

DOCTOR VERSUS DOCTOR

Physicians and IPAs Struggle With Deselection

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Today's competitive managed care environment has created much tension between IPAs' physician managers and their physician members. Many IPAs (independent practice associations), under pressure to maintain quality care while controlling the costs to deliver care, are responding by reducing their membership. IPA physicians naturally feel they are being treated unfairly if they are "deselected" by having their IPA contract terminated "without cause."

Physicians literally find themselves on both sides of this difficult issue, and both sides need to approach it carefully. What can physicians do to reduce the risk of being deselected? How should IPAs design a deselection process that ensures fairness and reduces potential legal liability? What strategies and avenues might a physician pursue to appeal a deselection decision?

AVOIDING DESELECTION.

The adage, "an ounce of prevention is worth a pound of cure," certainly applies to avoiding deselection. In many cases, there are steps that a physician can take to reduce the risk of being deselected.

NEGOTIATE CONTRACT TERMS. Before signing an IPA contract, physicians should carefully review it, preferably with their attorney, and attempt to make certain changes to protect themselves from being deselected in the future. For example, even if a "without cause" termination provision cannot be dropped from the contract, the notice period might be extended from, perhaps, 30 to 90 days. Regarding "for cause" termination, the contract should state that the physician will be given notice of the alleged cause and a reasonable opportunity (at least 30 days) to attempt to correct the problem. Also, physicians should familiarize themselves with the appeal rights that the IPA may provide in the event of a proposed deselection.

AVOID GIVING GOOD CAUSE. IPAs generally terminate contracts "without cause" to avoid getting into a dispute with the physician over the "real" cause for the termination. In some cases, the IPA does not have "good cause," but in others, the physician's conduct precipitates the deselection decision.

Frequent causes for deselection are alleged overutilization, quality problems, and patient complaints. These are all areas where the physician has significant control and influence. The actual termination notice is often preceded by telephone calls or letters from the IPA concerning problems in these areas. Physicians must treat such complaints very seriously, by responding quickly and professionally to any and all complaints and doing whatever is reasonably possible to address and resolve them. They should try to avoid assuming a defensive attitude and should never ignore

complaints. Physicians should regularly obtain and review utilization information to see how they are doing in such areas as ordering expensive diagnostic tests, hospitalization, and referrals to specialists. They must constantly strive to treat patients courteously and professionally and not discriminate against IPA patients who are capitated (such discrimination is also illegal).

Physicians should also understand what the contract requires of them—for example, following procedures for specialist referrals and ordering tests—and meet those requirements. Initial IPA applications and renewals should be accurately completed and submitted on time. Physicians should also be sure to obtain and maintain required professional credentials.

BECOME INVOLVED. Physicians should get involved in IPA committee work, and become shareholders, directors and/or officers of the IPA, when possible. They should also cultivate relationships with their patients, referring physicians, and IPA medical directors. Being involved will help physicians know what is going on and possibly enable them to take steps to avert a surprise termination.

CARE FULLY CONSIDER EXCLUSIVE CONTRACTS. Many IPAs seek to obtain exclusive contracts from physician members, particularly primary care physicians. Frequently, physicians are offered increased capitation rates and a greater share of risk-pool funds as an incentive to “go exclusive.” Because exclusivity typically means that the physicians cannot join other IPAs in the same service area, physicians should carefully consider whether the exclusivity benefits outweigh the deselection risk when all of their managed care eggs are in one basket.

IPA DESELECTION PROCEDURES

Many IPAs consider physician membership changes as a way to remain financially viable and competitive. However, if the IPA makes a deselection decision for improper reasons, it not only can have a significant impact on the deselected physician’s income but expose the IPA to legal liability as well. Therefore, IPAs should ensure that before making any membership changes, they have a reasonably, defensible, and fair deselection process already in place. At minimum, the process should establish: appropriate criteria for evaluating network needs and comparing the performance of member physicians; objective protocols to be used in decision-making; and all avenue for physicians to formally or informally appeal deselection. The process should be as objective, open, and as consistently applied as possible.

CRITERIA. IPAs should first establish and notify applicants and existing members of required basic credentials in advance. These may include a current, valid medical license, membership on particular hospital medical staffs, board certification and a minimum number of years in practice.

