PLEASE NOTE: THIS RESOLUTION WILL BE DEBATED AT THE 2020 COUNCIL MEETING. RESOLUTIONS ARE NOT OFFICIAL UNTIL ADOPTED BY THE COUNCIL AND THE BOARD OF DIRECTORS (AS APPLICABLE).

American College of Emergency Physicians®
ADVANCING EMERGENCY CARE

RESOLUTION: 52(20)

SUBMITTED BY: Robert McNamara, MD
Thomas Scaletta, MD, FACEP

SUBJECT: The Corporate Practice of Medicine

PURPOSE: 1) Review and report on the legal and regulatory matters related to the corporate practice of medicine in each state; 2) Develop policy stating that upon request from groups facing loss of their contract to a corporate entity, ACEP and the relevant state chapter will provide a written review of the legality of the corporation obtaining the contract for emergency services; 3) ACEP and the chapter will work with other organizations in petitioning appropriate state authorities to investigate if the corporate practice of medicine is occurring in a state where it is prohibited; and 4) Convene a meeting of other specialties affected by private equity involvement to examine joint efforts to combat the corporate control of medicine by lay entities.

FISCAL IMPACT: Budgeted committee and staff resources for policy development Additional unbudgeted and substantial staff resources to develop a comprehensive review of the legal and regulatory matters related to the corporate practice of medicine in each state. Additional staff resources to advocate for states to investigate whether the potential corporate practice of medicine is occurring contrary to state law. Unbudgeted travel and meeting costs of up to $10,000 to convene a meeting of specialties affected by private equity involvement to examine joint efforts to combat the corporate control of medicine by lay entities.

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

WHEREAS, Optum, a subsidiary of the United Healthcare insurer, has recently taken ownership of emergency medicine practices; and

WHEREAS, The Corporate Practice of Medicine (CPOM) doctrine exists in many states 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, In states where the CPOM doctrine and the state Medical Practice Acts prohibit lay ownership of a medical practice an ACEP member can be subject to a detrimental licensure action through the State Board of Medicine if they are found to be aiding or abetting the illegal practice of medicine; and

WHEREAS, The original Bylaws of ACEP stated that "an emergency physician will not associate himself in any fashion with any institution which permits medical practice other than by a physician;" and

WHEREAS, The FTC in 2004 (8/30/04 letter of Jeffery W. Brennan to Alvin Dunn, Esq.) stated in response to antitrust concerns raised by ACEP, that ACEP could respond to "behavior of market participants that it believes are detrimental to its members or the public"; and

WHEREAS, The CPOM can be detrimental to the member and the public; therefore be it

RESOLVED, That ACEP will 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; and be it further

RESOLVED, That ACEP adopt as policy: "The 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."; and be it further

RESOLVED, That ACEP, in those states that are found to have existing prohibitions on the corporate practice of medicine, along with the relevant state chapter, will 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 of anesthesia and radiology in this effort and solicit the support of the state medical society; and be it further

RESOLVED, That ACEP will convene a meeting with representatives of physician professional associations representing anesthesiologists, radiologists, hospitalists, dermatologists, and other specialties affected by private equity involvement to examine joint efforts to combat the corporate control of medicine by lay entities.

References:
https://www.texmed.org/CPMwhitepaper/
https://www.ama-assn.org/media/7661/download

Background

This resolution calls for ACEP to review and report on the legal and regulatory matters related to the corporate practice of medicine in each state. Additionally, it directs ACEP to develop policy stating that upon request from groups facing loss of their contract to a corporate entity, the College and the relevant state chapter will provide a written review of the legality of the corporation obtaining the contract for emergency services, and that the College and chapter will work with other organizations in petitioning appropriate state authorities to investigate if the corporate practice of medicine is believed to be taking place in a state where it is prohibited. It also directs ACEP to convene a meeting of other specialties affected by private equity involvement to examine joint efforts to combat the corporate control of medicine by lay entities.

