

Supreme Court Ruling Limits Religious Belief Practice Variation

by Dan Groszkruger, JD, MPH, Contributing Editor

Last August, the California Supreme Court sent a message to physicians that they may not base certain treatment decisions on individually-held religious or moral beliefs. But, while the Benitez case (“Benitez”) was widely publicized, the true scope of the Court’s message remains obscure. Simply stated, the California Supreme Court ruled that a physician may not, based on the physician’s religious convictions, deny to homosexuals medical services available to other patients. Benitez appears to represent a fairly narrow rule, applicable only to elective fertility treatments sought by homosexual patients.

In Benitez, a doctor-patient relationship began in 1999, when Guadalupe Benitez first sought care from Dr. Brody, an obstetrician with North Coast Women’s Care Medical Group (NCWCMG), located in northern San Diego County. The patient along with her lesbian partner initially sought Dr. Brody’s care and advice about how to become pregnant using intra-vaginal self-insemination (IVI). Benitez used sperm obtained from a sperm bank but she never was able to become pregnant using non-medical means. She ultimately became pregnant and gave birth to a child, following in vitro fertilization.

When Benitez sought care with Dr. Brody she identified herself as a homosexual. She denies that she was told that Dr. Brody’s religious beliefs would prevent her from performing any medical procedures, if necessary. Dr. Brody ultimately declined to perform medical fertility services because Benitez was unmarried. In her lawsuit, Benitez alleged that Dr. Brody and her colleagues wanted to prevent her from becoming pregnant because she was a homosexual. (Since the court case was appealed prior to trial, there remained an unresolved issue which will be determined at the upcoming trial: did Dr. Brody decline to perform intrauterine insemination (IUI), a medical procedure, because Benitez was a homosexual, or because she was an unmarried woman?).

Apparently, Benitez interpreted Dr. Brody’s refusal to perform IUI on an unmarried woman as a mere pretext, to disguise her bias. But, Benitez’ lawsuit ignored Dr. Brody’s willingness to provide fertility treatments (mainly medication, over a 10-month time period) to assist her efforts to become pregnant by non-medical means.

The Court based its decision on a California law known as the Unruh Civil Rights Act. That law provides: “All

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persons within . . . this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal . . . services in all business establishments of any kind whatsoever.” The law has been held to apply to both individual private practice physicians and to medical groups. Prior to the events in this case, courts determined that the Unruh Act prohibited sexual orientation discrimination. But when Benitez sought treatment from Dr. Brody, the Unruh Act did not prohibit discrimination based on marital status. (Of note, Benitez’ lawsuit did not allege discrimination based on marital status.)

“Physician should not base certain treatment decisions on individually-held religious or moral beliefs.”

The Court’s decision might apply only to obstetricians who attempt to treat infertility problems suffered by lesbian patients. However, there is ample room for disagreement on the question of whether the Benitez rule extends to other types of physician services.

It is fairly certain that the reach of Benitez will be tested in future cases, pitting religious objections against a patient’s civil rights. Religious rights are constitutional in origin, while the legal rights of homosexuals depend entirely upon interpretive case law, handed down by appellate courts. In view of the recent controversy (California’s Prop. 8) over the legality of “gay marriage,” there is little doubt that future cases will explore the intersection of these religious and civil rights.

Benitez established that there is no religious-conviction exception to application of the Unruh Civil Rights Act. But, outside of situations involving obstetricians treating homosexual patients with fertility issues, it is unclear that the Benitez rule prohibits physicians in other specialties from practicing medicine in ways consistent with individually-held religious or moral beliefs. Practically speaking, physicians should be able

to avoid liability by offering, or declining, the same medical services to all. This will ensure that every patient receives “full and equal” access to any medical procedure, but that may not be an easy decision for physicians or a practice.

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As always, the Risk Management Hotline at 800-252-0555 is available for questions.



The issue of freedom of religion also continues to be defined by the federal government. On December 18, 2008 the Bush Administration announced a new regulation that extends the “right of conscience” to a broader range of health care workers and activities. This new regulation extends the current federal protection which allows doctors and nurses to decline to provide services based on the right to act according to their conscience -- a protection which has existed for 30 years. President-elect Obama’s team is evaluating this regulation.

