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FEBRUARY 2010

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**DO THE TRIAL
LAWYERS REALLY
BELIEVE WE CAN
LIVE WITHOUT
MEDICAL CARE?**

**IS "I'M SORRY"
WORTH IT?**

OUR LEGAL LANDSCAPE

**WHEN THE
MBC COMES
KNOCKIN'...**

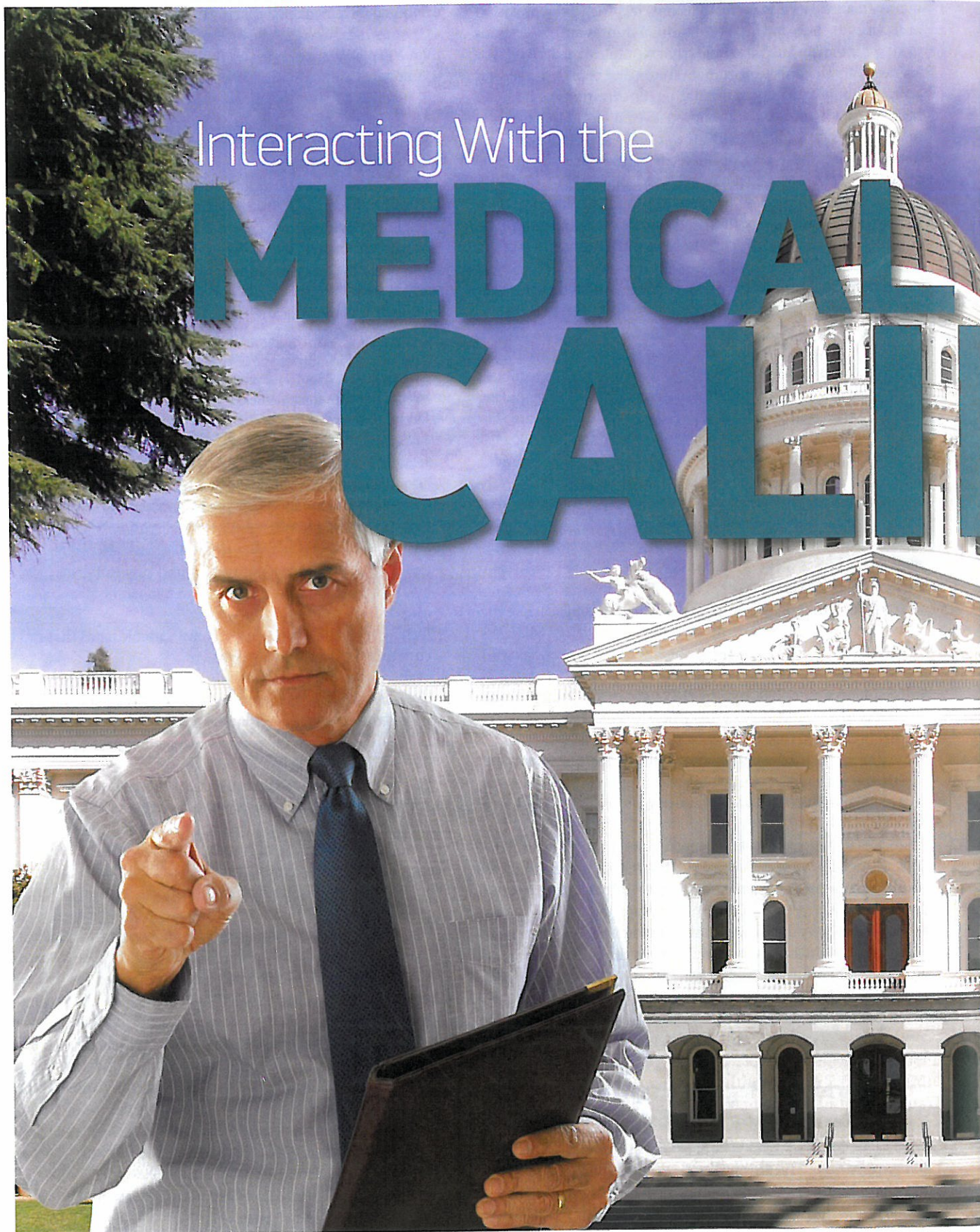
**MEDICAL
RECORDS
PERILS 'N'
PITFALLS**

**ARBITRATION
VS. JURY
TRIAL**

**WHY
CAN'T WE
UNIONIZE?**

"PHYSICIANS UNITED FOR A HEALTHY SAN DIEGO"





Interacting With the

MEDICAL BOARD of CALIFORNIA

FOUR ENLIGHTENED RULES

By Barton Hegeler, Esq.
and Storm Anderson, Esq.