A 2015 AMA Issue Brief on the corporate practice of medicine states: "The corporate practice of medicine doctrine prohibits corporations from practicing medicine or employing a physician to provide professional medical services. This doctrine arises from state medical practice acts and is based on a number of public policy concerns, such as (1) allowing corporations to practice medicine or employ physicians will result in the commercialization of the practice of medicine, (2) a corporation's obligation to its shareholders may not align with a physician's obligation to his patients, and (3) employment of a physician by a corporation may interfere with the physician's independent medical judgment. While most states prohibit the corporate practice of medicine, almost every state has broad exceptions, such as for professional corporations and employment of physicians by certain health care entities."

It also notes that "every state allows for the creation of professional corporations, which are corporations organized for the specific purpose of rendering a professional service. State statutes often specify how the professional corporations should be structured, who can participate as shareholders or owners and who must serve on the board of directors. Most states restrict the shareholders, owners, or board of directors of a professional corporation to persons licensed to render the same professional service as the professional corporation." About 30 states have explicit restrictions, and exceptions, to the corporate practice of medicine.

Some state medical boards have issued opinions as to whether certain practices violate corporate practice of medicine restrictions and, according to the AMA, the question is often decided on whether employment agreements specify that physicians maintain independent medical judgement in those arrangements.

As independently incorporated entities, ACEP chapters have autonomy to determine their own actions, within the parameters of ACEP and chapter bylaws and may not choose to work with ACEP as directed in the resolution.

ACEP's policy statement "Emergency Physician Rights and Responsibilities" states that "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. This includes reasonable, good faith deviations from current, published ACEP Clinical Policies based upon the particular clinical situation in a given patient. Emergency physician autonomy should not be restricted by cost-saving guidelines, rules, or protocols. The physicians must have the ability to do what they believe in good faith is in the patient's best interest at all time."

ACEP's policy statement "Emergency Physician Contractual Relationships" states that "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."

Last year, the Council and the Board adopted Resolution 58(19) Role of Private Equity in Emergency Medicine. Part of the resolution directed the College to study the market penetration of non-physician owned emergency medicine groups and their impacts on physicians. Additionally, it called for ACEP to work with other organizations 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. In response to the resolution, ACEP President William Jaquis, MD, FACEP, appointed an Emergency Medicine Group Ownership Task Force. The task force is chaired by former ACEP President Andrew Sama, MD, FACEP, and consists of members representing a variety of different employment models. The task force developed an RFP to study the market penetration of all emergency medicine ownership models, and research their respective impacts on physicians and their practices and, to the extent possible, their unique impacts on quality of care and cost of care. In August, the Board of Directors accepted the recommendation to retain the services of Milliman to lead this research effort. As of this writing, final contract negotiations are underway, with the project likely to begin in September and a goal of providing a final report to the 2021 Council. A status report on this resolution has been prepared for the 2020 Council.

As referenced in the sixth Whereas statement, the original ACEP Bylaws from 1968 included a provision that "No person shall remain a member of the College unless he is of good moral character and agrees to abide by the Principles of Medical Ethics of the American Medical Association and the American College of Emergency Physicians Principles of Ethical Practice." The Principles of Ethical Practice consisted of six statements, one of which read: "The emergency physician shall not associate himself in any fashion with any institution which permits medical practice by other than a physician." In 1976, the ACEP Council removed the Principles of Ethical Practice from the Bylaws and made them separate official ACEP policy. Additionally, in 1976, the Bylaws were amended to state that the AMA Principles of Medical Ethics and ACEP's Principles of Ethical Practice and other related ACEP policy statements are the principles of ethics of ACEP. In 1979, the Board of Directors approved removing all references to ACEP's Principles of Ethical Practice from College literature and that the AMA Principles of Medical Ethics would be referenced instead. In June 1997, the Board of Directors adopted the "Code of Ethics for Emergency Physicians," most recently approved January 2017.

As referenced in the seventh Whereas statement, in 2004, ACEP sought and received an Advisory Opinion from the Federal Trade Commission (FTC) regarding issues raised in two Council resolutions referred to the Board in 2003. The resolutions were 17(03) Certificate of Compliance and 18(03) Intention to Bid for a Group Contract. While the FTC Advisory Opinion noted that ACEP could respond to "behavior of market participants that it believes are detrimental to its members or the public," it raised a number of potential antitrust concerns about actions contemplated by both resolutions. The FTC Advisory Opinion stated that "ACEP may not unreasonably restrict competition among its members in order to force all contractual relationships between emergency physicians and holders of contracts to provide emergency services to hospitals into its preferred model."