If the IPA is considering terminating members who meet the basic credentials, it should develop a baseline of its physician needs, by specialty and the criteria that will be used in evaluating individual members so that the decisions are made objectively. The criteria should be relevant and fair for use in comparing and ranking IPA members. For example, helpful criteria may include efficiency rankings based on statistically valid utilization and cost measures, accessibility, and patient satisfaction. To the extent the criteria are based on existing IPA statistics, the collection and

interpretation of the data must be reliable; otherwise, the rankings of physician members could be subject to challenge by a deselected physician.

The IPA should consider disclosing the criteria, once developed, to its members. IPAs are often reticent to do so because they consider the information proprietary. But it would be more fair to the IPA's physician members, and the IPA's legal position should be stronger, if physicians were made aware of the review criteria before they were applied. The process will be fairer still if, before a final decision is made, physicians who "score" poorly under the criteria are allowed to try to improve their performance during a "probation" period.

PROTOCOLS. In addition to developing criteria, an IPA should establish in advance the protocol for decision-making. For example, the protocol should identify who will review proposed termination cases and make recommendations to the IPA board for final approval. To reduce the possibility of bias, this might be done by an IPA committee comprised of physicians who do not have a direct financial interest in the outcome. If several criteria are used to evaluate members, the relative weights of each should be determined, as well as the scoring system for ranking members.

Likewise, the protocol should ensure that deselection decisions are based on a consistent application of the criteria. For example, absent some other valid reason, it would be difficult to defend a situation in which physicians who have relatively low rankings are retained, while physicians with higher rankings are deselected.

REVIEW AND APPEAL OF DECISIONS. In light of several recent court cases regarding "fair procedure" in an IPA setting, IPAs should seriously consider providing members with a reasonable opportunity to request a review or appeal of a deselection decision. In fact, in some instances, a formal appeals process may be legally required. Specifically, IPAs with 25 or more physician members should have a "fair hearing plan" in place so that a physician who is terminated for a "medical disciplinary cause or reason" (that is, relating to the physician's competence or quality of care), can request a formal appeal (see California Business & Professions Code Section 809 *et seq.*).

Even if a deselection decision is based solely on economic factors, IPAs should consider offering a review and appeal process. The IPA's legal position should be stronger if it provides the deselected physician with a reasonable opportunity to demonstrate, in person or in writing, why he or she should be retained. IPAs will not want the review and appeal process to be so lengthy or costly that they will not be able to make appropriate termination decisions. To balance the physician's and IPA's concerns, the IPA may consider offering a fixed period (for example, 30 days) for the physician to request review of the decision and an opportunity to present arguments either in writing or in person, in a formal or informal setting. The process could include one or more levels of appeal, with or without the presence of legal counsel, with the final decision made by the IPA governing board.

CONTESTING DESELECTION DECISIONS

Physicians deselected by IPAs need to quickly determine whether it is worthwhile to contest the decision and if so, how to go about it.

The first step is to do a cost-benefit analysis of the impact of the termination on the physician's practice and the cost of challenging the decision. For example, a physician who has been terminated by an IPA that accounts for 50 percent of his or her practice income obviously has more at stake than if the IPA provides 2 percent of the physician's income. On the other hand, even if the IPA represents a small percentage of income, it may be worth contesting the deselection so that in the future the physician is not faced with having to disclose (in another managed care organization's credentialing application that he or she has been terminated.

The cost to contest a deselection depends on what needs to be done and how protracted the effort is. Participating in an informal appeal process, or retaining an attorney to write a letter to the IPA, clearly is less expensive than filing a lawsuit and going to trial. If the IPA has not made a careful and unbiased decision, and the physician believes the termination is unjustified, the physician should certainly try to reverse the termination decision. However, if it appears that the decision was made in accordance with a fair evaluation process, and for legitimate reasons, it may not be worth spending a lot of money on what may be a futile effort. The physician should consult with an experienced health care attorney to get a realistic evaluation of his or her case.

It is very important to consult with legal counsel as soon as possible after receiving the termination notice. Too many physicians wait until the last week before the notice becomes effective, after unsuccessfully trying to reverse the deselection decision on their own. At that point, it may be too late for an attorney to pursue certain strategies that might have been productive earlier.

