

BY JOHN ZICCONI

GETTING

The Boot



ILLUSTRATION / STEPHANIE CARTER

Physicians can still be deselected by managed-care organizations, but the tides seem to be turning. Legislation has passed or is under way in many states to protect doctors and their patients.

WHEN TWO MAJOR MANAGED-CARE organizations in Houston dropped a combined 75 physicians from their provider panels in 1994, the Texas Medical Association (TMA) and several of the affected physicians banded together to sue both Aetna and Prudential for what they deemed to be unfair dismissal.

They lost.

Even though many of the doctors were deselected for non-medical reasons—Aetna admitted much of its decision was based on economic factors—the doctors were not able to overcome the fact they had signed contracts with the insurance companies that allowed for termination without cause.

A few physicians were eventually allowed back into the provider networks (Aetna embarrassingly deselected a physician it just had named Doctor of the Quarter), but the vast majority had to sever relationships with patients that were insured by the two MCOs.

Despite losing the lawsuit, this ugly incident

did act as a wake-up call for many individuals associated with the medical profession in Texas.

Realizing too many physicians were at the mercy of managed-care bean counters, the TMA started a four-year political lobbying effort that ended with the lone star state not only passing physician-protection legislation but in Texas becoming the first state to allow patients the ability to sue their HMO for malpractice.

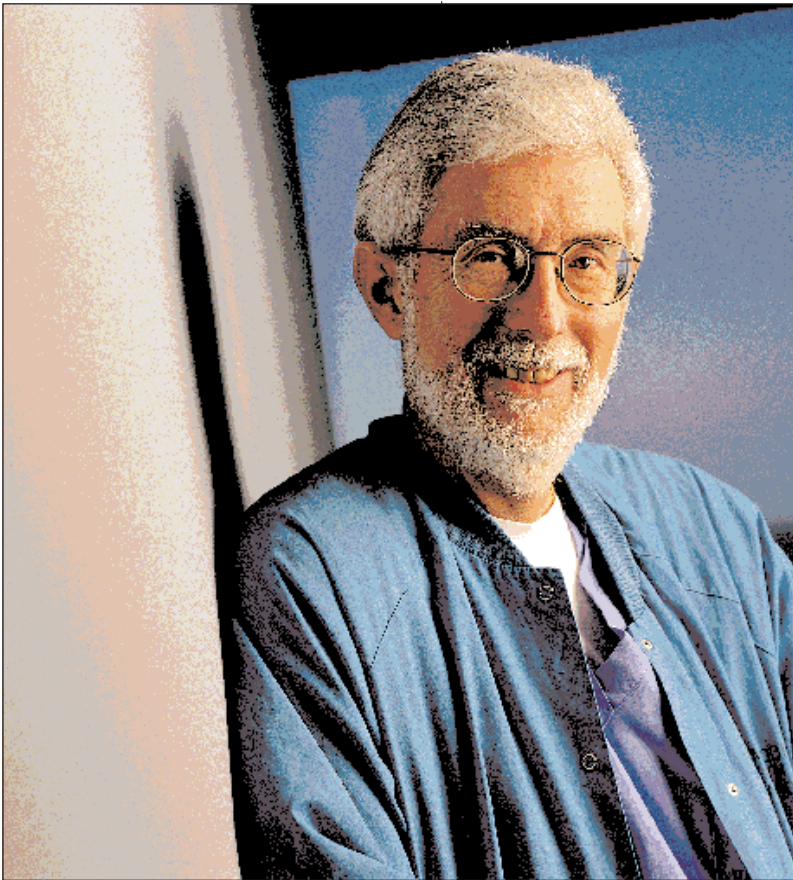
“The lawsuit got everyone’s attention,” says Dr. Robert Sloane, the chair of the TMA’s Council on Legislation. “There are still a ton of problems on how to administer managed care, but as a result of the new legislation we are seeing that everyone is a little more willing to sit down and work out the problems.”

Texas is not a unique situation. All across the country, physicians and medical associations are turning to both courts and state legislatures for help in combating what they view as a health-care industry that provides MCOs too much power.

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Dr. Robert Sloane, the chair of Texas Medical Association's Council on Legislation: "...sometimes to get everyone's attention it does have to start as a legislative process. Every so often, that is the only way to get everyone thinking about the problem."