For physicians practicing in California, it is probably not a matter of *if* their care of a patient will ever be investigated by the Medical Board of California but rather *when*. Investigations are generally prompted by one of two events: 1) involvement in a medical malpractice action; or 2) a patient complaining directly to the Medical Board. The approach taken by physicians in responding to these inevitable inquiries can have a significant impact on the result of the investigation.

Most physicians agree that being a defendant in a medical malpractice action is the single most stressful experience of their professional careers. The stress of being a defendant is only magnified when the Medical Board investigates with potential ramifications to a physician's ability to practice medicine. It is the gravity of potential licensing implications that often results in the wrong approach in interacting with the Medical Board. Instead of an aggressive "take no prisoners" attitude toward the Medical Board, physicians and their attorney representatives are better served by an approach characterized by cooperation, an attitude of assistance to the Medical Board in understanding the care rendered, and, if appropriate, forthright admissions.

A good starting point for physicians and attorneys is to under-

[Legal Landscape]

stand and accept the proposition that the Medical Board, its investigators, and the deputy attorneys general assigned to the investigation are not "the enemy" and they do not like to be treated as such. Just like physicians, Medical Board investigators and prosecutors want to be respected and appreciated for their role in ensuring the good quality of medical practice. It is also important to understand that the Medical Board is a powerful investigative body with all of the sophisticated resources of other more visible government law enforcement and investigative agencies.

For too long, attorneys representing physicians in investigations with the Medical Board have "stonewalled" investigators and have refused to acquiesce to reasonable requests. Investigators are disarmed when shown a cooperative and reasonable approach by attorneys and physicians. The Medical Board appreciates and responds favorably to cooperation. Deputy attorneys general assigned to prosecute cases on behalf of the Medical Board are uniform in their opinion that those physicians (and attorneys) who cooperate with investigations invariably benefit from this approach.

Rule 1: Do Not Appear Adversarial
The "first rule" of a sophisticated interac-

tion with the Medical Board is that it should not appear to be adversarial. When the initial response is aggressive or confrontational, it only serves to entrench the investigator. For example, rather than refuse to respond to a request for a narrative summary by the Medical Board, a physician should first contact an attorney to interact with the Board regarding the request. A request for a summary of patient care will not "just go away." A reasonable interaction with the Board's investigator will universally result in an extension to respond to an inquiry.

Rule 2: Retain an Attorney

The "second rule" of interacting with the Medical Board is to always retain an attorney to assist in the response. A typical reason stated for not having an attorney send a response on the physician's behalf is that "it will make me look guilty or like I have something to hide." Interestingly, this is not an interpretation shared by investigators. The investigators understand: 1) that most physicians have insurance that provides for legal counsel under these circumstances; and 2) that utilizing an experienced attorney is not an admission of guilt but is evidence that the physician is taking the

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Too often physicians take the approach that they can write a summary of care but fail to consider all of the potential ramifications that are readily apparent to a lawyer experienced in defending these types of administrative actions. More importantly, physicians frequently fail to understand that the attorney can write the letter on the physician's behalf and that any statements made by the attorney are not construed as admissions of guilt by the physician in any later proceeding.

Rule 3: Be Proactive

The "third rule" of interacting with the Medical Board is to be proactive in analyzing the situation and identifying potential problems. The Medical Board is interested in making sure that physicians understand the standard of good practice and comply with it. If an attorney and physician identify an area of weakness early, it is possible to initiate a plan prior to drafting a response to the Board. The Medical Board responds favorably to physician recognition of problems, statements of remorse, or acknowledgement

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approach and will never admit to a problem. An early admission of a mistake often leads to a reasonable response by the Board.

The vast majority of Medical Board investigations in which this approach is utilized result in favorable outcomes and satisfied physicians. **SDP**

of suboptimal care, and a willingness to address practice deficiencies through education. The PACE program is a vehicle for physicians to take refresher courses in basic topics such as record keeping, prescription writing, and ethics (see page 28). The Board responds favorably to reasonable, proactive plans like early enrollment in PACE classes.

Rule 4: Recognize a Practice Deficiency Early

The "fourth rule" of interacting with the California Medical Board is a willingness to accept the proposition that the Medical Board reacts favorably to an early recognition of a practice deficiency. Too often physicians and attorneys take a hard-line




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