2022 Council Resolution 56: Policy Statement on the Corporate Practice of Medicine

Council Action: **AMENDED AND ADOPTED**

Board Action: **ADOPTED**

Status: **Completed**

SUBMITTED BY: Charles F Pattavina, MD, FACEP
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Purpose:

Adopt a policy statement on the corporate practice of medicine based on the California Medical Board's guidance.

Fiscal Impact:

Budgeted committee and staff resources for development of a policy statement. Unbudgeted costs of $25,000 – $30,000 for potentially obtaining a legal opinion.

WHEREAS, A significant number of the nation's emergency departments (EDs) are controlled by a staffing company with private equity backing or ownership; and

WHEREAS, Optum, a subsidiary of the United Healthcare, an insurer, through Sound Physicians has significant ownership of emergency medicine practices; and

WHEREAS, The Corporate Practice of Medicine (CPOM) doctrine exists in many states as a legal doctrine to keep the business interest out of the physician-patient relationship; and

WHEREAS, The CPOM doctrine has as its main purpose the protection of patients and the avoidance of the commercialization of the practice of medicine; and

WHEREAS, ACEP has filed an amicus brief in support of the American Academy of Emergency Medicine – Physician Group (AAEM-PG) litigation against Envision that addresses the CPOM doctrine in California and the California Medical Board's guidance on the CPOM; and

WHEREAS, ACEP, ACEP members, or other stakeholders may be called upon to be engaged in or offer amicus opinion in other CPOM matters in the future or to testify or opine in litigation, and having an existing policy statement will assist ACEP in those circumstances; and

WHEREAS, The membership of ACEP has a very negative view of the corporatization of emergency medicine based on the results of the 2021 ACEP Workforce Task Force survey and the collected experiences recently reported to the Department of Justice and the Federal Trade Commission by ACEP (letter to Lina Khan and Jonathan Kanter, April 20,2022); therefore be it

RESOLVED, That ACEP adopt the following policy statement based on the California Medical Board's guidance:

ACEP Policy Statement on the Corporate Practice of Medicine

ACEP strongly believes that the physician-patient relationship should be free of commercialization and undue

influence by business interests. The corporate practice of medicine prohibition is intended to prevent unlicensed persons from interfering with or influencing the physician's professional judgment. The decisions described below are examples of some of the types of behaviors and subtle controls that the corporate practice doctrine is intended to prevent. The following health care decisions should be made by a licensed physician and would constitute the unlicensed practice of medicine if performed by an unlicensed person:

- Determining what diagnostic tests are appropriate for a particular condition.
- Determining the need for referrals to, or consultation with, another physician/specialist.
- Responsibility for the ultimate overall care of the patient, including treatment options available to the patient.
- Determining how many patients a physician must see in a given period of time or how many hours a physician must work.

In addition, the following "business" or "management" decisions and activities, resulting in control over the physician's practice of medicine, should be made by a licensed physician and not by an unlicensed person or entity:

- Ownership is an indicator of control of a patient's medical records, including determining the contents thereof, and should be retained by a licensed physician.
- Selection, hiring/firing (as it relates to clinical competency or proficiency) of physicians, allied health staff and medical assistants.
- Setting the parameters under which the physician will enter into contractual relationships with third-party payers.
- Decisions regarding coding and billing procedures for patient care services.
- Approving of the selection of medical equipment and medical supplies for the medical practice.

The types of decisions and activities described above cannot be delegated to an unlicensed person, including (for example) management service organizations. While a physician may consult with unlicensed persons in making the "business" or "management" decisions described above, the physician must retain the ultimate responsibility for, or approval of, those decisions.

The following types of medical practice ownership and operating structures also are prohibited:

- Non-physicians owning or operating a business that offers patient evaluation, diagnosis, care, or treatment.
- Management service organizations arranging for or providing medical services rather than only providing administrative staff and services for a physician's medical practice (non-physician exercising controls over a physician's medical practice, even where physicians own and operate the business).

In the examples above, non-physicians would be engaged in the unlicensed practice of medicine, and the physician may be aiding and abetting the unlicensed practice of medicine.

