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Chapter 742: Paving the Way for “Alternative and Complementary Medicine” in California?

Eric Ritigstein

Code Section Affected

Business and Professions Code § 2234.1 (new).
SB 1691 (Vasconcellos); 2004 Stat. ch. 742.

I. INTRODUCTION

Medical practices are considered “alternative” when “they are based on untested, untraditional or unscientific methods, principles, treatments or knowledge.”¹ If an alternative medical practice is offered in conjunction with conventional medicine, it is referred to as “complementary” medicine.² A 1993 survey in the *New England Journal of Medicine* found that a greater number of Americans consulted complementary and alternative medicine (CAM) providers than traditional physicians.³ A 1997 study published in the *Journal of the American Medical Association* found that Americans spend more than \$30 billion on CAM each year,⁴ and in 1993, researchers estimated that consumer spending on CAM would grow by as much as fifteen to thirty percent annually.⁵

Patients opt for alternative medicine over conventional medicine for a variety of reasons, including fear of surgery and the side effects of drugs, a preference for natural remedies, a cheaper cost, and a desire for “holistic” treatment, which is believed to treat the mind, body, and soul of the patient.⁶ Despite the heated debate over the effectiveness of CAM therapies, physicians cannot ignore their growing popularity, and many have integrated such therapies into their own practices either by performing the therapy themselves or referring patients to a CAM practitioner.⁷ In response to the increased popularity of CAM, the United States government created the National Center for Complementary and

1. ROBERT TODD CARROLL, *THE SKEPTIC’S DICTIONARY: A COLLECTION OF STRANGE BELIEFS, AMUSING DECEPTIONS, AND DANGEROUS DELUSIONS* (2003), available at <http://skepdic.com/althealth.html> (last visited on July 15, 2004) (on file with the *McGeorge Law Review*) (noting that some of the most popular “alternative health practices” include “relaxation techniques, chiropractic, herbal medicine and massage”).

2. *Id.*

3. Joseph A. Barrette, *The Alternative Medical Practice Act: Does It Adequately Protect the Right of Physicians to Use Complementary and Alternative Medicine?*, 77 ST. JOHN’S L. REV. 75, 75 (2003).

4. Wynne Brown, *Alternative Medicine Goes Mainstream*, Discovery Health Channel, at <http://health.discovery.com/centers/althealth/medtrends/medtrends.html> (last visited on July 15, 2004) (on file with the *McGeorge Law Review*).

5. Barrette, *supra* note 3, at 76 & n.5.

6. CARROLL, *supra* note 1.

7. Barrette, *supra* note 3, at 78.

Alternative Medicine (NCCAM) within the National Institutes of Health.⁸ NCCAM's funding has grown from \$2 million in 1992 to an estimated \$121.1 million for 2005.⁹

Physicians who have integrated or are considering integrating CAM therapies into their practices are naturally concerned about malpractice liability and exposure to disciplinary action for unprofessional conduct.¹⁰ In California, the Medical Practice Act¹¹ empowers the Division of Medical Quality to take action against physicians and surgeons who engage in unprofessional conduct and violate the applicable standard of care.¹² Chapter 742 attempts to define the standard of care which applies to alternative or complementary medicine.¹³

II. EXISTING CALIFORNIA LAW – THE MEDICAL PRACTICE ACT

A. Medical Board of California

“The Medical Board of California (MBC) is a consumer protection agency within the State Department of Consumer Affairs.”¹⁴ The purposes of the MBC are “to protect consumers from incompetent, grossly negligent, unlicensed, impaired, or unethical practitioners; enforce the provisions of the Medical Practice Act . . . and educate healing arts licensees and the public on health quality issues.”¹⁵ Protection of the public, however, is clearly and explicitly the MBC's top priority.¹⁶

8. Medical Board of California, 17 CAL. REG. L. REP. 51, 58 (Winter 2001) (outlining the major projects of the Medical Board of California (a regulatory health care agency) for the year 2001).

9. NAT'L CNTR. FOR COMPLEMENTARY AND ALTERNATIVE MED., NCCAM FUNDING: APPROPRIATIONS HISTORY, available at <http://nccam.nih.gov/about/appropriations/index.htm> (last modified Feb. 5, 2004) (on file with the *McGeorge Law Review*) (the National Center for Complementary and Alternative Medicine was known as the Office of Alternative Medicine from 1992 to 1998).

10. Barrette, *supra* note 3, at 78.

11. CAL. BUS. & PROF. CODE § 2000 (West 2003) (“This chapter shall be known and may be cited as the Medical Practice Act. Whenever a reference is made to the Medical Practice Act by the provisions of any statute, it is to be construed as referring to the provisions of this chapter.”).

