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OPINION	:	No. 81-1006
of	:	FEBRUARY 10, 1982
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The PODIATRY EXAMINING COMMITTEE has requested an opinion on the following question:

1. Does section 2498 of the Business and Professions Code authorize the Podiatry Examining Committee to inspect and require reports from a hospital and inspect podiatric patients records when the committee is not conducting an investigation relating to specific treatment of a patient by a podiatrist?

2. Does section 2498 of the Business and Professions Code authorize the Podiatry Examining Committee, as part of its inspection of and request for report from a hospital, to require a hospital to provide information relating to the possible limitation or restriction of podiatrists' rights and privileges for reasons other than demonstrated competence if such limitation or restriction is related to the quality of care rendered to a patient?

CONCLUSIONS

1. Section 2498 of the Business and Professions Code does authorize the Podiatry Examining Committee to inspect and require reports from a hospital and inspect patient records even though the committee is not conducting an investigation relating to specific treatment of a patient by a podiatrist.

2. Section 2498 of the Business and Professions Code does authorize the Podiatry Examining Committee, as part of its inspection of and request for report from a hospital, to require a hospital to provide information relating to the possible limitation or restriction of podiatrists' rights and privileges for reasons other than demonstrated competence if such limitation or restriction is related to the quality of care rendered to a patient.

ANALYSIS

The Medical Practice Act is contained in chapter 5 of division 2 of the Business and Professions Code. (§ 2000 et seq.)[1] The act provides for the Board of Medical Quality Assurance in the Department of Consumer Affairs (hereinafter BMQA).[2] The BMQA is divided into three divisions, that is, the Division of Medical Quality, the Division of Licensing, and the Division of Allied Health Professions. (§ 2003.) Article 22 of the Medical Practice Act is entitled "Podiatric Medicine." (§§ 2460-2499.) That article generally provides for the establishment of the Podiatric Examining Committee (hereinafter "committee") within the Division of Allied Health Professions, the requirements for licensure as a Doctor of Podiatric Medicine (D.P.M.) in California, and the powers and duties of the committee. Such powers and duties are generally the evaluation of and examination of applicants for licensure as podiatrists, with a recommendation to BMQA with respect thereto, and the hearing of and determination of disciplinary matters concerning such licensees.

The focus herein is on section 2498, a part of Article 22 of the Medical Practice Act. That section provides:

> "(a) The committee shall have the responsibility for reviewing the quality of podiatric medical practice carried out by persons licensed to practice podiatric medicine.

[1] All section references are to the Business and Professions Code unless otherwise indicated.

[2] The successor to the Board of Medical Examiners.

"(b) Each member of the committee, or any licensed podiatrist appointed by the committee, shall additionally have the authority to inspect, or require reports from, a general or specialized hospital and the podiatric staff thereof, with respect to the podiatric care, services, or facilities provided therein, and may inspect podiatric patient records with respect to such care, services, or facilities. The authority to make inspections and to require reports as provided by this section shall not be delegated by a member of the committee to any person other than a podiatrist and shall be subject to the restrictions against disclosure described in Section 2263."

1. *Must Inspections and Reports Relate to Investigations of Treatment Provided a Particular Patient or Patients?*

The first question presented is whether the committee, when exercising the powers granted by subdivision (b) of section 2498, is limited to situations where the committee is conducting an investigation relating to specific treatment of a patient by a given licensed podiatrist.

A reading of subdivision (b) discloses that its operative language confers authority upon the committee "to inspect, or require reports from" a hospital "with respect to the podiatric care, services or facilities provided therein, and may inspect podiatric patient records with respect to such care, services, or facilities." The operative language contains no limitation that the authority conferred must be with respect to an investigation of the care provided a particular patient or patients by given licensees.

Accordingly, under the plain meaning rule of statutory construction, the committee's authority would not be limited to such an investigation or investigations. "'When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.'" (*In Re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 348.) As the court stated in *Great Lakes Properties, Inc.* v. *City of El Segundo* (1977) 19 Cal.3d 152, 155-156, quoting from a leading authority on statutory construction:

""'One who contends that a provision of an act must not be applied according to the natural or customary purport of its language must show either that some other section of the act expends or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning." (2A Sands, Statutes and Statutory Construction (4th ed. of Sutherland, Statutory Construction, 1973)

§ 46.01, p. 49.)' (*Leroy T.* v. *Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, at p. 438 [115 Cal.Rptr. 761, 525 P.2d 665].)"