Background:

This resolution requests the College to adopt a policy statement on the corporate practice of medicine based on the California Medical Board's guidance.

Laws regarding the corporate practice of medicine vary from state-to-state. Governmental agencies have authority to prohibit certain behavior from companies licensed to do business in their jurisdictions. ACEP, however, does not have equivalent authority over separate legal entities and as such, some prohibitory language included in the resolution may not be enforceable by the College.

Although ACEP does not have a specific policy statement on the corporate practice of medicine, in April 2022, the ACEP Board of Directors approved the "ACEP Statement on Private Equity and Corporate Investment in Emergency Medicine" reaffirming ACEPs core beliefs and emphasizing the physician-patient relationship as the moral center of medicine that can never be compromised. The statement includes:

"Medical decisions must be made by physicians and any practice structure that threatens physician autonomy, the patient physician relationship, or the ability of the physician to place the needs of patients over profits should be opposed."

The Emergency Medicine Group Ownership Task Force was created in response to Amended Resolution 58(19)

Role of Private Equity in Emergency Medicine. The task force is currently preparing a report of its findings to address the effects of different ownership structures on the practice of emergency medicine and the impact on individual physicians.

ACEPs policy statement "Emergency Physician Rights and Responsibilities" states:

"Emergency physician autonomy in clinical decision making should be respected and should not be restricted other than through reasonable rules, regulations, and bylaws of his or her medical staff or practice group."

"Emergency physician autonomy should not be unduly restricted by value based or other cost-saving guidelines, contracts, rules, or protocols. The physicians must have the ability to do what they believe in good faith is in the patient's best interest."

ACEPs policy statement "Emergency Physician Contractual Relationships" states:

"The emergency physician is individually responsible for the ethical provision of medical care within the physician-patient relationship, regardless of financial or contractual relationships."

"Quality medical care is provided by emergency physicians organized under a wide variety of group configurations and with varying methods of compensation. ACEP does not endorse any single type of contractual arrangement between emergency physicians and the contracting vendor."

The College also has existing policies "Compensation Arrangements for Emergency Physicians," "Definition of Democracy in Emergency Medicine Practice," and "Emergency Physician Compensation Transparency."

State law varies on the topic of corporate practice of medicine. Laws can be viewed by state at: https://silo.tips/download/corporate-practice-of-medicine-50-state-survey

Since this resolution is based on California law, a few excerpts from that law are:

"Section 2052---Any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor."

"Section 2400---Corporations and other artificial legal entities shall have no professional rights, privileges, or powers. However, the Division of Licensing may, in its discretion, after such investigation and review of such documentary evidence as it may require, and under regulations adopted by it, grant approval of the employment of licensees on a salary basis by licensed charitable institutions, foundations, or clinics, if no charge for professional services rendered patients is made by any such institution, foundation, or clinic."

"Section 2052 of the California Medical Practice Act declares it to be illegal for any person to practice, attempt to practice or to advertise himself/herself out as practicing medicine in California without a valid certificate of licensure. For the purposed of the act the term "person" is limited in meaning to "a natural person" and with limited exception it declares corporations and other artificial entities to have "no professional rights, privileges or powers" thereunder. Accordingly, it has been stated as being settled that as a general rule a corporation may neither engage in the practice of medicine directly, nor may it do so indirectly by "engaging physicians to perform professional services for those with who the corporations contracts to furnish such services."

In Pacific Employers Ins. Co. V. Carpenter, 10 Cal.App.2d 595, 594 (1935). California courts have held that state medical licensure laws prohibit corporations from practicing medicine through licensed employees or independent contractors, and from realizing profits through the distributions of a physician's professional services. Whether or not an arrangement will be considered "unlawful practice of medicine" depends on the extent of control or influence a corporation has over the physician's practice. Indicia of unlawful physician control include employment, mandatory fee schedules, minimum office hour requirements, the selection of office sites, personnel or equipment, and other controls which singly or in combination may interfere with the ability of a physician to independently exercise his or her medical judgment. See, e.g., Cal. Ass'n of Disp. Opticians v. Pearle Vision, 143 Cal.App.3d 419 (1983) Lack of patient freedom of choice in the selection of his/her treating physician is also a factor that implies the existence of corporate practice of medicine. The corporate practice of medicine prohibition remains a significant factor in the structure of health care provider relationships. It is a criminal offense for any person or entity to practice or attempt to practice, or to advertise or hold itself out as

practicing medicine, without having at that time a valid license, therefore. Penalties for the unlawful practice of medicine are significant and include: (1) criminal prosecution '(2) injunctive relief' (3) ouster in a quo warranto proceeding' and (4) exposure to civil lawsuits.

