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TOP HEALTH CARE LAWYERS 2020



Benjamin J. Fenton

The single greatest change caused by the government’s response to the coronavirus pandemic has been its new attitude toward telehealth, said Fenton, a litigation partner at Fenton Law Group.

“Federal health care programs like Medicare have now issued new orders with much stronger incentives for doctors to conduct a lot of patient interaction using telehealth techniques,” said Fenton, the son of firm founder Henry R. Fenton. “Formerly the feds paid much lower rates and the initial meeting couldn’t be by telehealth. I think it is fantastic for both providers and patients that they made the reimbursement levels equal.

“With everyone staying home now it will be vital, and when this is over it will be hard to go back.”

He added that he’s already been asked for guidance by a physician client as concerns arise about security and privacy in remote interactions with patients.

“There’s a need for businesses to step up to facilitate the way physicians can pull up labs and medical records beyond Skype,” Fenton said.

Fenton and his firm specialize in fraud and abuse cases, medical staff disputes, credentialing, Medicare and Medi-Cal reimbursement, Stark Law and other anti-kickback rules, Drug Enforcement Administration and Food and Drug Administration issues, business disputes, long-term care, behavioral health and alcohol and substance abuse cases.

Privacy issues are another key area of practice. He

prevailed for a physician client, Kamyar Cohanshoet, against the Medical Board of California after the board filed a petition for an order to obtain medical records of five of the physician’s patients. The move was part of an investigation, based on an anonymous tip, into the physician’s prescription of controlled substances to the patients. The Los Angeles County Superior Court granted the order; Fenton successfully took the case to a state appellate panel and, in January 2019, won reversal. *Grafilo v. Cohanshoet*, B285193 (2d DCA, filed April 11, 2017). The plaintiff, Dean R. Grafilo, is director of the state Department of Consumer Affairs.

In a published opinion, the unanimous panel held that the medical board must demonstrate a compelling state interest before a court will order disclosure of patient records in accordance with an administrative subpoena. The ruling clarified that courts should apply the compelling interest standard instead of a simple balancing test in deciding whether to require disclosure.

“We are not persuaded an anonymous complaint which provides scant detail, particularly about who and when the prescriptions were written, constitutes substantial evidence of good cause,” wrote Presiding Justice Tricia A. Bigelow for her colleagues.

“This was major pushback against government overreach in seeking patient records as part of its oversight function,” Fenton said. “We affirmed individual privacy rights and stopped the case in its tracks.”

— John Roemer



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Fenton founded his namesake law firm in 2014 after decades in the health care industry to provide legal services to a sector that has changed and adapted to conditions from the Affordable Care Act to the Health Insurance Portability and Accountability Act to the Confidentiality of Medical Information Act — and now faces unprecedented stresses amid a deadly worldwide coronavirus pandemic.

“There’s a tremendous burden on doctors and nurses today,” he said, “as they have to proceed to heal patients even as they must concern themselves with the lack of protective equipment. I’ve been practicing for a long time”—Fenton attended law school in the late 1960s—“and this is completely unprecedented.”

Fenton predicted that regulators and courts will view with leniency cases arising from the emergency. “To the extent that there are complaints about care provided by medical professionals, there’s likely to be a lot of leeway afforded them in the course of hearings by medical boards or the consideration of malpractice suits.”

He said his firm has rolled with the coronavirus crunch. “We’re able to work remotely. Courts are delaying things by granting extensions and continuances, but it seems the same sorts of problems arise. Much of our work now predates the crisis, but new cases continue to flow in. We continue to represent physicians, dentists and pharmacists. Business is as usual except for the reality

that there is no office and no face-to-face with clients. We carry on.”

In a notable case for Fenton last year, he successfully defended a physician before the Medical Board of California and won the dismissal of an accusation without having to conduct a hearing. The board alleged that his client, an ophthalmologist, engaged in gross negligence in her treatment of a pediatric patient. The issue was brought to the board’s attention by a competitor of Fenton’s client. Fenton said the claims were specious at best.

“We felt the matter was defensible. Then we came to suspect that the seven-year statute of limitations had run. We asked for documents.” The request put the medical board on notice that Fenton’s defense would challenge the case on limitations grounds as well as on the merits. Rather than turn over the documents, the medical board withdrew the accusation and dismissed the case.

“It was a great victory that not only resulted in a complete dismissal for the client but also allowed her to win with minimal expense,” Fenton said. “I work with the board all the time and there are very good people there, but sometimes they forget their goal is to do justice. In all venues there are people who forget that this is a search for truth.”

— John Roemer