End-of-Life Care Decisions

A new California law creates a standardized physician order form to broaden the vision of resuscitative or life-sustaining treatment.

by Ann Whitehead, RN, JD
Risk Management & Patient Safety Specialist



Effective January 1, 2009, Assembly Bill (AB) 3000 amends existing law adding an optional standardized physician order form, the Physician Orders for Life-Sustaining Treatment (POLST) form, to the currently recognized “do not resuscitate” (DNR) order form. This law does not remove any of the currently recognized health care advanced directives requirements; rather it seeks to include POLST orders as an addition or an alternative to the other forms. The use of the POLST form is not mandatory but highly recommended for seriously or terminally ill individuals. If used, there are specific requirements which must be met, which are explained below.

“POLST is a physician’s order form that outlines a plan of care reflecting the patient’s wishes concerning care at life’s end.”

The value of the POLST form is that it compliments the advanced directive by taking a patient’s wishes regarding life-sustaining treatment, which may be set forth in the advanced directive, and converting them to

medical orders. The POLST form becomes an actual set of physician orders which will follow the patient across all health care settings. It allows the patient to identify specific issues related to end-of-life care. The advanced directive may include this and additional information such as designation of a surrogate decision maker, general health care wishes and post-death wishes. The POLST form addresses a the patient’s wishes about specific medical treatments, including cardiopulmonary resuscitation (CPR), antibiotic use, artificial nutrition, and degree of medical intervention desired by a patient when he or she is not in cardiac arrest, such as intubation, or artificial ventilation. The form also provides more detailed instructions as to when, where, to what extent, and under what circumstances life-sustaining or resuscitative measures should be employed.

“The POLST form becomes an actual set of physician orders which will follow the patient across all health care settings.”

What is important for you to know:

For a POLST form to be valid in CA:

- It must be explained by a licensed health care provider to the patient (or the patient’s legal health care decision-maker under CA law).
- The provider should, also, inform the patient about the difference between a health care advanced directive and the Physician Orders of Life Sustaining Treatment form. This should be documented in the patient’s medical record.
- The form should be pink and must be signed by a physician and the patient or legal representative.

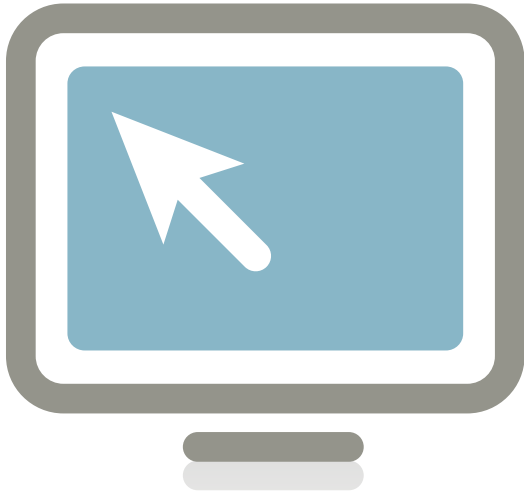
Other important information:

- Like the DNR form, the POLST form will apply both in and out of hospitals. Any health care provider who honors a POLST form in good faith is protected from liability.
- Your patient should be instructed to keep a copy of their POLST form on their refrigerator, by their bed

or in their wallet for easy access, if needed. If the form is part of your medical record, forward it to the hospital with admission orders.

- It is also important to determine how your hospital is going to honor a patient POLST order form.

More information about POLST in California, a sample form and patient brochure may be found at the California Coalition for Compassionate Caring website at <http://www.finalchoices.org>.



Risk E-Notes

by Ann Whitehead, RN, JD
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Earlier this year, the Cooperative of American Physicians, Inc. Risk Management & Patient Safety Department launched a new online communication. This bi-monthly e-mail newsletter, *Risk E-Notes*, is designed to provide a brief piece of risk management information to education your office management staff. With the introduction of this risk management communication tool, it is our goal to assist you to improve patient care, establish consistent office systems and reduce the number and severity of professional liability claims brought against you.

We know you will want your staff to get this important communication to help keep them up-to-date.

Please provide an office or personal e-mail address, your membership number and an office staff contact (first and last name) to llopez@cap-mpt.com so that we may send this informative newsletter to your office starting in January 2009.

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