Several suggestions have been made to limit subdivision (b) to the investigation of the podiatric care provided by particular podiatrists. It has been suggested that such a limitation is implicit when subdivision (b) is read in conjunction with subdivision (a). This argument, however, is not convincing in that the provisions of subdivision (b) have been present in the law since their enactment in 1971 as section 2130.5. (Stats. 1971, ch. 753, § 8, p. 1489.) Section 2130.5 was reenacted in 1974 as section 2525.10. (Stats. 1974, ch. 1044, § 31, p. 2274.) However, *it was not until 1978* that the provisions of subdivision (a) were added to the law by the addition of a new paragraph to then section 2525.10. (Stats. 1978, ch. 938, § 3, p. 2914.)[3] Accordingly, the Legislature could not have intended that the provisions of subdivision (b) be limited by the provisions of law, now found in subdivision (a), which were enacted *seven years later*. Furthermore, it is to be noted that since the 1978 enactment, subdivision (b) (previously § 2525.10, paragraph two) has provided that the authorization in subdivision (b) shall be in addition to the authorization in subdivision (a). Accordingly, it would seem that each subdivision is to be read separately as providing independent authorizations.

A second suggestion as to why subdivision (b) should be read as being limited to investigations of care given by a particular podiatrist is that section 2498 is found in Article 22; that Article 22 merely provides for the committee's evaluation of and examination of licensees and their discipline; and that, accordingly, the committee has no reason to inquire into the administrative practices of hospitals or their staff. Stated otherwise, this is the business of the Department of Health Services, which is responsible for the licensing of hospitals and ensuring their conformance with the law.

We also reject this suggestion. First of all, it is to be noted that the Legislature has, in an analogous situation, vested in the Division of Medical Quality of BMQA certain inspection functions with respect to hospitals in section 2226 despite the fact that BMQA does not license hospitals. Section 2498 was clearly patterned upon the predecessor to present section 2226. The latter section provides the Division of Medical Quality with the authority to inspect the administrative practices of hospitals a delineated therein without the necessary of being in the process of investigating particular physician or surgeon. Thus, section 2226, which had its genesis in the enactment of former section 2122.5 in 1965 (Stats. 1965, ch. 1460, § 1, p. 3419), provides:

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[3] When the Medical Practice Act was revised and renumbered in 1980 (Stats. 1980, ch. 1313), section 2525.10 was renumbered section 2498, and the paragraphs designated as subdivisions (a) and (b).

"The Division of Medical Quality may inspect a licensed general or specialized hospital and require reports therefrom to determine if the hospital has adopted and is complying with the provisions of Sections 2282 and 2283. The division may inspect medical staff and patient hospital medical records subject to the provisions of section 2225. Notwithstanding Section 2224, the division's authority under this section shall be delegated only to a licensed physician and surgeon."[4]

Sections 2282 and 2283 provide that it is unprofessional conduct to practice in hospitals which are not organized and governed with respect to their medical staffs as delineated in those sections.

Section 2498, subdivision (b) and section 2226 are statutes *in pari materia*, that is, statutes which relate to the same general subject, that is, the inspection of hospitals and patients' records by medical licensing boards or committees. Since section 2226, the earlier enactment, is clearly not limited to inspection with reference to an investigation of a particular licensee, we believe that section 2498, upon which is patterned, should be similarly construed and not be read to contain such a limitation.

Secondly, with reference to the construction of subdivision (b) and its possible limitation to investigations of licensees, we note that the committee's duties are not completely limited to licensing and disciplining functions. Section 2470 provides:

"The committee may recommend to the board the adoption, amendment, or repeal of rules and regulations relating to the practice of podiatric medicine."

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[4] Prior section 2122.5, as originally enacted in 1965, and as it read in 1971, when the predecessor to subdivision (b) of section 2498 was first enacted, stated:

"2122.5. Each member of the board of each member of a district review committee may inspect a licensed general or specialized hospital or require reports therefrom to determine if the hospital had adopted and is complying with the rules specified in Sections 2392.5 and 2392.6. This authority to inspect to require written reports may not be delegated by either a member of the board or by a member of a district review committee to any person other than a licensed physician and surgeon.

