

THE PRINCESS OR THE TALKING FROG

By: Steven I. Kern, Esq.

An old man was out playing golf. He hit his ball into the woods. Searching for the ball he came across a frog. The frog looked up at him and said: "If you kiss me I'll turn into a beautiful princess". The old man bent down, picked up the frog, put it into his pocket, and continued looking for his ball. A few minutes later the voice from his pocket shouted "Hey, didn't you hear me, I said, if you kiss me, I'll turn into a beautiful princess". The old man looked down and said "Frankly, at my age, I'd rather have a talking frog".

Unfortunately, for too many physicians Organized Medicine is starting to look more like a talking frog than a beautiful princess. In the next twenty minutes or so, I would like to offer you three recommendations to help enhance and refresh the role of Organized Medicine, so that it will continue to be a strong, meaningful, relevant and, indeed, necessary force to every physician in this country.

I submit that, to maintain the support of its constituency, Organized Medicine must, first and foremost, protect the fundamental legal and property interests of its physicians. Twenty-five years ago government played but a small part in a physician's professional life. Today, Government is pervasive. From State licensing Boards investigating every consumer gripe to criminal prosecutions for fraud and abuse, to huge civil penalties for overbilling Medicare under a reimbursement system that is nearly incomprehensible, Government is involved in nearly every aspect of a physician's life. In our experience, well over 90% of physicians subject to investigation are ultimately vindicated. They are good doctors that have done nothing wrong. However, the cost of legal representation and the physical and emotional toll of being the subject to a government investigation, can be overwhelming. Any misstep along the way can broaden an investigation, or result in unwarranted discipline.

As such, the first step I recommend is the creation of a program to protect the individual legal and property rights of your membership from improper government intrusion.

For nearly twenty years in New Jersey and for more than seven years in New York State our law firm has provided, as a member benefit, a Physician Advocacy Program⁷ to the physicians of these States' societies. For as little as \$125 a year, a member has unlimited access to legal counsel with over twenty years of day-in and day-out experience with State licensing Boards, without additional charge, and whenever a governmental agency initiates an investigation of that physician. Does it matter to the doctor? Is it important to the State Society? Let me give you two examples.

Not too long ago, in California, investigators of that State's licensing board, with guns at their side, removed a doctor from his own office, without notice, during office hours, and searched his entire office, confiscating his books, records, patient charts, and personal items. They copied documents protected by attorney-client privilege, tax returns, and hundreds of patient records. They did not have a search warrant executed by a judge. They merely had an administrative demand for inspection. The reason for the search? A complaint of misleading advertising and other issues not relating to quality of care or billing fraud. Defenseless, having no where to turn, the physician was unable to prevent this outrageous abuse of his constitutional rights, and the search was conducted, unchallenged.

By contrast, last month, in New Jersey, investigators of the State's Attorney General's Office came to the offices of another physician with a similar administrative demand to inspect, copy and videotape her entire office, again including all patient charts, books and records. The reason? A patient complained that she had received a free sample of an over-the-counter medication which had an outdated expiration date stamped on the box. Here, however, the outcome was far different. As previously instructed, the physician called our office immediately, when the investigators arrived. We advised the investigators that they could conduct an inspection of the office, but limited only to those items in plain view. We told the investigators that they were not to open any door, drawer or cabinet, or take any records. We told them if they did, we would call the police and have them arrested. Rather than conducting a search under these conditions, they left. The Attorney General then brought an action before the State Board of Medical Examiners to enforce their demand for an unfettered right to inspect, copy and videotape. As part of our joint effort with the Medical Society of New Jersey, I called

Vincent Maressa and told him what was happening. He directed that the Society immediately seek to intervene in the case as amicus curiae. The Society has now been granted the right to intervene and we believe that this concerted effort will result in the successful defense of the physician and the elimination of warrantless, unreasonable searches of physicians' offices in New Jersey. Every member of the Medical Society has also received a letter, by fax and mail, from the President of the Society, Dr. Carl Restivo, advising the community of the outrageous efforts of the Attorney General, the steps taken by the Medical Society, and the availability of free, expanded legal services to all members of the Physician Advocacy Program⁷ in the event an investigator arrives at a member's front desk seeking to conduct a similar type of search. A copy of that letter, along with information on the Physician Advocacy Program⁷, is available in the packet of materials we have distributed. This is not the first time we have engaged in this type of concerted activity.

Three years ago we brought a federal action against the New Jersey Board of Medical Examiners, on behalf of the Medical Society of New Jersey, when the Board sought confidential information about physicians' past histories of psychiatric care or substance abuse treatment. Had the Board been successful it would have destroyed the Society's Physician Health Program. It would also have allowed the Board unfettered access to every physician's mental health records -- whether the physician sought assistance to get through a stressful divorce or suffered from sexual impotence. Instead, the Society successfully challenged the Board in what has since become the leading licensure case in the country, involving an interpretation of the Americans with Disabilities Act. Because of our concerted actions, physicians may, today, obtain confidential medical, psychiatric, or substance abuse treatment, without risking loss of license by having to disclose that treatment to their state licensing board.