ACEP Strategic Plan Reference

Goal 2 – Enhance Membership Value and Member Engagement
Objective A – Improve the practice environment and member well-being.

Fiscal Impact

Budgeted committee and staff resources for policy development. Additional unbudgeted and substantial staff resources to develop a comprehensive review of the legal and regulatory matters related to the corporate practice of medicine in each state. Additional staff resources to advocate for states to investigate whether the potential corporate practice of medicine is occurring contrary to state law. Unbudgeted travel and meeting costs of up to $10,000 to convene a meeting of specialties affected by private equity involvement to examine joint efforts to combat the corporate control of medicine by lay entities

Prior Council Action

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.

Resolution 18(03) Intention to Bid for Group Contracts referred to the Board of Directors. The resolution called for ACEP to require member to abide by a policy regarding "Duty to Inform Other ACEP Members of Intention to Bid for Their ED Group Contract."

Resolution 17(03) Certificate of Compliance referred to the Board of Directors. The resolution called for ACEP to require emergency physician staffing groups to comply with terms of a certificate as a prerequisite for being an exhibitor or sponsor for any ACEP activity. The certificate included multiple provisions that groups must attest to including "With the provisional period not to exceed one year, our physician group provides our emergency physicians access to predefined due process."

Amended Resolution 14(01) Fair and Equitable Emergency Medicine Practice Environments adopted. Directed ACEP to continue to study the issue of contract management groups and determine what steps should be taken by ACEP to more strongly encourage a fair and equitable practice environment and continue to promote the adoption of the principles outlined in the "Emergency Physician Rights and Responsibilities" policy statement by the various emergency medicine contract management groups, the American Hospital Association and other pertinent organizations.

Resolution 58(95) Sales of Emergency Department Contracts not adopted. The resolution asked that ACEP's lobbying efforts be directed toward federal and state legislation that would ban the sale of emergency department contracts.

Resolution 5(76) Principles of Ethical Practice adopted. This Bylaws amendment removed the "Principles of Ethical Practice" from the ACEP Bylaws and made it an official policy of the College. Additionally amended the Bylaws to state that the AMA Principles of Medical Ethics and ACEP's Principles of Ethical Practice and other related ACEP policy statements are the principles of ethics of ACEP.

Prior Board Action

August 2020, approved the recommendation of the Emergency Medicine Group Ownership Task Force to contract with Milliman to conduct research on the landscape and market penetration of group ownership models and seek to identify unique impacts of different models on emergency physicians, cost of care, and quality of care.

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

June 2018, approved the revised policy statement "Emergency Physician Contractual Relationships;" revised and

approved Octobe4 2012, January 2006, March 1999, and August 1993 with the current title. Originally approved October 1984 titled "Contractual Relationships between Emergency Physicians and Hospitals."

July 2018, reviewed the PREP "Emergency Physician Contractual Relationships" as an adjunct to the policy statement "Emergency Physician Contractual Relationships."

January 2017, approved the revised "Code of Ethics for Emergency Physicians;" revised and approved June 2016 and June 2008; reaffirmed October 2001; revised and approved June 1997 with the current title; originally approved January 1991 titled "Ethics Manual."

October 2015, approved the revised policy statement "Emergency Physician Rights and Responsibilities;" revised and approved April 2008 and July 2001; originally approved September 2000

September 2004, approved submitting the report to the Council on Referred Resolution 17(03) and Referred Resolution 18(03) with the FTC Advisory Opinion.

September 2003, approved the submission of the request for an FTC Advisory Opinion

1979, approved removing all references to ACEP's Principles of Ethical Practice from College literature and that the AMA Principles of Medical Ethics would be referenced instead.

Resolution 5(76) Principles of Ethical Practice adopted.

Background Information Prepared by: Craig Price, CAE
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