"Subject to the provisions of Section 2379, each member of the board or each member of a district review committee may inspect medical staff and patient hospital medical records, but this authority may not be delegated by either a member of the board or by a member of a district review committee to any person other than a licensed physician or surgeon."

Since podiatrists practice in hospitals, the section 2498 subdivision (b) inspection by the committee could conceivably bring forth such recommendations. Furthermore, it is also conceivable that the Legislature intended that the committee have broad inspection powers with respect to podiatric care and services provided in hospitals so that it, the committee, could bring matters with respect thereto to the attention of the Department of Health Services, where appropriate.

Finally, and extremely convincing as to the intent of the Legislature not to require that the authorizations found in subdivision (b) be exercised only while investigating the care provided a given patient or patients is the fact that the authorizations with respect to inspections and requiring reports extend to podiatric *facilities* as well as to podiatric care and services. The inclusion of the word "facilities" indicates a broad authorization not necessarily linked to particular patients and their care.

In sum, it is concluded that the plain meaning rule of statutory construction should be applied to subdivision (b) of section 2498. Accordingly, to imply a limitation that the committee's powers are to be exercised only in the context of an investigation of a particular patient or licensee would, in our opinion, constitute "judicial" legislation under the guise of interpretation. This we are not permitted to do. . . ." (*Vallerga* v. *Dept. Alcoholic Bev. Control* (1959) 53 Cal.2d 313, 318.)[5]

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[5] Although not specifically placed in issue by this request, we note the decision of the Court of Appeal in *Board of Medical Quality Assurance* v. *Gherardini* (1979) 93 Cal.App.3d 669 which permitted a hospital to raise the physician-patient privilege where BMQA sought to inspect records of patients of a particular physician, and which also set forth the rule that because of the constitutional right of privacy any disclosure of medical records must

> ". . . be justified by a compelling state interest . . . [and that] the resolution of these insistent issues involves a balancing of the respective interests *and if state scrutiny is to be allowed, it must be by the least instrusive manner*." (*Id*., at p. 680.)

We have no problem finding a compelling state interest in the inspection of patients' records to insure the quality of hospital and medical care. We, however, believe that, where feasible, the patient's name should be blocked out where the committee inspects records to protect the patients' privileges and right of privacy. This would appear to be state scrutiny "by the least intrusive manner."

Compare, however, *Wilson* v. *California Health Facilities Com.* (1980) 110 Cal.App.3d 317, 322-323 and *Kate' School* v. *Department of Health* (1979) 94 Cal.App.3d 606, 621, indicating that when the state's interest is in safeguarding health, the state's regulations need only be tested under the traditional "rational basis test" which does not evoke the requirements of the "least strict alternative" or "least intrusive" test.

2. May The Committee Require Information Relating To Limitations On Podiatrists' Staff Privileges If Related To Patient Care?

The second question presented is whether section 2498 authorizes the committee to require a hospital to provide information related to the possible limitation or restriction of podiatrists' rights and privileges for reasons other than demonstrated competence if such limitations or restrictions are related to the quality of care rendered to patients. In short, may the committee inquire as to restrictions on podiatrists' staff privileges in a given hospital and require reports thereon?

At this juncture it is worthy to note the definition of podiatry. Section 2472 provides:

> "The certificate to practice podiatric medicine authorizes the holder to practice podiatric medicine.
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> "As used in this chapter, 'podiatric medicine' means the diagnosis, medical, surgical, mechanical, manipulative, and electrical treatment of the muscles and tendons of the leg governing the functions of the foot.
>
> "No podiatrist shall do any amputation or administer an anesthetic other than local."

It is our understanding that podiatrists, with the proper residency training, are both licensed to and capable of treating any medical problem which requires surgery on the human foot. We are informed that a podiatrist may surgically treat any foot problem which can be treated by an orthopedic surgeon, including such procedures as bone implants and reconstructive surgery. For the more complicated procedures, which are not amenable to office surgery, the podiatrist and his patient need access to hospitals and the services and facilities they provide.

