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President's Message

The Ban on the Corporate Practice of Medicine

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OF THE HUNDREDS OF BILLS introduced this year in California, three bills (the most in a single year on this topic) could erode the ban on the corporate practice of medicine in California. Their proponents have argued that allowing certain hospitals and hospital districts to hire doctors will increase access in underserved areas.

The three are AB 646, AB 648 and SB 726. As I write this article, only SB 726 (Ashburn) remains in play, with amendments including major components of the two other bills. The CMA opposes this bill as amended, arguing there are more effective ways to increase access in underserved areas. The interests of patient protection, as well as physician integrity, served by the corporate bar are too important to be pushed aside.

The Bar on Corporate Practice

California Business & Professions Code Sections 2052 and 2400 prohibit lay individuals, organizations, and corporations from practicing medicine. In simple terms, hospitals or other corporations cannot hire or employ physicians or other health care practitioners. There are important reasons for these laws. Shielding the physician-patient relationship from commercial interests has been supported repeatedly by California courts under case law since 1938.

There has been long-standing legislative support for the public policy against permitting untrained or unlicensed people to practice medicine. For example, the corporate practice bar's public policy concerns were expressly incorporated into the Moscone-Knox Act., commencing at Corporations Code Section 13400.

Furthermore, as the Attorney General's office has repeatedly noted, the reasons underlying this proscription are two-fold:

"[F]irst, that the presence of a corporate entity is incongruous in the workings of a professional regulatory licensing scheme which is based on *personal* qualification, responsibility and sanction, and second that the interposition of a lay commercial entity between the professional and his/her patients would give rise to divided loyalties on the part of professional and would destroy the professional relationship into which it was cast."

Exceptions

There are many exceptions to the corporate practice of medicine bar. Foremost, it does not apply to

physician partnerships or professional medical corporations. The bar also does not apply to counties, given the broad "police powers" granted to them.

Business & Professions Code Section 2401 allows a clinic operated primarily for medical education by a private or public university medical school to employ physicians. Case law has found the UC Regents are acting as a "state" and, because every patient is potentially a "teaching" patient, the Regents are excluded from the corporate practice of medicine bar.

Hospitals are exempt for Medi-Cal psychiatric inpatient services. Under narrow circumstances, community clinics and primarily research clinics can employ physicians.

In 2003, the Legislature created an exemption (under SB 376) for a rural hospital district pilot program. Specifically, a district hospital in a county with a population of less than 750,000 that provides more than 50 percent of its care to Medicare, Medi-Cal and uninsured patients and that reported a net loss to the Office of Statewide Health Planning and Development in fiscal year 2000-2001, may employ up to two physicians.

The medical foundation model is a less clear exception. It enables some alignment and integration of interests or incentives between hospitals and physicians. Under a complicated arrangement, a hospital may create, but not own, a 501(c)(3) medical foundation. The foundation can own and operate 1206(l) clinics if it meets rigorous requirements. The clinics arrange for physician services through professional services agreements with one or more medical groups. Physicians are employed by the medical groups, not by the clinic, foundation or hospital.

Arguments in Support of the Bar

The driving force behind hospital employment of physicians is the alignment of incentives. This, however, may not lead to patient-centric care. While the concept of the physician as an independent patient advocate does not guarantee quality patient care, it is a potentially powerful safeguard.

I am not just referring to malevolent intent or criminal behavior by corporations, which has been known to occur rarely. The influence on decisions can be subconscious. It is basic human nature to want your team (or employer) to succeed. An example from our own backyard is Redding. Even without direct employment, incentives between a couple of doctors and the hospital were aligned. This resulted in a climate of intimidation, which suppressed and delayed appropriate peer review.

Direct employment of physicians by hospitals has the potential to squeeze out independent physicians, ultimately eliminating competition and diminishing patient choice.

But what about access to care and physician staffing difficulties in complying with federal emergency transfer legislation? The pilot program referred to above, to improve access to care in underserved areas, has not shown direct employment of physicians to be a factor. A copy of the Medical Board of California's report on this can be found at www.mbc.ca.gov.

The Medical Board also supports the corporate bar. Furthermore, the Office of Inspector General of Health and Human Services studied and reported on the subject.[1] It concluded "these prohibitions do not appear to present a major overall problem for hospitals" and "the prohibition on hospital employment of physicians is a relatively unimportant factor in providing emergency coverage." The bottom line is hospitals have many recruitment options (including the medical foundation model) other than corporate practice of medicine.

Arguments Against the Bar

Certainly one of society's great problems is the escalating cost of health care. There is growing belief and

data indicating that, for many reasons, the models of care delivering the highest quality and most cost-efficient care are those that align hospital and doctor interests.

There are other ways to assure the patient's best interests are not overlooked, such as peer review, regulations and the threat of malpractice litigation. Despite the lack of proof in California, physician recruitment and retention could potentially be best addressed by hospitals via direct employment. Finally, hospitals in many states can employ physicians, further testimony against the need for the bar.

My intent is to provide a brief, balanced review of the topic and our positions on pending legislation. The potential benefits of SB 726 for better access and recruiting are not certain, yet our willingness to fight for the integrity of patient care is still the primary function of SSVMS and the CMA. With rising pressures to control costs, any tool that can help assure the patient's interests come first is worth fighting to preserve. We as Californians can be proud of our corporate practice of medicine bar.

For those interested in more information, I encourage you to start with the CMA's ON-CALL Document #0280 Corporate Practice of Medicine Bar, and the CMA's Legislative Hot list at www.cmanet.org.

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1. State Prohibitions on Hospital Employment of Physicians, November 1991 (federal publication # OEI-O1-91-0072).