The general rule against the corporate practice of medicine is not absolute as exceptions to the California law permit the following types of corporations to practice medicine: (1) professional medical corporations, partnerships and group practices' (2) Knox-Keene Health Care Service Plans (i.e., HMOs)' (3) nonprofit corporations' (4) fraternal, religious, hospital, labor, education, and similar organizations may contract with physicians on an independent contractor basis in certain situations' (5) corporations having an interest in the health of its employees may contract with physicians to provide medical services for the corporation's employees at a reduced cost, and (6) certain licensed health care institutions may contract with physicians to provide medical services for the institution's employees at a reduced cost.

It is consistently recognized by the American Medical Association (AMA) and legal professionals that the adoption and enforcement of corporate practice of medicine doctrine is not just a matter of statutory law but as well a complex and living web of case law and attorneys general and regulatory agency opinions. An internet search yields several different types of state-level comprehensive reviews, albeit each limited in some way and nearly all cautioning about the complexities of this issue residing in of notoriously porous statutes and in a constant state of change.

ACEP currently works with our chapters to summarize or curate resources via our Legislative Information Clearinghouse. This is currently being used to monitor such issues as crowding, liability reform, reimbursement, and many more. Matters of CPOM are not one of the issues currently tracked as a state legislative issue. ACEP is working with state chapters to help create and track references on selected existing legal and regulatory resources related to the corporate practice of medicine in states.

In July 2021, ACEP's executive director discussed ACEP's concerns with the AMA's CEO regarding matters related to the corporate practice of medicine and interest in potentially collaborating with the AMA on an educational or needs assessment meeting. There was mutual interest in exploring this further, possibly through a virtual summit that could convene professional and state medical societies, as well as research organizations. Like ACEP has experienced, many of these research efforts are limited by a lack of transparency around ownership models and/or the inability to link ownership data to claims-based or other government database research, as well as published literature to study the CPOM landscape. At this time, ACEP and AMA staff continue working to develop the needs assessment.

ACEP began a campaign in March 2022 to collect stories that would help inform the Federal Trade Commission's (FTC) efforts to update its health care merger guidelines by expanding its evaluations on the impact of mergers and acquisitions to assess labor conditions rather than just competition. Stories were submitted through the ACEP website and other communications promoting the campaign were launched. The stories were reviewed to identify common themes and statistics and were used to create ACEP's response to a recent FTC/DOJ request for information. ACEP President Dr. Gillian Schmitz and ACEP Executive Director, Sue Sedory, provided public comments in a listening session hosted by the FTC and DOJ on April 14, 2022, on the effects of mergers and acquisitions in the healthcare industry. In their comments, Dr. Schmitz and Ms. Sedory shared results from ACEP's story collection that showed numerous anti-competitive labor-related effects associated with mergers and acquisitions in emergency medicine including: reduced wages and/or non-cash benefits; infringement of due process rights; interference with physician autonomy to make independent medical decisions benefiting patients; inability to find a job or undue imposed restrictions on ability to switch jobs; and a shift to use of a less-skilled health care workforce jeopardizing patient care.

ACEP filed an amicus brief in the AAEMPG v. Envision case on March 25,2022, upholding the sanctity of a physician's duty to patients and the importance of allowing them to practice medicine without undue pressure from outside forces. Through this filing, ACEP is applying its might on behalf of our nearly 40,000 members in legal efforts to assert the physician's right to autonomy in medical decision-making. EMRA also filed a Declaration of Interest in support of the ACEP position.

Additionally, ACEP has been in communication with the Physicians Advocacy Institute to help inform a report they are developing that would address trends in emergency medicine regarding physician employment and acquisitions of medical practices.

