Unfair Disciplinary Proceedings by Boards

by Andy Schlafly, Esq

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Good afternoon. I'm Andy Schlafly, General Counsel for the Association of American Physicians and Surgeons ("AAPS"). I am a member of the New York Bar, and specialize in administrative law.

AAPS is a nonprofit national group of thousands of physicians, including many practicing in New York. We were founded in 1943 and are dedicated to promoting the ethical practice of medicine and defending the patient-physician relationship. AAPS is almost exclusively membership-funded. We file amicus briefs in defense of physicians who are unfairly treated in disciplinary proceedings, as in the case of Dr. Dan Alexander v. State Board for Professional Medical Conduct, Civ. No. 89006 (N.Y. App. Div. 3rd Dept. 2001).

We have many physician members in New York who feel pressured and intimidated to protect their own licenses by altering their care to patients. They are faced with the choice between avoiding the wrath of insurance companies and delivering the best possible care to their patients. This intimidation interferes with the ethical practice of medicine, and ultimately hurts patients.

Physicians feel threatened because they have fewer rights than almost anyone else in a judicial proceeding. Physicians can lose their license based on very little proof, and inadequate due process. Physicians are vulnerable to manipulation of the process for economic reasons, rather than true concern for patient health.

For example, we see unexplained targeting of certain types of physicians for discipline. Physicians who treat Lyme Disease are frequent victims of investigations, but not due to any complaints by their patients. Third-party payers, who find the aggressive treatment of Lyme Disease costly, have too much influence over the disciplining of a physician.

AAPS has a member in New York who even predicted that he would be investigated because of his proactive treatment of Lyme Disease, and he was. His patients love him because his treatments are so effective. But those who pay for the treatments find it profitable to delicense physicians who are costly. Economic harm should not be a basis for revoking or restricting a physician's license. A clear showing of medical harm to patients should be required.

If an insurance company is unhappy with a physician, then it has full recourse to our court system to bring a lawsuit, whereupon the physician-defendant would have the safeguards of due process rights essential to the fair administration of justice. These rights include meaningful prior notice of the charges against him, right to a public hearing, right to full cross-examination of witnesses, right to a decision based only on information in the record, and right to a meaningful appeal. But these basic due process rights, which are so fundamental to fairness, are glaringly absent from disciplinary hearings. Third party payers alleging economic harm can more easily delicense a physician than prevail in litigation against him.

It is ironic, and unjustified, that a physician enjoys greater rights in defending a fraud action than

he does in a disciplinary proceeding with his license at stake. It is likewise irrational that a physician enjoys greater rights in contesting a simple speeding ticket than in a disciplinary proceeding threatening his livelihood. If a physician is sued by a patient, an employee, or a neighbor, he enjoys the due process rights we all find essential. But if he is subjected to a disciplinary proceeding, the most essential due process rights are not there to protect him.

Patients are the ultimate victims of this vulnerability of their physicians. Patients deserve the undivided attention and care of their physicians, without intimidation by third parties. Instead, the unfair disciplinary process creates a conflict-of-interest for physicians, such that they must choose between taking precautions to defend their license versus acting in the best interest of the health of their patients. When those choices are in conflict, the patient's health suffers. In some cases, patients lose their trusted physician entirely based on an unfair proceeding that is shielded from the accountability of public scrutiny.

Specific Proposals.

Physicians should have the right to request a public hearing to obtain the benefits of public scrutiny. The interests of hundreds of patients are at stake when suspension or termination of a physician's license is adjudicated. Physicians should be able to invite their patients to attend the proceedings, and physicians should have the right to open the proceedings to the entire public. Defendants have a right to public trial. Why should a physician's rights be any less?

Physicians should have the right to full cross-examination of the witnesses testifying against him. Currently, the Administrative Law Judge (ALJ) can and does limit cross-examination. Rules of Evidence, essential to protecting the rights of the accused, are not followed. They should be. Cross-examination is the best defense against perjury. Without public scrutiny, and with cross-examination often limited, the essential safeguards against perjury are missing.