> "The podiatrist in turn offers the hospital specific knowledge and skills which can improve the quality of patient care. As far as the foot is concerned, the podiatrist is qualified to apply the skills in his area of concentration more effectively and efficiently than the practitioner who does not devote full time to ailments of the lower extremities."[6]

[6] Brochure: "Podiatry in Today's Hospital" by Block, McGibony & Associates, Inc. (Oct. 1973), citing as authority, Podell, Richard N., "Issues in the Organization of Medical Care:

In this vein we are also informed that a podiatric surgeon is not merely the equivalent of an orthopedic surgeon in the area of the human foot. We are informed that podiatrists may approach foot problems in a manner different from an orthopedic surgeon. This is so because podiatry is a discipline emphasizes the biomechanics of the lower extremities. Accordingly, podiatric surgery includes newly developed procedures not normally used by an orthopedic surgeon. We also note parenthetically that podiatry has its own board certification procedures for podiatric surgeons as does general medicine for its surgeons. In short, podiatry is clearly an independent branch of medicine where the licensee specializes in the treatment of the human foot and, to a degree also, the lower leg. (See, generally, Atty.Gen.Unpub.Op. I.L. 79-403.)[7]

Returning to the language of section 2498, subdivision (b), we note again that the committee may inspect or require reports from hospitals "with respect to the podiatric care, services, or facilities provided therein." Requiring a hospital to report as to whether or not staff privileges are granted to podiatrists would clearly fall within the purview of that language. If podiatrists were completely denied staff privileges, that fact would relate to podiatric care or services. There would be no such services. The same reasoning would be applicable to limitations or restrictions on the ability of a podiatrist to practice within the range of his license in a hospital setting. It would merely be a matter of degree.

Again, it appears that the plain language of section 2498 permits the committee to inquire into discriminatory practices of hospitalization which can affect the range of and level of podiatric care and services in such hospitals.

Several suggestions, however, have been made as to why the committee does not have such power under subdivision (b) of section 2498. These suggestions are similar to those raised with respect to question one, that is, the committee's jurisdiction should relate to the investigation of, at most, the care given by podiatrists to their patients (see again, section 2498, subdivision (a)) and should not extend to questions relating to staffing policies which are the primary consideration of the Department of Health Services, the

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Podiatry in the United States," *The New England Journal of Medicine*, Vol. 284, No. 11, May 1971.

[7] See also Health and Safety Code section 1316. That section provides that podiatrists are to be granted staff status along with medical doctors and osteopaths to the end that all three disciplines shall have "full clinical and surgical privileges . . . within the scope of their respective licensure" and that "[s]uch rights and privileges shall be limited or restricted only upon the basis of an individual practitioner's demonstrated competence." This "demonstrated competence" is to be determined by hospital rule and applied on a nondiscriminatory basis as between the three named professional groups.

licensing agency. With respect to these arguments, we believe our analysis as to question one above is equally applicable. We are not convinced that the Legislature sought to so limit the committee in its duties under the plain meaning rule of statutory construction.[8]

It has been further suggested that section 2226, *supra*, which permits the Division of Medical Quality to inspect *staff* as well as patient records implicitly demonstrates that the Legislature did not intend that the committee should be authorized to inquire into staff matters. Stated otherwise, the Legislature would have used the same language in section 2498, subdivision (b), and it so intended. In response to this argument, we point out that section 2226 and 2498 though similarly worded have different ultimate goals. Section 2226 relates to the inspection of and that of its staff. It does not apply to the inspection of records with respect to patient *care* or *services*. Accordingly, the use of different language in the two sections should not detract from the language in section 2498 (not contained in section 2226) whereby the committee may inspect and require reports as to podiatric care and services, *which can be affected by staffing policies*. Thus, to accept the suggested argument would read in a limitation not found in the language of section 2498, subdivision (b). As already noted with respect to question one, such would, in our opinion, constitute "judicial legislation under the guise of interpretation. This we are not permitted to do . . . ." (*Vallerga* v. *Dept. Alcoholic Bev. Control*, *supra*, 53 Cal.2d 313, 318.)

Accordingly, it is concluded that section 2498 does authorize the committee, as part of its inspection of and request for report from a hospital, to require a hospital to provide information relating to possible limitation or restriction of podiatrists' rights and privileges for reasons other than demonstrated competence if such limitation or restriction is related to the quality of care rendered to a patient.

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[8] With respect to the argument that the Department of Health Services should be the sole state agency taking cognizance of section 1316 of the Health and Safety Code, we see no particular conflict in jurisdiction for the committee, which has the primary interest and expertise, to also become involved. (*Cf. California Medical Assn*. v. *Karksen* (1981) 124 Cal.App.3d 28, 40 (dual interest of Health Services and CMA in hospital surgical procedures).)