If the physician decides to contest the deselection decision, a number of options for doing so may be available:

U REVIEW THE CONTRACT AND IPA PROCEDURES. The first thing deselected physicians should do is review their IPA contract to determine whether the termination is in accordance with the contract's terms. Furthermore, physicians should review any, written IPA procedures (such as bylaws) to determine if they provide for hearing and appeal rights. If the IPA offers a hearing and appeals procedure, physicians should follow the procedures and meet all filing deadlines. If the IPA has no procedures for appeal where the termination is "without cause," physicians should be aware of a possibly anomalous result if they pursue hearing rights. That is, if the "real" reason for the termination was quality of care, and the IPA grants a hearing at which the "without cause" termination is continued for quality reasons, the IPA may be obligated under California law to file an "805 report" with the Medical Board of California.

U REQUEST AN INFORMAL MEETING. Even if the IPA does not provide formal hearing rights, the physician or his or her attorney can still request an informal meeting or at least a telephone conference to discuss the matter. In many cases, informal meetings and contacts, sometimes buttressed by a strong letter from an attorney, result in the physician's reinstatement.

As previously discussed, terminations always have some reason, even if it is not set forth in the termination notice, and a meeting or telephone conference may help the physician find out the underlying cause. The physician or his or her attorney is then in a better position to argue that the reason is not valid or proper. For example, an IPA's utilization statistics may simply be in error there may be other reasons (such as sicker patients) for higher utilization figures. There also may be reasonable explanations for, and another side to, patient complaints. This may also be an opportunity, albeit a last minute one, for a physician who has not previously addressed legitimate complaints to finally acknowledge and deal with them.

U CALL ON SUPPORTERS. Deselected physicians often feel very alone and betrayed by organizations to which they have devoted years of work. Now may be the time to call on friends and supporters. This can include asking patients to write letters to the IPA, or to their health plan or employer. Other physician members in the IPA may provide support. Primary care physicians, for example, may not be happy if one or more specialists to whom they regularly refer will no longer be available to them and their patients. If an IPA is closely affiliated with and supported by a hospital, a hospital administrator may have some influence. And CMA members can request the organization's help in contesting a termination.

U CONSIDER FILING A LAWSUIT. If the approaches previously described are not successful, the deselected member may need to consider filing a lawsuit. Because of cost and time, a lawsuit may be a last resort. But in some cases, filing suit, or posing the credible threat that one will be filed, may be necessary to demonstrate the physician's seriousness and resolve to contest an improper decision. There may be a number of grounds, or "causes of action," for filing a lawsuit.

If the IPA does not offer an opportunity to request a review of a terminated-without-cause decision, this may constitute a denial of the physician's due process rights under California law. Although the law in this area is still developing, the recent cases of *Banasky v. Delta Dental Plan and Ambrosino v. Metropolitan Life* provide support for the position that if the IPA represents a significant income source, it should extend some type of appeal procedure to physicians who are terminated without cause. Furthermore, a deselected physician should argue that hospital medical staff due process rights should be extended to deselection from an IPA. In this era of managed care, a physician who is deselected by an IPA may suffer even greater economic harm than a physician who loses privileges at one or more hospitals where he or she is on staff.

The termination may violate other provisions of California law. For example, if it can be shown that the termination is really in retaliation for the physician's advocating medically appropriate health care for his or her patients it would violate Business & Professions Code 2056. If termination is for failure to have board certification or for "too many malpractice claims," and the IPA has not clearly established these as basic criteria for membership, the physician may be able to argue that these conditions, in and of themselves, do not prove a lack of competence.

Other possibly illegal bases for termination include violation of the Unruh Act (Civil Code Sections 51 *et seq.*), which prohibits discrimination based on race religion, sex, national origin or disability. The termination might violate California or federal antitrust laws if it constitutes a

conspiracy in restraint of trade, unfair competition, or a group boycott. If the physician's reputation has been harmed by untrue statements to either physicians, patients, or plans, it may be actionable.

As we have discussed, there are a number of ways in which physicians and IPAs can approach the fractious problem of deselection. From the physician's perspective, there are many things they can do to avoid being deselected in the first place. On the other hand, IPAs should strive to develop and follow a fair deselection process, and should consider extending deselected members the right to appeal "without cause" termination decisions and terminations for economic reasons.

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