Stragegic Plan Reference:

Career Fulfillment – Members believe that ACEP confronts tough issues head on and feel supported in addressing their career frustrations and in finding avenues for greater career fulfillment.

Advocacy **–** Members believe that they can rely on ACEP to fight for emergency physicians across all landscapes and levels, including federal, state, and local.

Prior Council Action:

Amended Resolution 52(20) The Corporate Practice of Medicine referred to the Board of Directors. The resolution requested that ACEP: 1) prepare a comprehensive review of the legal and regulatory matters related to the corporate practice of medicine and fee splitting in each state and the results of this review will be compiled into a resource and announced to members as an available electronic download; 2) adopt as policy: "ACEP, in concert with its relevant component state chapter, in those states where there are existing prohibitions on the corporate practice of medicine, will provide assistance to physician owned groups who are threatened with contract loss to a corporate entity or to hospital employed physicians whose site will be taken over by a corporate entity by providing, upon request, a written review of the legality of the corporation obtaining the contract for emergency services."; 3) in those states that are found to have existing prohibitions on the corporate practice of medicine, along with the relevant state chapter, petition the appropriate authorities in that state to examine the corporate practice of emergency medicine if such is believed to occur within that state and ACEP will reach out to the state professional societies to solicit the support of the state medical society; and 4) work with the American Medical Association to convene a meeting with representatives of physician professional associations representing specialties and other stakeholders affected by the corporate practice of medicine, to ensure the autonomy of physician owned groups or hospital employed physicians contracting with corporately-owned management service organizations.

Amended Resolution 58(19) Role of Private Equity in Emergency Medicine adopted. The resolution called for ACEP to study and report annually the market penetration of non-physician ownership of emergency medicine groups and the effects that these groups have on physicians and ACEP advocacy efforts. It further directed the College to advocate to preserve access to emergency care for patients and protect the careers of emergency physicians in the event of contract transitions, bankruptcies, or other adverse events of their employer/management company. Additionally, ACEP was directed to partner with other medical societies to determine the circumstances under which corporate or private equity investment could lead to market effects that increase the cost of care without a commensurate increase in access or quality and to advocate for corrections to the market if such market effects should occur.

Prior Board Action:

August 2022, reviewed the draft final report from the Emergency Medicine Group Ownership Task Force and referred the report back to the task force for additional information to be included in the report.

April 2022, the ACEP Board of Directors approved the ACEP Statement on Private Equity and Corporate Investment in Emergency Medicine,

January 2022, approved filing a brief in the AAEM-PG vs. Envision lawsuit.

April 2021, approved the revised policy statement "Compensation Arrangement for Emergency Physicians;" revised April 2015, April 2002, June 1997; reaffirmed October 2008, April 1992; originally approved June 1998.

April 2021, approved the revised policy statement "Emergency Physician Contractual Relationships;" revised June 2018, October 2012, January 2006, March 1999, August 1993; originally approved October 1984 titled "Contractual Relationships Between Emergency Physicians and Hospitals."

April 2021, approved the revised policy statement "Emergency Physician Rights and Responsibilities;" revised October 2015, April 20018, July 200; originally approved September 2000.

September 2021, approved actions regarding Referred Amended Resolution 52(20) The Corporate Practice of Medicine.

January 2021, approved the revised policy statement "Definition of Democracy in Emergency Medicine Practice;" reaffirmed April 2014; originally approved June 2008.

October 2020, approved the policy statement "Emergency Physician Compensation Transparency."

October 2019, Amended Resolutions 58(19) Role of Private Equity in Emergency Medicine adopted.

Council Action:

Reference Committee C recommended that Amended Resolution 56(22) be adopted.

