Supplement to the Los Angeles and San Francisco
Daily Journal
JULY 5, 2023

TOP HEALTHCARE LAWYERS 2023

The Wild, Wild West: Practicing Health Law in California

By Mark E. Reagan

I started practicing health law in California in 1990. It was complicated then but nothing like what it means to be a practitioner in 2023. As demonstrated throughout the course of the COVID-19 pandemic, the complexity of multiple overlapping elements of federal, state and local regulation and oversight have become commonplace and overwhelming.

Going forward, the phenomenon of greater activism by an increasing number of competing health care bureaucracies will create significant challenges for California health law practitioners and our clients.

Even before the pandemic, these complications were being driven by two primary trends in the functioning of the federal and state governments.

The first trend is the increasing inability or outright refusal of Congress to enact reticulated statutory language in important enactments. In doing so, Congress has left the heavy lifting to the Centers for Medicare and Medicaid Services (CMS) to issue regulations and sub-regulatory guidance. Not surprisingly, that outright delegation of health policy to CMS has produced an environment of "shifting sand" as Presidential administrations change and widespread uncertainty and confusion abounds for most participants in the California health care infrastructure and elsewhere.

The second trend is a substantially similar approach to California health care legislation but with a different twist. Rather than merely delegating important policy decisions to the regulators (largely the Department of Health Care Services and the Department of Public Health), the California legislature has increasingly authorized those bureaucracies to implement regulations without even proceeding through formal rule-making with the Office of Administrative Law.

In other words, California regulators have been empowered to establish binding regulation through sub-regulatory guidance under the guise of convening "stakeholder meetings" and then issuing binding instructions, letters and FAQs. It's almost as though this standardized legislative language has been established as a condition for the Governor's signature by the Executive Branch.

These two phenomena have produced mountains of new requirements that, at times, have taken great liberties with the letter as well as spirit of implementing legislation, and created very different outcomes for health care clients. It has also operated to deprive these clients of a basic understanding of their rights and responsibilities and left health law practitioners trying to make sense of the new regulatory state and what it means.

Inevitably, picking up these pieces has resulted in the increasing use of the judicial system to resolve conflicts. Of course, the Courts are not experts in the complicated world of health law and policy. As a result, judges are often tempted to reflexively defer to the regulators. More often than not, they "throw up their hands" trying to unwind various "Gordian knots" of law and regulation and ultimately rely on the government as the "experts" in this heavily regulated area. This reality gives rise to clients looking for legislative relief and, if successful, the cycle only repeats itself.

Enter the pandemic and its empowerment of Local Health Officers and Departments. Much like the "awakening" of the proverbial "sleeping giant," these actors immediately launched themselves full speed into the fray and began enacting various ordinances and directives designed to address the pandemic.

At times, this involved taking action in direct conflict with state and federal law. Even when the action did not

conflict, it operated to create a new exercise for health law practitioners–understanding the new hierarchy of a three-headed bureaucracy which dictated that the most "restrictive requirement" was the new baseline client obligation. This assumed, of course, the three competing enactments were actually known and understood. Chaos ensued.

Coming out of the pandemic, however, this new third regulator had found its voice. This produced a variety of aberrant actions. Some communities rebelled against their assigned Local Health Department and sought to create their own, regardless of the legalities of doing so. Others began legislating into areas of law and regulation without regard to the scope of their authority or the presence of other state and federal authorities already occupying the area. More chaos.

So where does that leave us all? Here's what we know. We know that every involved regulatory agency at every level (local, state and federal) wants to regulate health care. But do they have the authority? Are they experts? And can they always override one another through a more restrictive pronouncement?

How it ends is anyone's guess. It's a race to even more complexity and confusion.

But one thing should be clear to us. It will be up to health law practitioners to help clients understand exactly what is happening and why. And after they recoil in horror, we will have to help them figure out what to do next.

Welcome to the Wild, Wild West!"

MARK E. REAGAN *is managing shareholder at Hooper, Lundy & Bookman, P.C.*

Reprinted with permission from the *Daily Journal*. ©2023 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.