In one case, a physician lost his New York license to practice because the ALJ cut off cross-examination of witnesses on issues crucial to the disciplinary hearing. Defendants in legal proceedings have full rights of cross-examination. Why should a physician's rights be any less?

The burden of proof in a disciplinary proceeding to revoke a physician's license is shockingly low. The standard is the lowest "preponderance of evidence" test, which simply requires that something be considered more likely than not. That standard is much lower than the criminal "beyond reasonable doubt" standard, and also lower than the "clear and convincing evidence" requirement for many civil actions, such as fraud.

It is unconscionable that a physician can lose his license, and hundreds of patients lose their doctor, without a showing of "clear and convincing" proof of wrongdoing. If there is a 49% chance that the physician did nothing wrong, then he and his patients should receive the benefit of the doubt. Yet in one case, revocation of a physician's license was imposed even though the factfinder admitted that there was a substantial chance the physician acted properly. The New York State Board for Professional Medical Conduct expressly based its decision to revoke the physician's license, destroy his livelihood, and deprive hundreds of patients their trusted physician, on a mere "51%" probability. Given this low standard, a physician could win a case in court and yet still lose his license in a disciplinary proceeding. That injustice must end.

The low standard of proof jeopardizes the traditional reliance by physicians on chaperones in the examining room to defend against baseless allegations. A New York physician lost his license when a patient contradicted the testimony of a chaperone that nothing improper happened in the examining room. The State Board claimed that the chaperone was biased because she had been retained by the physician. The reliance by physicians, including many members of our organization, on chaperones to defend against allegations is now in doubt. If the standard were "clear and convincing evidence," then chaperone testimony could not be so easily rejected.

Physicians should not lose their license when their own accusers, and family members of accusers, continue to see the physicians for care with full knowledge of the disciplinary proceedings. Uninterrupted use of a physician by patient or patient's family should create a presumption that the patient is satisfied with the physician's services. Nor should the State be interfering with the patient-physician relationship by restricting or terminating the physician's license while the relevant patients continue to demand the doctor's services.

The standard for judicial review of these disciplinary proceedings is also far too deferential. The courts assume that physicians have benefited from full due process, when in fact they have not. The findings of fact are assumed to be true on appeal, when in many cases they should be reviewed de novo. For example, any findings in a decision revoking or restricting a physician's license, which are not supported in the record, should require a remand rather than affirmance. On at least one occasion, the Hearing Committee declared that the physician had a "deep seated psychological problem," without anything in the record to support that psychoanalysis. Despite this and other errors in the factual finding, the revocation in that case was nevertheless affirmed. A remand should be required, as in other areas of administrative law.

The government should not be permitted to shop around for experts until it finds someone willing to testify against the physician. Rather, government experts at these disciplinary proceedings should be selected from an objective group of physicians, as juries are. There should be guidelines requiring that those experts review information by both sides to the dispute.

If the government expert feels that there is no case against the physician, then that should dispose of the matter. Instead, the government can and does simply look for additional experts until it finds one of its liking. We have even seen the government fire one of its experts because he, after reviewing the facts, testified for an accused physician. This government manipulation of experts is inconsistent with the objectivity and high standards that should be required before revoking a physician's license.

Physicians need discovery rights with respect to the experts and hearing committee members, who effectively determine the outcome. Like true defendants, physicians need to be able to explore and eliminate possible conflicts-of-interest that create bias in the proceedings. Judges have broad duties to publicly disclose information about themselves. So should experts and those who sit on these disciplinary hearing committees. There should be an analog to the voir dire in jury trials to eliminate potential bias.

Rarely should the State be telling patients that they cannot see a particular physician because his license has been restricted, suspended, or terminated. Only the most egregious, documented cases of violation of trust should be candidates for license revocation. Patients should have as broad and diverse selection of physicians as possible, without government or third party interference.

Conclusion.

The Association of American Physicians and Surgeons opposes the intimidation of physicians through deprivation of their rights at disciplinary proceedings. This interference destroys the integrity of the patient-physician relationship and the ethical practice of medicine. Please consider the reforms suggested by AAPS and others at this hearing.

Thank you.

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