Once the basic rights of your constituency are protected, Organized Medicine must further the economic interests of its membership. I do not have to relate to you the enormous financial pressures placed on today's physicians. Everyone is looking to you for the quick fix. When you cannot deliver the impossible, frustration and then desperation sets in. Desperation creates opportunity, especially opportunity for those disreputable enough to promise the impossible and the near impossible. While the next two recommendations are, no doubt, controversial, I believe that they must receive careful consideration by Organized Medicine if Organized Medicine is to continue as a strong advocate of physicians.

Unions, promising that they will collectively bargain for independent employees against HMOs are, I believe, creating unreasonable expectations, since the law clearly appears to prohibit such activity. Unfortunately, such naked promises divert the attention of physicians from more meaningful and necessary activities. Physician Practice Management Companies, controlled by real estate developers or insurance executives promising physicians unfettered control as they buy up their practices, are no less dangerous.

Unfortunately, as the level of despair increases, it becomes more and more difficult for responsible leadership to argue against this snake oil, unless they can provide a viable alternative. Therefore, Organized Medicine, to maintain its credibility, must provide bold, achievable solutions for its members.

While I do not believe independent physicians, who are not employees, can collectively bargain, I do believe that Unions can have a significant and legitimate role in the representation of physicians who are bona fide employees of hospitals, HMOs and clinics. And, let us not forget that a significant and ever growing number of physicians are now practicing as employees of these institutions. These physicians include not only traditional hospital-based practitioners, such as pathologists, radiologists and anesthesiologists. As a result of aggressive acquisition efforts by hospitals and MCOs, more and more private practitioners have sold their practices and are now bona fide institutional employees. Responsible unions, willing to limit their scope to the representation of such physicians, are eager to align themselves with Organized Medicine. On behalf of the Medical Society of one of the largest states in the country, we are now exploring the possibility of forming an alliance between that State society and a union, to provide just such representation. Under the terms of such agreement, the union will guarantee that the Society will not lose any dues income as a result of its organizing efforts and, in fact, the Medical Society can realize substantial additional non-dues income by providing all member services to the union's members, including administering their health and welfare program.

Whatever people's views are of physicians' unions, the reality is that they are here, they are aggressively seeking to organize your membership, and, if they act responsibly, they may be able to provide significant benefit to certain segments of your membership. I believe leadership is obligated to direct the physician community to those who will act most responsibly, and to enter into agreements which will maximize Organized Medicine's role in that process. As such, the second recommendation I make is that you seek out a favorable relationship with a responsible union organization, to

provide assistance to those physicians who meet the stringent requirements of a bona fide employee.

Irresponsible, self-serving activities are not limited to unions. The tremendous growth of Physician Practice Management Companies is at least as threatening to the independent practice of Medicine as are Managed Care Organizations. Indeed, I predict that within ten years, PPMs will exercise more control over the practice of Medicine, and over physicians= fees, than MCOs. As reported in the November 24th issue of AMA News, PPMs are emerging as a powerful force. Yet, surprisingly little attention has been directed to this phenomenon. Independent practitioners, the core constituency of Organized Medicine, must move toward larger organizational models to compete in today=s environment. Merger and acquisition is occurring at a frenetic pace. Those who do not merge are likely to be left behind. But mergers can be disastrous. Organized Medicine must assist in directing the independent practitioner to those models which are most likely to enable physicians to maintain relative autonomy and independence.

After his retirement as Executive Vice President of the AMA, the late Dr. Jim Todd and I spent a significant amount of time together creating a model PPM that would maximize physician control, provide physicians with access to the capital necessary to compete in this increasingly complex system, assure relative autonomy and independence, and limit the scope of the physicians= risk. A description of the model that we created, with the assistance of the former head of investment banking at Banker=s Trust Company, is included in your materials. The model does not require a physician to sell his practice, does not require any investment from the physician, requires no personal financial guarantees and includes no restrictive covenant. Any physician is free to leave the model, at any time, without financial penalty. The model maintains control of the practice of Medicine totally within the physician members, and the physician members will always maintain majority control of the Board of Directors of the PPM. The model requires no venture capital.

The only problem with the model is that it requires physicians to organize themselves, either by region or by specialty. As Dr. Todd was fond of saying, organizing physicians is like herding cats. State Societies can be of enormous assistance to their membership by assisting in organizing physicians within such models. There is opportunity for Societies to receive non-dues income for assisting in these efforts. Most importantly, the success of these models will assure a vital role for Organized Medicine well into the next century.

I look forward to your questions. My partner, Al Augustine, from our Chicago office, is here with me today. We would welcome the opportunity to work with you to develop any of these recommendations in your own states, or nationally. Simply stated, we would be happy to work with you to kiss the frog.