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California Appellate Court Dismisses Doctor's Wrongful Termination Claim

In *Tran v. Mission Hospital Regional Medical Center*, the California Appellate Court recently affirmed a decision to dismiss a doctor's complaint for damages against Mission Hospital Regional Medical Center ("Mission"), a private nonprofit hospital. Dr. Bryan Tran ("Tran") brought suit after Mission terminated his hospital privileges in April of 2005. Tran's ten-count complaint alleged violations of "the common law right to procedural and substantive procedures," interference with economic relations, intentional interference with contract, and intentional and negligent infliction of emotional distress. The court ruled that Tran's termination was quasi legislative in nature. Accordingly, he was not entitled to minimum due process requirements, which were the foundation of his case.

Tran is a licensed physician in California. He specializes in obstetrics and gynecology, but he is not board certified. When Tran joined Mission in 1999, board certification was not required for physicians to enjoy full staff privileges. In 2002, Mission amended its bylaws to require all medical staff to obtain board certification within five years from the start of employment. Mission's amended bylaws state that the Medical Executive Committee ("the Committee") may only grant time extensions under "extraordinary circumstances and for demonstrated good cause as determined solely at [its] discretion." The bylaws also exempt current members of the medical staff who are not progressing toward board certification, and who cannot reasonably be expected to do so.

On September 28, 2004, Mission notified Tran that his privileges would be terminated on October 25, 2004, unless he obtained board certification. On October 5, 2004, Tran requested a two-year extension. Tran had previously passed the written exam for board certification, but his results had expired. He therefore needed to retake the written exam before he was eligible to take the oral exam. On November 23, 2004, the Committee denied Tran's request for an extension. Tran was advised that he could address the Committee at a meeting or in writing, but his medical staff membership was set to expire on April 23, 2005. On April 22, 2005, Tran applied for injunctive relief, which the court denied. Tran subsequently amended his complaint to request damages.

Courts generally view medical staff decisions as "quasi judicial" or "quasi legislative" acts. Legislative actions involve uniform standards, whereas adjudicatory actions apply rules to individual circumstances. For example, rules setting minimum competencies are judicial, and rules setting minimum qualifications are legislative. Legislative acts need not follow minimum due process requirements as long as they are not used as a back door for targeting individuals.

In *Tran*, the court ruled that Mission's policy was quasi legislative since it applied to the entire medical staff. In reaching its decision, the court rejected Tran's argument that quasi legislative acts were limited to administrative or systemic problems. The court stated that "hospitals are entitled, indeed required, to set minimum qualifications for their staff," even though policy decisions may negatively impact certain individuals. Additionally, since Tran had declared his intent to pursue board certification he was not entitled to an adjudicatory hearing on whether he met the bylaw's exception for individuals who were not reasonably expected to do so.

In reaching its conclusion, the court distinguished Tran's case from *Anton v. San Antonio Community Hospital*, 19 Cal.3d 802 (1977), a California Supreme Court decision that established a doctor's hospital privilege was a property right that vested upon appointment, and became subject to divestment only upon showing adequate cause in a proceeding consistent with minimal due process requirements. Most significantly, the court pointed out that unlike *Tran*, *Anton* was based upon quasi judicial action.

The court concluded that Tran's only available remedy, if any, was to seek a writ requiring Mission to hold a hearing pursuant to its own bylaws to argue that the Committee should exercise its discretion to extend the time under which he has to become board certified, or to challenge the bylaw itself on grounds that it is "arbitrary, capricious, or entirely lacking in evidentiary support." The court noted that Tran may have already waived his opportunity to seek such a writ since the Committee already offered him an opportunity to be heard in 2004, but he was welcome to pursue the option.

If you have any questions concerning medical staff bylaws, due process rights or the termination of hospital privileges, please contact a member of Robinson & Cole's Health Law Group. ([back](#))

OIG Advisory Opinion Determines That Hospital Subsidy Of Ambulance Expense Would Be Prohibited Inducement

On March 7, 2007, the Office of Inspector General ("OIG") of the Department of Health and Human Services issued Advisory Opinion No. 07-02, which considered a hospital's subsidy of ambulance services expenses. The OIG concluded that such an arrangement would constitute grounds for the imposition, by the OIG, of civil monetary penalties ("CMP") against the hospital and would potentially violate the Anti-kickback Statute. The full Advisory Opinion can be obtained by clicking [here](#).

BACKGROUND

The hospital that requested the Advisory Opinion (the “Hospital”) is recognized as a leader in cardiovascular services in the region, and typically receives patients transferred from hospitals outside the local area. The Hospital proposed the arrangement in response to payment refusals by the local Medicare carrier for ambulance transportation for these transfers. Generally, Medicare only reimburses for local ambulance transportation, unless the patient requires a higher level of care or specialized services that cannot be provided at a local hospital, in which case, Medicare would reimburse the full cost of the transportation to a non-local hospital. The Hospital found that when patients, typically with cardiac issues, would request ambulance transfers to the Hospital from outside the local area due to their own preference, they would receive bills from their ambulance suppliers for the excess mileage beyond the local area covered by Medicare. These bills generated patient complaints and served as a disincentive for physicians to recommend the transfer of patients to the Hospital from outside the local area.