12. CAL. BUS. & PROF. CODE § 2234 (West 2003) (stating that “[t]he Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct”).

13. See ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 1691, at 4 (June 22, 2004) (outlining the conditions that must be met to adhere to the proper standard of care).

14. Medical Board of California, *supra* note 8, at 51.

15. *Id.*

16. CAL. BUS. & PROF. CODE § 2001.1 (West 2003) (“Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”).

The nineteen-member Board¹⁷ “is divided into two autonomous divisions: the Division of Medical Quality and the Division of Licensing.”¹⁸ While the Division of Licensing is mainly responsible for overseeing medical education and proper licensing of practitioners,¹⁹ the Division of Medical Quality wields the power to discipline those practitioners who violate certain provisions of the Medical Practice Act.²⁰

B. Addressing “Alternative or Complementary” Medicine

The MBC “acknowledge[s] the significant interest of physicians and patients alike in integrating preventative approaches and holistic-based alternatives into the practice of medicine.”²¹ Until now, legislation addressing CAM and CAM providers has focused primarily upon monitoring unlicensed practitioners.²² In fact, the same statute that requires specific written disclosures²³ by CAM providers also stipulates that nothing in the statute “shall be construed to . . . affect the scope of practice of licensed physicians and surgeons.”²⁴ However, as these licensed physicians and surgeons increasingly continue to integrate CAM

17. See Medical Board of California, *supra* note 8, at 51 (“The 19-member Board consists of twelve physicians and seven public members. MBC members are appointed by the Governor (who appoints all twelve physicians and five public members), the Speaker of the Assembly (one public member), and the Senate Rules Committee (one public member). Members serve a four-year term and may be reappointed to a second term.”).

18. CAL. BUS. & PROF. CODE § 2003 (West 2003).

19. See *id.* § 2005 (listing the responsibilities of the Division of Licensing).

20. See *id.* § 2004. The section states:

The Division of Medical Quality shall have the responsibility for the following:

- (a) The enforcement of the disciplinary and criminal provisions of the Medical Practice Act.
- (b) The administration and hearing of disciplinary actions.
- (c) Carrying out disciplinary actions appropriate to findings made by a medical quality review committee, the division, or an administrative law judge.
- (d) Suspending, revoking, or otherwise limiting certificates after the conclusion of disciplinary actions.
- (e) Reviewing the quality of medical practice carried out by physician and surgeon certificate holders under the jurisdiction of the board.

Id.

21. *Id.* § 2500.

22. *Id.* §§ 2053.5, 2053.6.

23. See *id.* § 2053.6(a)(1)(A)-(F). Alternative healing arts providers must disclose to a client, in a written statement:

- (A) That he or she is not a licensed physician.
- (B) That the treatment is alternative or complementary to services that are licensed by the state. (C) That the services being provided are not licensed by the state.
- (D) The nature of the services that are being provided.
- (E) The theory upon which the services are based.
- (F) His or her education, training, experience, and other qualifications regarding the services to be provided.

Id.

24. *Id.* § 2053.6(c)(1).

into their own practices, state legislators are being forced to further define CAM's legal parameters.²⁵

To keep up with CAM's growing popularity, the Medical Practice Act authorizes the MBC to "establish specific policies . . . and review statutes and recommend modifications of law, when appropriate, in order to assure California consumers that the quality of medicine practiced in this state is the most advanced and innovative it can be both in terms of preserving the health of, as well as providing effective diagnosis and treatment of illness for, the residents of this state."²⁶

III. CHAPTER 742

A. Defining "Alternative or Complementary Medicine"

Chapter 742 defines "alternative or complementary medicine" as "those health care methods of diagnosis, treatment or healing that are not generally used but that provide a reasonable potential for therapeutic gain in a patient's medical condition that is not outweighed by the risk of the health care method."²⁷ With such an ambiguous definition, the remainder of Chapter 742 is dedicated to ensuring that a patient's "reasonable potential for therapeutic gain" is properly balanced against the potential risk of the treatment.²⁸

B. Protecting Licensed Physicians and Surgeons

Chapter 742 provides that a licensed physician or surgeon is not subject to discipline for certain unprofessional conduct solely on the basis that the treatment or advice rendered is "alternative or complementary medicine."²⁹ Specifically, Chapter 742 excuses physicians and surgeons from punishment under subdivisions (b), (c), and (d) of section 2234 of the Medical Practice Act,³⁰ provided the *only* grounds for disciplinary action are that he or she rendered treatment or advice to a patient that falls under the umbrella of "alternative or complementary medicine," and the treatment or advice meets certain criteria.³¹

25. Barrette, *supra* note 3, at 77-78.

26. CAL. BUS. & PROF. CODE § 2500 (West 2003).

27. CAL. BUS. & PROF. CODE § 2234.1(b) (enacted by Chapter 742).

28. *Id.* § 2234.1(a)(1)-(4).

29. ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 1691, at 1 (June 22, 2004).

30. CAL. BUS. & PROF. CODE § 2234 (West 2004). The section identifies certain actions that would constitute "unprofessional conduct." Subdivisions (b), (c) and (d) represent, respectively, gross negligence, repeated negligent acts, and incompetence. *Id.*

31. See CAL. BUS. & PROF. CODE § 2234.1 (enacted by Chapter 742) The section requires that physicians' and surgeons' treatment or advice regarding alternative or complementary medicine meets the following criteria:

(1) It is provided after informed consent and a good-faith prior examination of the patient,

IV. ANALYSIS OF CHAPTER 742

With CAM's growing popularity and continued integration into traditional medical practices,³² it is clear steps must be taken to not only better inform patients receiving CAM treatments and advice, but also to protect licensed physicians and surgeons from undue enforcement by the MBC.³³ Even detractors of Chapter 742 applaud the bill's intent to "accommodate new and emerging treatment modalities."³⁴ However, despite universal agreement on the bill's righteous intent, the specific content of Chapter 742 has received mixed reactions.³⁵ The MBC sponsored and supported the passage of the bill,³⁶ while the California Medical Association (CMA)³⁷ was in opposition.³⁸

A. *Paving the Way for CAM in California?*

There has been a belief in the CAM community that the MBC takes disciplinary action against certain licensed physicians and surgeons solely because they employ alternative or complementary medicine in their practices.³⁹ Because CAM treatments are based on different philosophies of healing than

and medical indication exists for the treatment or advice, or it is provided for health or wellbeing.

- (2) It is provided after the physician and surgeon has given the patient information concerning conventional treatment and describing the education, experience, and credentials of the physician and surgeon related to the alternative or complementary medicine he or she practices.
- (3) It does not cause delay in, or discourage traditional diagnosis of, a condition of the patient.
- (4) It does not cause death or serious bodily injury to the patient.

Id. If these four criteria are not met, and the physician or surgeon has provided CAM treatments or advice, he or she may be subject to disciplinary action on the grounds of unprofessional conduct. *Id.*

32. See *supra* Part I.

33. ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 1691, at 2 (June 22, 2004).

34. See Letter from Bryce W.A. Docherty, Associate Director, California Medical Association, to Senator John Vasconcellos, California State Senate (June 10, 2004) [hereinafter Docherty Letter] (on file with the *McGeorge Law Review*) (expressing CMA's opposition to Chapter 742, especially quality of care implications).

35. ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 1691, at 4-5 (June 22, 2004).

36. See Letter from David T. Thornton, Interim Executive Director, Medical Board of California, to Senator John Vasconcellos, California State Senate (April 5, 2004) [hereinafter Thornton Letter] (on file with the *McGeorge Law Review*) (expressing the MBC's support of Chapter 742).

37. See CAL. MED. ASS'N, CMA MISSION AND HISTORY, at <http://www.cmanet.org/ublicdoc.cfm/10/1> (last visited Jul. 28, 2004) (on file with the *McGeorge Law Review*). The California Medical Association (CMA) consists of over 30,000 physicians/members. It is the largest state medical association and is a leader in the socio-economics of medicine. CMA's mission is to "promote the science and art of medicine, the care and well-being of patients, the protection of the public health, and the betterment of the medical profession." CMA unites with similar organizations in other states to form the American Medical Association. *Id.*

38. ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 1691, at 2, 5 (June 22, 2004).

39. *Id.* at 3.

allopathic medicine,⁴⁰ CAM treatments are often viewed as ineffective or fraudulent, and licensed physicians who provide CAM treatments have often been determined not to meet a conventional standard of care.⁴¹

The MBC argues that Chapter 742 “takes positive steps toward allowing physicians to offer complementary or alternative medicine without fear of discipline if they appropriately document and provide information to their patients.”⁴² The MBC believes the bill will likely lead to an increased number of physicians willing to offer CAM treatments to consumers, while ensuring that safeguards are maintained to protect consumers.⁴³ The MBC remains “committed to finding a balance between the practicing of alternative and complementary medicine and the protection of the public, the Board’s highest priority.”⁴⁴