Medical officials believe legal or legislative intervention is necessary to bring balance to the situation because MCOs, which usually have much greater financial muscle power than physicians, are reluctant to change the rules on their own.

"In the last five years we saw some real abuses in the health-plan industry," says Carol O'Brien, the director of advocacy and government relations for the American Association of Oral and Maxillofacial Surgeons and a former staff attorney with the American Medical Association. "When I was with the AMA, one

PHOTO/REED HORN

One Battle Won

The four doctors who ran Pediatric Associates of Kingston were deselected by a regional health-care plan in 1995 for economic reasons and could no longer see about 3,000 of their 25,000 patients. The Pennsylvania practice fought back.

Using its computer system, the doctors drafted a letter that was sent to not only the affected families, but also to their employers. The message was subtle but clear: If you want us to continue treating your children you need a new health plan.

People listened. When the end of the year rolled around, many switched their affiliation.

"We had a bunch of mothers who weren't happy," says Dr. Michael Harris, one of the practice's physicians. "About 2,000 have come back."



Dr. Harris

Dr. Harris and his associates, who have changed their name to Pediatrics-Wyoming Valley Health Care, were fortunate. They were a well-known pediatric group in a fairly small community. Their patients

could carry enough clout to force area employers to offer a different or additional health plan.

"We have learned in pediatrics that we control the market," Harris says. "Where the pediatrician goes, the parents will follow. They will switch."

Most physicians aren't so lucky. To protect themselves against deselection they need to take other measures, says Dr. Stanley Pollock, who runs Professional Practice Planners, a physician consulting firm outside of Pittsburgh.

Managed-care plans can drop physicians from their networks

on a whim because doctors often allow the HMO to dictate the finer points of their contract, Pollock says. But often physicians can prevent "without cause" deselection if they pay closer attention and hold out for a better deal, he says.

"How much they will negotiate depends on the community and how many doctors they need, but in most cases they will," Pollock says. "Now that the legislatures are putting their axe to these things, they listen more carefully.

"But it's the same old deal: If you don't ask, you are not going to get. And that is often what

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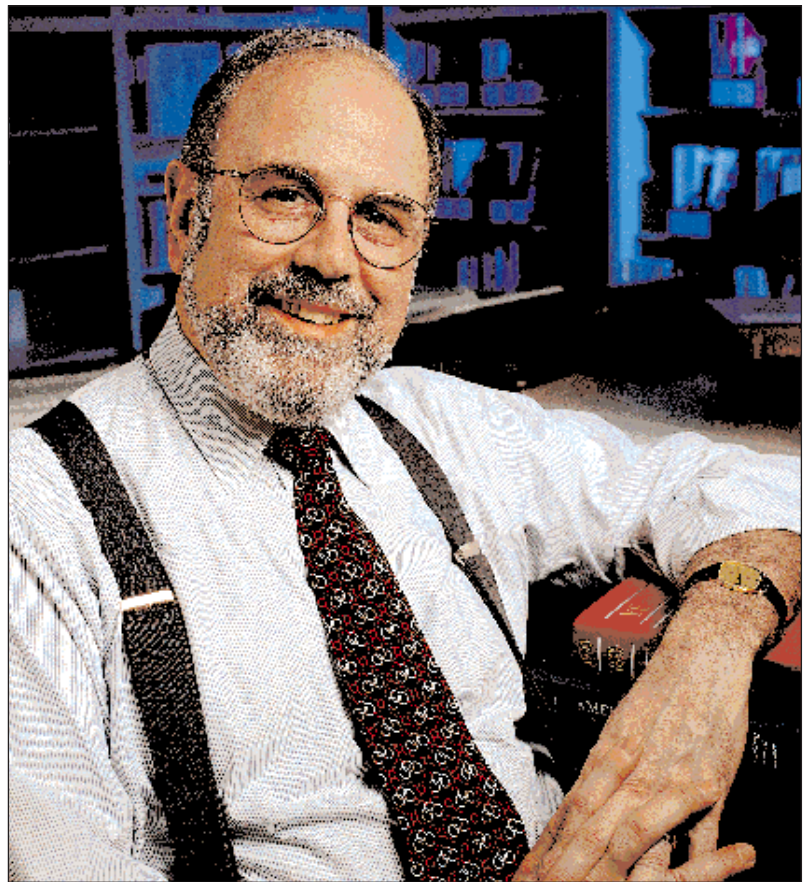
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Dr. Allan Korn, the chief medical officer for Blue Cross/Blue Shield of Illinois: "One of the problems you get into when you start legislating health care and health-care organizations is you get locked into whatever happens to be the flavor of the month when they write the law."