To address these issues, the Hospital proposed an arrangement whereby the Hospital would pay the ambulance suppliers directly for such transfers and submit claims for reimbursement on the transported patients’ behalf (the “Arrangement”). The Hospital would absorb any differential between the amounts received from third-party payors, including Medicare, due to the excess mileage charges. The Hospital proposed to offer the Arrangement for all patients, not just for cardiac patients, and without regard for financial need, but also certified that it would not advertise that it was subsidizing the patients’ ambulance service bill. [\(back\)](#)

OIG’s ANALYSIS

The OIG analyzed the Arrangement under both the CMP provisions of the Social Security Act (42 U.S.C. §1320a-7a) and the Anti-kickback Statute (42 U.S.C. §1320a-7b(b)). Under the CMP provisions, the OIG can impose CMP against any person who gives anything of value, or “remuneration,” to a Medicare or Medicaid beneficiary that the person knows or should know is likely to influence the beneficiary’s selection of a particular provider for items or services reimbursed under Medicare or Medicaid. The Anti-kickback Statute makes it a criminal offense to “knowingly and willfully” offer, pay, solicit or receive any remuneration, directly or indirectly, to induce or reward referrals of items or services reimbursable under Medicare or Medicaid. Specific exceptions exist for both provisions, but the OIG found that none of the exceptions were applicable to the Arrangement.

In finding that the Arrangement would potentially violate the Anti-kickback Statute and CMP provisions, the OIG relied on two basic findings. First, the OIG found that the subsidy of an expense on behalf of a patient would constitute “remuneration” under the Anti-kickback Statute and CMP provisions since it would be of value to the patient. Second, the OIG found that the remuneration would be prohibited since it would likely influence patients to choose the Hospital for hospital services. The OIG stated that cardiac patients are likely to develop ongoing relationships with a hospital services provider, so the initial influence to choose the Hospital could have long-lasting effects. The OIG was also concerned that the subsidy would influence patient choice when it came to ambulance services. The lack of advertising of the subsidy by the Hospital was deemed by the OIG to be an ineffective safeguard from the danger of fraud and abuse.

In the end, the OIG found that the overarching purpose of the Arrangement was to generate increased business for the Hospital, in a manner which was impermissible under the Social Security Act, and therefore would be grounds for the imposition of CMP. Since the Anti-kickback Statute requires a determination of intent on the part of the Hospital, the OIG stated that the Arrangement “could” violate the Anti-kickback Statute, without forming a definitive conclusion.

CONCLUSION

This latest Advisory Opinion demonstrates that the OIG will find violations of the CMP provisions and the Anti-kickback Statute if only one result of a financial incentive is to influence patient choice. For assistance in structuring business arrangements to comply with the Anti-kickback Statute and CMP provisions of the Social Security Act, please contact any member of Robinson & Cole's Health Law Group. ([back](#))

South Carolina Court Upholds Doctor's Obligation to Repay Recruitment Loan

On February 23, 2007 the South Carolina Court of Appeals upheld a decision of the lower court that Dr. Philip Watterson ("Watterson") was liable for repayment of \$348,550 in advances and interest under his relocation and recruitment agreement (the "Agreement") with Mary Black Health System ("Mary Black"). (Mary Black Health System v. Watterson, S.C. Ct. App., No. 2007-UP-092, unpublished decision).

In 1998 Mary Black recruited Watterson, an OB-GYN physician, to the underserved area (the "Underserved Area") to fulfill an unmet need for OB-GYNs in the community. In exchange for Watterson relocating to the Underserved Area, Mary Black paid for start-up costs and ongoing support of Watterson's new practice during his first year in the Underserved Area (the "Loan"). The Agreement allowed for forgiveness of the Loan over the next two year period as long as Watterson remained in the Underserved Area. If Watterson failed to remain in the Underserved Area however, the Agreement mandated repayment of all sums with interest.

At the end of the first year of the Agreement, Watterson became ill and terminated his practice. During that same year, Mary Black recruited five other OB-GYN doctors to the Underserved Area. Once Watterson recovered from his illness, he claimed his efforts to re-establish his practice were hindered by the new OB-GYN physicians that Mary Black had recruited to the Underserved Area.

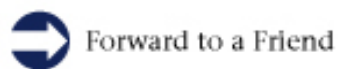
Because Watterson failed to maintain a practice in the Underserved Area, Mary Black made a claim for repayment of the Loan including interest. Watterson counterclaimed claiming that Mary Black had misrepresented the area as "underserved" with an "unmet need" for OB-GYN physicians and had misrepresented that there was a "community need" for his services. Watterson further claimed that Mary Black concealed from him that it would be adding five new OB-GYNs to the Underserved Area.

The court found no misrepresentations on the part of Mary Black in the Agreement or otherwise. There was no evidence that the representations made to Watterson were false. Further, the court ruled that there was no duty owed to Watterson on the part of Mary Black to keep him informed of its present recruiting efforts in the area or its intentions for future recruiting. The court upheld the lower court's ruling in favor of Mary Black.

As this case demonstrates, the courts are not reluctant to enforce recruitment loan agreements that mandate conditions of community service in exchange for the forgiveness of loan debt whenever these conditions are breached. ([back](#))

If you have any questions or need more information regarding content of this Health Law Pulse, please contact any member of Robinson & Cole's Health Law Group.

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