B. Going Too Far?

The CMA is concerned with quality of care implications of Chapter 742, specifically the potential harm to patients from an overly broad definition of “alternative and complementary medicine.”⁴⁵ The MBC chose the specific language of Chapter 742 based on its Alternative Medicine Committee discussions, which primarily focused on the concern that physicians offering CAM treatments would be prosecuted.⁴⁶ Even though protection of the public is professed to be the MBC’s highest priority,⁴⁷ the CMA fears Chapter 742’s definition of “alternative and complementary medicine” may prove harmful to patients in certain situations.⁴⁸

The CMA believes there are only three permissible categories of medical practice: “1) Experimental and investigational; 2) Accepted by a reputable minority of the profession; and 3) Standard community practice.”⁴⁹ All three

40. See MEDICINET.COM, DEFINITION OF ALLOPATHIC MEDICINE at <http://www.medterms.com/script/main/art.asp?articlekey=33612> (last modified June 26, 2004) (on file with the *McGeorge Law Review*) (defining “allopathic medicine” as “[t]he system of medical practices which treats disease by the use of remedies which produce effects different from those produced by the disease under treatment”; also called conventional medicine).

41. ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 1691, at 2 (June 22, 2004).

42. Thornton Letter, *supra* note 36.

43. *Id.*

44. *Id.*

45. Docherty Letter, *supra* note 34.

46. Thornton Letter, *supra* note 36.

47. See CAL. BUS. & PROF. CODE § 2001.1 (West 2004) (“Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”).

48. Docherty Letter, *supra* note 34.

49. *Id.*

categories are recognized and subject to accountability under California law.⁵⁰ If a medical practice is not “accepted by a reputable minority of the profession” and/or “standard community practice,” the CMA would suggest the practice be governed by the “host of laws that regulate experimental and investigational treatments that are designed to protect citizens from unauthorized, needless, hazardous and negligently performed medical experiments on human beings.”⁵¹

The CMA argues that, by its definition of “alternative or complementary medicine,” Chapter 742 suggests that there is a fourth treatment category that is neither “experimental and investigational” nor within the two other recognized standards of care.⁵² “[I]f the practice is not subject to the rules concerning experimentation or otherwise within the recognized standards of care, [the California Medical Association] [is] concerned that the practice is harmful to patients and should not be tolerated, even with the heightened . . . consent and treatment requirements.”⁵³

V. CONCLUSION

The CMA believes that Chapter 742’s definition of alternative and complementary medicine “describes a practice of medicine that is beyond the three permissible categories of medical practice.”⁵⁴ The CMA fears Chapter 742 creates a new treatment category that is not within previously recognized standards of care or subject to established rules.⁵⁵ The CMA is not alone in their fear and skepticism of CAM—the American Medical Association has consistently denied alternative providers access to its physicians’ patients, and insurance companies have been slow to respond to increasing consumer demands for CAM treatments.⁵⁶

Regardless of one’s stance on the benefits or dangers of CAM, it is indisputable that CAM is widely practiced and continues to grow in popularity and demand.⁵⁷ The “conditions that [once] led to a closed system of professional healing . . . and to a model of extreme paternalism are changing.”⁵⁸ It is important to keep in mind that “[t]he function of the law is not to draw ironclad boundaries

50. See CAL. MED. ASS’N, SB 1691: POLICY AND LEGAL COMMENTS, at 1 (on file with the *McGeorge Law Review*) (detailing CMA’s reasons for opposition to Chapter 742).

51. *Id.*

52. *Id.*

53. Docherty Letter, *supra* note 34.

54. *Id.*

55. CAL. MED. ASS’N, *supra* note 50, at 2.

56. Kristen J. Josefek, *Alternative Medicine’s Roadmap to Mainstream*, 26 AM. J.L. & MED. 295, 296-97 (2000).

57. See *supra* Part I.

58. MICHAEL H. COHEN, BEYOND COMPLEMENTARY MEDICINE: LEGAL AND ETHICAL PERSPECTIVES ON HEALTH CARE AND HUMAN EVOLUTION 170 (2000).

between overlapping professions but rather to create a structure in which the patient's healing needs can be optimally accommodated.”⁵⁹

Chapter 742 is the MBC's attempt to keep up with changing times and changing consumer needs and to clearly regulate licensed physicians who provide CAM treatments for their patients.⁶⁰ It stipulates that if a licensed physician meets certain criteria,⁶¹ which includes satisfying conditions of informed consent regarding CAM treatments, the physician will be protected from undue punishment by the MBC.⁶²

59. *Id.*

60. ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 1691, at 3 (June 22, 2004).

61. *See supra* note 31 and accompanying text.

62. ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 1691, at 2 (June 22, 2004).