of my duties was to review contracts and advise physicians about contracts. Virtually every contract I saw from health plans all over the country allowed, with very few exceptions, that the plan could simply terminate the physician at will without any kind of due process. Physicians had no appeal rights and could not even get reasons for their dismissal in writing. Just 60 days and out."

In a 1995 survey, six percent of 4,500 practicing physicians reported they had been involuntarily dropped from contracts with

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PHOTO/ART CARRELO

happens. The MCOs push these things in front of the doc's desk and the doc says I'll just sign it because everybody else in the neighborhood is doing it. But then they wind up with all these dilemmas."

Practice consultants suggest physicians take the following safeguards whenever possible:

- ✓ Avoid without-cause provisions. Have the MCO actually list the reasons—loss of license, drug addiction, embezzlement—for which a doctor can be dropped from a network.
- ✓ Know who you are dealing

with. Look into the MCO's history and talk with other physicians to find out what they know and how they treat providers.

- ✓ Sign a long-term contract. The easiest time for an MCO to drop a provider is upon the completion of contract because technically that is not termination, only non-renewal.
- ✓ Stay away from MCOs that do not offer due process upon termination. Many MCOs offer a hearing process and require that doctors make up a decent percentage of the review committee.
- ✓ Get on the boards of your local

MCOs and hospitals. Getting involved will not only cut down your chances of being dropped, but will also allow you to keep an eye on what is going on.

- ✓ Join a physician practice organization or an individual practice association. Large PPOs and IPAs carry clout and can negotiate a single contract for all their providers and prevent their members from getting dropped.
- ✓ Tie in with important specialty-specific organizations who can act on behalf of their members when necessary.
- ✓ Diversify as much as possible

by signing up with several MCOs. Don't allow a single plan to insure an overly large percentage of your patient base.

"Aside from diversifying, we tell doctors to distinguish themselves with their own patients so they feel and know that you are special," says Michael LaPenna, who runs a medical management group in Kentwood, Michigan. "Doctors also need to follow the rules of the managed-care programs and pursue every line of credentialing, certification, or accreditation they possibly can so they can't have those things used against them." ■

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Neighbors Miles Apart

Illinois and Missouri may share over 500 miles of border, but the midwestern states are worlds apart when it comes to legislative health-care reform.

In 1998, Missouri passed some of the most comprehensive legislation found anywhere in the nation. Illinois is one of just 12 states that does not have a single law.

As a result, physicians in Missouri enjoy many protections and safeguards against deselection, while their brethren to the northeast do not.

"It doesn't mean we aren't trying," says Dr. Richard Geline, an orthopedic surgeon and president of the Illinois State Medical Society. "But there is resistance from the business community. The business community looks at this as something that is going to increase the cost of health care and it doesn't want to see that happen."

Illinois has a Republican-controlled government with a history of supporting business concerns. Missouri is run by Democrats. Most believe the political makeup of the two states has everything to do with their ability, or inability, to pass health-care reform.

"Democrats seem to be supporting our efforts and the Republicans are lining up in opposition," Geline says. "But basically that is the way it is everywhere."

Before Missouri passed new laws, both doctors and patients were regularly abused by managed-care organizations,

says Tom Holloway, the director of government relations for the Missouri State Medical Society. Not only were insurance companies and hospitals merging and then dropping numerous physicians from their panels, but doctors were also being shown the door for economic reasons like specializing in expensive diseases such as AIDS or costly populations like the elderly, he says.

But all that is now expected to stop.

Economic deselections happened "off and on" until the legislation was proposed, Holloway says. "But I have not seen big wholesale changes in the last year."