RESOLVED, That ACEP ~~adopt the following policy statement based on the California Medical Board's guidance:~~ **work with relevant experts to develop a policy statement opposing the corporate practice of medicine.**

~~ACEP Policy Statement on the Corporate Practice of Medicine~~

~~ACEP strongly believes that the physician-patient relationship should be free of commercialization and undue influence by business interests. The corporate practice of medicine prohibition is intended to prevent unlicensed persons from interfering with or influencing the physician's professional judgment. The decisions described below are examples of some of the types of behaviors and subtle controls that the corporate practice doctrine is intended to prevent. The following health care decisions should be made by a licensed physician and would constitute the unlicensed practice of medicine if performed by an unlicensed person:~~

- ~~Determining what diagnostic tests are appropriate for a particular condition.~~
- ~~Determining the need for referrals to, or consultation with, another physician/specialist.~~
- ~~Responsibility for the ultimate overall care of the patient, including treatment options available to the patient.~~
- ~~Determining how many patients a physician must see in a given period of time or how many hours a physician must work.~~

~~In addition, the following "business" or "management" decisions and activities, resulting in control over the physician's practice of medicine, should be made by a licensed physician and not by an unlicensed person or entity:~~

- ~~Ownership is an indicator of control of a patient's medical records, including determining the contents thereof, and should be retained by a licensed physician.~~
- ~~Selection, hiring/firing (as it relates to clinical competency or proficiency) of physicians, allied health staff and medical assistants.~~
- ~~Setting the parameters under which the physician will enter into contractual relationships with third-party payers.~~
- ~~Decisions regarding coding and billing procedures for patient care services.~~
- ~~Approving of the selection of medical equipment and medical supplies for the medical practice.~~

~~The types of decisions and activities described above cannot be delegated to an unlicensed person, including (for example) management service organizations. While a physician may consult with unlicensed persons in making the "business" or "management" decisions described above, the physician must retain the ultimate responsibility for, or approval of, those decisions.~~

~~The following types of medical practice ownership and operating structures also are prohibited:~~

- ~~Non-physicians owning or operating a business that offers patient evaluation, diagnosis, care, or treatment.~~
- ~~Management service organizations arranging for or providing medical services rather than only providing administrative staff and services for a physician's medical practice (non-physician exercising controls over a physician's medical practice, even where physicians own and operate the business).~~

~~In the examples above, non-physicians would be engaged in the unlicensed practice of medicine, and the physician may be aiding and abetting the unlicensed practice of medicine.~~

The Council adopted Amended Resolution 56(22) on September 30, 2022.

Testimony:

Asynchronous testimony provided broad support for many of the concepts in the resolution, but there were concerns with the details and wording as written. Those in support emphasized the need for ACEP to have a strong policy against the corporate practice of medicine and that such a policy would stand as a guide for leadership on how to respond to corporate or lay encroachment on emergency medicine in either legal or policy matters. Those opposed to the resolution supported the spirit, but opposed it as written because it was believed that the California Medical Board's guidance is too prescriptive in many areas. An amendment was proposed condensing the resolved to "ACEP work with relevant experts to develop a policy statement opposing the corporate practice of medicine." Those opposing the resolution were largely open to an amendment. Live testimony broadly agreed that ACEP should oppose the corporate practice of medicine. There was discussion about how proscriptive to be about specific contents of the policy. Several members testified that some of these issues also apply to hospital settings and that the policy should ensure emergency physicians' judgments are not usurped by non-physician hospital leadership decisions.

Board Action:

The Board adopted Amended Resolution 56(22) on October 3, 2022.

RESOLVED, That ACEP work with relevant experts to develop a policy statement opposing the corporate practice of medicine.

References:

1. https://www.acep.org/globalassets/sites/acep/media/acep-newsroom-images/2022.03.25-filed-acep-amicus-brief.pdf.
2. https://www.acep.org/globalassets/acep-response-to-ftc-and-doj-rfi-on-merger-guidelines-04.20.22.pdf.
3. https://www.mbc.ca.gov/Licensing/Physicians-and-Surgeons/Practice-Information/ (go to the section on Corporate Practice)

Implementation Action:

Assigned to the Emergency Medicine Practice Committee to review ACEP's "Statement on Private Equity and Corporate Investment in Emergency Medicine" and develop a policy statement as directed in the resolution. The committee developed the policy statement "Corporate Practice of Medicine" and it was approved by the Board of Directors in June 2023. ACEP issued a press release on July 14, 2023, announcing the policy statement. A dedicated page on the topic of Corporatization was added to the ACEP website.

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