

April 12, 2007

BY EMAIL, HARD COPY TO FOLLOW

Mr. Lee Barclay
Casualty Actuarial
Office of the Insurance Commission
Insurance Building
P.O. Box 40255
Olympia, WA 98504

Dear Mr. Barclay:

I thought it might be helpful to send a note in follow-up to my brief statement during the March 20 conference call meeting of the NAIC SITF.

As I understand it, the paramount goal of the SITF in developing medical malpractice data is to enable state insurance commissioners and the NAIC to respond with authority, accuracy, and conviction to questions posed by the GAO, federal agencies, Congress, and state legislators, thereby advancing useful discussion and resolution of medical malpractice issues based on an accurate understanding of the financial condition of medical malpractice insurers and the market in which they operate. A secondary purpose is to develop a NAIC model database to replace the current incoherent patchwork of state medical malpractice reporting laws on the books in many states.

We believe the new NAIC database of deidentified claims information should only be available for regulators and the NAIC to prepare reports for policymakers on a timely basis. What we believe would not serve the interests of health care providers, their patients and the public interest is the further dissemination of such data in a raw, selective and undisciplined format. That would lead to privacy concerns and other misuses by special interests which can only serve to confuse and mislead policy makers, the medical community, the news media and patients.

With regard to including ultimate loss estimates on individual open claims, our experience is that individual loss estimates change continually and sometimes dramatically until the individual claim closes and such information would not serve any useful purpose in the proposed database NAIC database. However, we have more confidence in the aggregate reserves, and with proper safeguards, would be willing to discuss including a breakout of such information by state, report year and type of policyholder to provide regulators and the NAIC with a more complete estimate of medical malpractice losses than is currently available in the annual convention statement.

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For example, the type of detailed claims information available in the Annual Convention Statement Schedule T, reporting calendar year data could also be made available for report year data in Schedule P. This information would provide insurance commissioners and the NAIC with sufficient data to produce high level reports on medical malpractice loss trends by state and type of policyholder. To ease the reporting burden, we would suggest this special schedule be submitted to the domiciliary state insurance commissioner for transmission to the NAIC data base.

The inclusion of this type of open claims information would give the NAIC and state insurance regulators a more complete picture of the medical malpractice situation while still maintaining the necessary confidentiality of data.

I mentioned during the call, apportioning damages between economic and non-economic damages in a settlement situation is a very inexact process. It is NORCAL's view that the attempt to develop objective criteria for use by company statisticians to allocate settlement dollars into economic and non-economic damages will produce imprecise settlement data with a very low credibility and will not add value to the NAIC's important effort to collect reliable and uniform data to develop reports for policymakers.

Finally, we have included some information relating to the unfortunate release of supposed de-identified medical malpractice closed claim information by the Medical Board of California a few years ago. The MBC released the deidentified information at the request of a local newspaper which used the data together with other readily available public information to identify specific doctors and their patients involved in a significant number of cases. The California courts issued an injunction against further releases based on the privacy rights of the individuals involved in the claims. The court's decision balanced the public's interest to know against the privacy rights of the individuals involved and entered an order to protect the confidentiality of such information. Hopefully, the SITF will avoid any recommendation that would potentially open the door to unwarranted intrusions into the private legal and medical affairs of doctors and their patients.

Most sincerely yours,

Philip Hinderberger
Senior VP & Government Affairs Counsel

PRH/cm

Judge bars board from releasing malpractice files

Order cites 'irreparable injury'

By Robert Salladay

CHRONICLE STAFF WRITER

SACRAMENTO — A Superior Court judge yesterday refused to order the release of malpractice settlement records being kept by state regulators, saying that making the documents public might cause "irreparable injury."

The Chronicle filed a request in December under the state's Public Records Act asking to see thousands of settlement records on doctors that are kept in a central file at the California Medical Board.

The board agreed to the request, but the release has been blocked by a temporary restraining order secured by insurance companies that represent doctors in malpractice cases. They have argued the release would unfairly smear doctors and drive insurance and medical costs upward because it would force more malpractice litigation and trials.

After brief courtroom arguments yesterday, Superior Court Judge Morrison C. England Jr. issued a preliminary injunction against the Medical Board's release of the records. A lawyer for The Chronicle said the case will now be argued in more detail at a future hearing before the court decides whether to permanently bar the medical board from releasing the files.

England said the release "raises significant issues, and I find there would be irreparable injury to the plaintiffs if these disclosures are made, and there would be no remedy in a court of law."

Rachel Matteo-Boehm, an attorney representing The Chronicle, argues that information gathered by the government as it conducts the public's business — such as regulating doctors — is clearly covered under the public records act.

Since the Medical Board uses the records to determine if further action should be taken against a doctor, The Chronicle argued in court papers, the records are "necessarily related to the conduct of the public's business."

Philip Ward, an attorney representing the California Association of Professional Liability Insurers, said doctors get sued for all sorts of reasons, from the frivolous to the serious, and they settle malpractice lawsuits for a variety of reasons as well.

Since these are malpractice cases that haven't been argued in court and therefore aren't considered fact, doctors believe exposure in the newspaper would unfairly tar individual doctors hit with frivolous lawsuits but who settled for practical reasons.

The law requires all malpractice case settlements to be reported to the board. The board is allowed to review the cases to see if major problems are arising, but they cannot assume "that medical malpractice has occurred."

Ward also said the courts have held there is a constitutional right to privacy when it comes to records similar to those kept by the Medical Board on doctors. Criminal arrest records, for example, are not generally considered public because they offer no proof of guilt and could be used unfairly to harm a person's reputation, the courts have found.