Missouri laws protect both patients and doctors. Patient protections are numerous, but provisions which affect physicians declared the following:

- *Prohibited MCOs from offering inducements for withholding care.*
- *Prohibited MCOs from penalizing providers who advocate for patients.*
- *Deemed HMOs do practice medicine and removed insurance exemptions that prevent them from getting sued for malpractice.*
- *Removed an MCO's ability to decide the size of its own physician network and gave that authority to the state department of insurance.*
- *Provided written selection standards for physicians that do not allow MCOs to avoid high-risk populations or exclude doctors who treat high-risk populations.*
- *Mandated that MCOs must give 60 days notice before terminating a contract and providers must be*

given a hearing should they object.

At least 30 percent of the hearing panel must be comprised of the doctor's clinical peers.

"We are extremely happy," Holloway says. "My guys came out of the woodwork on this. Like never before they got involved in the political process. They wrote letters and made phone calls. Quite a few put out brochures or sample letters for patients. It was really quite an effort. It was hard ball."

Illinois has not seen the same abuses that Missouri has, Geline says. Economic deselection has not been a major concern as managed care has not yet penetrated Illinois to the same degree, he says.

However, that has not prevented doctors from calling for legislation. The state medical society introduced its first reform proposal in 1995, but it took until 1998 before both the House and Senate passed bills.

"Democrats control the House and Republicans control the Senate," Geline says. The bills they passed were very different. "They could not agree and give something to the (Republican) governor to sign so they adjourned and nothing happened.

"But if you step back, you can see the progress we have made over the years. I believe we are getting very close. I have every reason to believe 1999 will get the job done." ■

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managed-care plans. Once this reality was brought to the attention of both judges and lawmakers, many were willing to take action.

By the end of 1998, 27 states had passed some form of physician-protection law and a total of 38 states had passed consumer-protection laws. Nearly 60 percent of the states with physician protections—16 out of the 27—mandate grievance procedures for doctors who face termination from an MCO panel.

The vast majority of these laws have been passed since 1996. Most states that do not have laws either have seen active legislative debate or had bills pass in one or two houses of government before adjourning in 1998.

Continued debate and the passage of additional laws are expected in many states this year.

Where legislation is lacking, court decisions are filling in. In New Hampshire, which does not have physician-protection legislation, the state supreme court recently ruled that MCOs must apply principals of good faith and fair dealing before terminating a physician from a provider network even if the doctor's contract contains a without-cause provision.

A similar case has worked its way to the California high court, which expects to rule sometime this summer.

"There are more and more laws now that go in the direction of 'you cannot simply let these doctors go without at least an appeals procedure'," says Richard Cauchi, a policy associate with the National Council of State Legislatures, an advisory group based in Denver. "There are also laws that move in the direction of continuity of care, which are usually described as consumer protections.

"Under these laws, the patient is guaranteed the right to have their own

doctor regardless of that doctor's legal or contractual status. Obviously that has a strong implication on the provider side as well. But it does not guarantee physicians stay on the books of an HMO," Cauchi says.

Indeed. Physicians can be and still are dropped from HMO panels for economic reasons even in states with comprehensive protection laws. In New York, for example, Kaiser Permanente on January 1 of this year canceled the contracts of 145 doctors who were associated with the Catskill Alliance of Physicians, an independent physician association based in Kingston.

Seeking to downsize its physician network due to shrinking enrollment, Kaiser chose not to renew the doctor group's contract after the IPA informed the MCO it wished to renegotiate certain economic terms.

Although about 80 percent of the 145 physicians were eventually able to renegotiate individual contracts with Kaiser, the MCO, which insures about 10,000 Kingston-area families, used its financial clout to cherry-pick only the providers it wanted and re-signed most of them at a lower capitation rate, said Ralph Ricciardi, the CEO of the Catskill Alliance.

"A lot of them entered into financial contracts that are a lot less lucrative," says Ricciardi, who stated his doctors were unwilling to band together and negotiate a better deal. "They were afraid."

Ricciardi adds, "Certain doctors, primarily primary-care physicians who had a significant number of Kaiser patients, did not want to even take the chance they may lose access to those patients. That is the leverage an HMO has when it gets some size and market penetration."

