

**TESTIMONY OF KATHLEEN (Kitty) JUNIPER
TO SENATE COMMITTEE ON BUSINESS, PROFESSIONS AND ECONOMIC
DEVELOPMENT
SENATOR JERRY HILL, CHAIR**

**INFORMATIONAL HEARING ON THE CORPORATE PRACTICE OF MEDICINE
May 2, 2016**

Senator Hill and Members of the Committee,

My name is Kitty Juniper and I am a health care attorney with the health care practice at Buchalter Nemer, P.C., a full service California-based law firm. I have lectured and published nationally regarding California's corporate practice of medicine (CPOM) ban for several years. More importantly, I and members of our firm routinely advise clients on CPOM issues. Some of these clients include medical groups, clinics, national retail companies, optical companies, specialty health care plans, telehealth and device companies, imaging facilities, non-physician practitioners and many other types of providers and businesses.

At the Committee's request, I am here to provide a very brief background on our practical experience with CPOM issues and to comment on the California Research Bureau's Report on the Corporate Practice of Medicine in a Changing Healthcare Environment (Report). I congratulate the authors for succinctly summarizing what is a complicated area of health care law and one that can be challenging to the delivery of new health care products and services.

I am not here to advocate for or against the CPOM ban. I have worked with clients who vigorously defend the doctrine and clients who view the doctrine as impractical, burdensome and unnecessary. Our job is to work with our clients to find solutions that comply with the CPOM ban.

In the short time we have today, I would like to touch on the following:

1. The Breadth of CPOM in California
2. Typical Business Solution – management services arrangements and friendly professional corporations
3. Comments on the Report

A. The Breadth of the Corporate Practice of Medicine Doctrine

When we refer to CPOM, we are talking about more than the ban against lay person employment of licensed practitioners or ownership of practitioner practices (I will refer to lay persons today as corporations). CPOM also bars corporations from controlling practitioners' exercise of professional judgement and their delivery of health care services.

What constitutes control of the practice of medicine is the subject of various court cases and opinions of the Office of the Attorney General and guidance from the relevant regulatory boards. These interpretations are fairly broad and business services that a company may typically provide in one

Page 2

industry are unlawful controls in the medical field. Courts have made it clear that in determining whether excessive control has been exercised that they will scrutinize not only controls that are exercised over the delivery of clinical care but they also will examine the extent of control exerted over a corporation's provision of business services to a medical practice. This is typically a fact-specific analysis.

Corporations cannot contract with practitioners to provide medical services on their behalf, hold themselves out as practicing medicine by having practitioners practice under their corporate name, advertise on practitioners' behalves, take a percentage of a practitioner's professional fees in exchange for business services or make other decisions that California has determined are within the professional practice of medicine. There is an interesting pending case brought by the ACLU, in which the California Medical Association recently intervened, that alleges that a Catholic hospital's compliance with its Ethical and Religious Directives for Catholic Health Care violate the CPOM ban by interfering with a doctor's medical judgment and the doctor-patient relationship. There, the hospital has relied on the Directives in denying a doctor from performing post-partum tubal ligations.

While in theory CPOM sounds somewhat straightforward, in practice it can be difficult to apply in certain situations. This is particularly true with new health care products and services, including eHealth devices, and their development and ownership by corporations. Practitioners and companies alike would welcome more specific guidance in this area

Management Services Organizations and Agreements.

Notably, California law does not prohibit practitioners from contracting with corporate management services organizations (MSOs) to help them run certain aspects of their practices. This is the typical business arrangement made by corporations who enter California with businesses that may employ or contract with practitioners to deliver healthcare products or services in another states. The California Medical Board sets forth on its website certain acts and decisions that it considers must be made by physicians who enter into these business arrangements.

There is no doubt the CPOM ban complicates business arrangements causing the creation of additional business structures than those used in other states. We have found that these arrangements are not ideal for corporations compared to many other states. Nonetheless, the companies find workable solutions and ways to comply with the CPOM doctrine in California. We help them structure their business relationships and contracts carefully so they do not exercise unlawful control over practitioners and run afoul of CPOM. Whether the inefficiencies created are worthwhile is something this Committee and the legislature might hopefully resolve.

Comments on the 2016 Report

The Report discusses AB 684 and the recent changes to the optometry and optical company laws and specifically addresses the landlord tenant requirements therein. The Report also suggests that elements of those laws might be used as a model for other business relationships in the medical industry such as retail clinics. It is important to clarify that AB 684 made changes to laws that previously prohibited landlord tenant relationships between opticians and optometrists. Those types of landlord tenant relationships are generally not banned between physicians and retail entities, including opticians and optical companies. In fact, AB 684 recognized that and specifically excluded doctors and medical groups from its application. I think that AB 684 should be viewed as a unique solution where there were various factors at play. Using

Page 3

the AB 684 landlord tenant requirements as a model for business relationships would increase the requirements for a medical group's lease where there may be no need.

I agree with the Report's statement that CPOM requires that national retail clinics who want to do business in California change their usual business structure and operating practices. However, this goes beyond retail primary care clinics. For instance telemedicine and eHealth device companies are growing and entering the state and must comply with the CPOM doctrine. The Report also does not address employer-based healthcare clinics, which also are on the rise.

Finally, I urge the Committee not to impose new agency approvals with any of the changes that may be made that involve the CPOM doctrine. While the CPOM may sometimes complicate business arrangements in health care, particularly where businesses are testing new products and services to roll out nationally, what will keep them out of the market are the delays caused by agency approvals. These delays wreck their business plans and create uncertainty for their forecasting and otherwise.

Thank you for asking me to address this distinguished Committee. I would be happy to provide any further information or formal documents that might be helpful to your deliberations.

Kitty Juniper