complex and is intertwined in an intimate relationship with the public interest and welfare. The work of physicians has life-and-death consequences for their patients. Negligent or incompetent physicians endanger the physical and mental health and lives of their patients. There is no profession in which it is more critical that errant practitioners be swiftly and expeditiously identified, educated and disciplined."

The significance of this case is that it underscores the importance of being properly represented in MBC proceedings from the very first instance that a physician is contacted by the Medical Board to, if necessary, the Superior Court level. In this political climate, physicians cannot count upon the California courts of appeal to provide them with the niceties of procedural fairness or appellate review focused upon the protection of individual rights.

Note: This is particularly troubling since the state legislature has changed the law so that appeals from MBC cases must be filed directly before district courts of appeal rather than superior courts as of Jan. 1, 1995.

Under the change, the courts of appeal are charged with exercising their independent judgment in reviewing MBC decisions.

Prior to Jan. 1, the courts of appeal had jurisdiction only after the cases were first determined by the superior courts.

Conscientious superior court judges often would not hesitate to overturn MBC findings not supported by the preponderance of the evidence when exercising their independent judgment.

It can only be hoped that the courts of appeal will review such cases as fairly.

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