Kaiser was able to have the upper hand despite New York's physician protection laws because the IPA had an automatical-

ly renewing "evergreen" contract that allowed either party to terminate their affiliation at the end of its term. Since Kaiser never technically canceled the contract, it just simply did not renew an old agreement, all laws regarding termination did not apply.

"The bottom line is they can still cut doctors loose," says Tom Donoghue, a spokesperson for the Medical Society of the State of New York. "In the end, the basic legal structure is it's a business. And if it's a business decision not to have as many employees—even though the National Labor Relations Board does not recognize doctors who contract with HMOs as employees—then they can do so."

Despite these loopholes, many MCOs are attempting to become more physician friendly. Even in states that do not have physician-protection laws, MCOs have established their own due-process guidelines.

Reasons for this differ from region to region, but much has to do with legislative involvement. Although physicians in most cases are pleased with the recent rash of new laws, those who run managed-care plans are not.

Concerned they will be forced to deal with laws they find intrusive, managed-care groups are attempting to reform the way they do business before their hand is forced. In Missouri last year, the legislature seized control over the size of physician networks from MCOs and gave state government that power.

The recent rash of legislation "has changed the way some managed-care organizations do business," says Dr. Allan Korn, the chief medical officer for Blue Cross/Blue Shield of Illinois. "The pity is we have come to this point. If every managed-care organization had been more open and candid with the clinical community over the past five to 10 years, perhaps some of this

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might not have happened.”

Legislation frightens MCOs for two main reasons, Korn says. Laws are written by people who don't always fully understand the issues, and once damaging legislation is passed, it is nearly impossible to get it altered.

Considering the forces that control health care are ever changing, passing laws that are designed to fix the problems of today can easily get in the way of altering the system so it better suits tomorrow, Korn says.

“One of the problems you get into when you start legislating health care and health-care organizations is you get locked into whatever happens to be the flavor of the month when they write the law,” Korn says. “Although the clinical-practice community right now sees itself as achieving some significant political victories with each of these bills, I think they are very pyrrhic victories because the physicians will ultimately be the victims when they find themselves locked into certain practice patterns or modalities that now cannot be changed.”

Ironically, Dr. Sloane of the TMA, who helped fight to pass the legislation in Texas and credits the new laws with reducing incidents of deselection, agrees.

“I don't think there is anything I could say to disagree with that except sometimes to get everyone's attention it does have to start as a legislative process,” he says. “Every so often, that is the only way to get everyone thinking about the problem.”

Political intervention has become widespread. Not only are all 50 state legislatures either passing or pondering laws, but forces in Washington D.C. are also poised to join the fray.

In his State of the Union Address, President Bill Clinton encouraged Congress to pass legislation commonly referred to as the Patient Bill of Rights.

Although this popular Democratic initiative has very little to do with physician deselection—its main points include anti-gag provisions, access to specialists, external review when care is denied and the ability to sue HMOs for malpractice—the AMA and other physician groups continue to lobby for federal physician protection laws.

“Deselection has been on the minds of people here at the AMA for some years now,” says James Stacey, an AMA spokesperson in the organization's Washington D.C. office. “But I don't think the will of Congress is moving in that direction.”

As a result, the AMA and other physician groups are looking to the courts as they ponder the potential of unionizing doctors so they can pull more weight when negotiating with managed-care plans.

“There is a law suit pending before the NLRB regarding residents and interns,” says Elizabeth Dearscent, council to the division of government affairs for the Medical Society of the State of New York. “And if that goes our way, we are going to begin to organize them. After that, we will turn our attention to doctors who are employees of hospitals and MCO plans, and then we will advocate and look for ways to negotiate on behalf of the self-employed physicians.”

Even though self-employed doctors are technically independent contractors, the evolution of managed care, which now insures about 135 million Americans, and its ability to control the economic fate of private physicians could prompt courts to rule in favor of their right to unionize, Dearscent says.

“Physicians throughout the country very much want to retain or reclaim some leverage in their discussions with the managed-care industry,” she says. “The AMA, at its interim meeting in December, heard

from the physician community through its delegates and organization is a high-priority item for them.

“I think it is the new wave, but I really don't know yet what its true potential is. But it is a direction the physician community has asked its leadership to take.” ■

John Zicconi is a reporter in Stowe, Vermont. He is a regular contributor to UO.