Finally, Ward said, state law carves out exemptions for only certain public officials to view the malpractice settlement records, such as law enforcement, but not the general public. In fact, Ward said, the state Legislature in 1997 debated making settlement records public, and declined.

"You've got to think," Ward said, "that the Legislature did not want those types of records disclosed."

the California board since Jan. 1, 1993.

The disclaimer a board operator will read for discipline by another state board is: "This information is from another state (or a federal government agency), and we are providing it to you as a courtesy without guarantee of its accuracy. California may take disciplinary action based on the discipline by another state (or federal government agency). For more information or verification, you should write (insert state or federal government agency), which imposed the discipline."

Felony convictions, but only those reported to the California Medical Board since Jan. 1, 1993.

The disclaimer a board operator will read is: "This information provided to you only includes felony convictions that are reported to the board.

All felony reports to the board are reviewed and action taken only if it is determined that a violation of the Medical Practice Act has occurred. For additional information, you may check the local District Attorney's Office.

Malpractice judgments of \$30,000 or more, but only those reported to the Medical Board since Jan. 1, 1993.

The disclaimer a board operator will read is: "A malpractice judgment is an award for damages and does not necessarily reflect that the physician's medical competence is substandard. All such reported judgments are reviewed by the Medical Board and action taken only if it is determined that a violation of the Medical Practice Act has occurred. Judgments are subject to appeal.

To file a complaint against a physician call (800) MED-BDCA (633-2322).

The disclosure of all cases forwarded to the Attorney General's Office has been suspended following a preliminary injunction granted Dec. 2 by Superior Court Judge Ronald Robie in Sacramento.

The Medical Board will present its arguments in the case within a few months, said board spokeswoman Candis Cohen.

The proposed disclaimer a board operator would read is: "Charges have not been filed. The physician has not had a hearing or been found guilty of any charges."

SOURCE: Daily News research

HOW DATA WAS ANALYZED

The Daily News began its inquiry into California medical malpractice last year by obtaining under the state's Public Records Act all settlements, judgments and arbitrations between Jan. 1, 1990 and Dec. 31, 1992 in which doctors or their insurers paid \$30,000 or more.

By analyzing those 2,002 payments made by physicians statewide, the newspaper identified all Los Angeles County physicians who had paid \$30,000 or more in that three-year period - about 400 doctors.

Then, by going to the 15 courts and record repositories in Los Angeles County, the Daily News expanded the histories of those 400 Los Angeles physicians, reviewing their medical malpractice histories over a decade. More than 800 lawsuits were examined to create profiles on about 100 of the 400 Los Angeles physicians.

Those profiles included the doctors' medical malpractice histories, disciplines by the Medical Board of California, disciplines by other state boards, and accusations made against them to the Attorney General's

Office.

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10
11 **SUPERIOR COURT OF CALIFORNIA**
12 **COUNTY OF SACRAMENTO**

13 CALIFORNIA ASSOCIATION OF) Case No.: 02AS00843
14 PROFESSIONAL LIABILITY INSURERS,) **DECLARATION OF GEORGE E.**
15 MEDICAL INSURANCE EXCHANGE OF) **WASHINGTON**
CALIFORNIA, NORCAL MUTUAL) _____
16 INSURANCE COMPANY, SCPIE)
INDEMNITY COMPANY, and DOE A,)
17 M.D.,) Date: February 14, 2002
18) Time: 9:30 a.m.
Plaintiffs,) Dept.: 53
19)
vs.)
20)
RON JOSEPH, Executive Director of)
21 Medical Board of California; THE)
MEDICAL BOARD OF CALIFORNIA; and)
22 DOES 1 through 10, inclusive,)
Defendants.)

23 I, GEORGE E. WASHINGTON, declare:

- 24 1. I am a partner at Washington & Heithecker, and have been practicing law
25 since 1970. For the last fifteen to twenty years, I have frequently represented

1 physicians in the defense of medical malpractice cases and am regularly
2 retained by Norcal Mutual Insurance Company to represent their insureds.
3 Presently, approximately eighty percent (80%) of my business involves the
4 representation of physicians in the defense of medical malpractice cases.

5 2. It has been my experience that a small percentage of cases are dismissed
6 voluntarily by the plaintiff; a small percentage are disposed of by motions such
7 as motions for summary judgment; and a small percentage proceed to trial; but
8 most are settled. Often, these settlements occur in settings where plaintiffs
9 have dramatically dropped their settlement demands in the face of a vigorous
10 defense and realization that the defendant physician has a good chance of
11 prevailing in trial or by motion. In many of these cases, it is my experience
12 that the defendant physician may have reservations concerning settlement, but
13 for a variety of reasons, including - the chances of prevailing at trial; the
14 physician's witness capabilities; the potential damages, including the potential
15 for an excess verdict; the personal emotional impact on the physician and his
16 family; the costs of defense; the cost to the physician and/or his group in being
17 away from his practice; the impact on his patients, especially in smaller
18 communities where he is the only or one of few physicians available; and the
19 concerns of adverse publicity if the case proceeds to trial - the physician
consents to settle.

20 3. In my opinion, it would be devastating to our ability to settle cases if I could
21 not advise my physician clients that the settlement would remain confidential
22 subject to the parameters of the current national data bank reporting
23 requirements and reporting requirements to the Medical Board of California.
24 It is nearly always one of the first questions a defendant physician asks when
25 settlement is discussed. Therefore, proposed changes in that confidentiality
would have a substantial impact on our ability to settle cases.

