MEMORANDUM ON CALIFORNIA SENATE BILL SB-577

SB-577 (Chapter 820 of the Statutes of 2002), authored by Senator John Burton, will take effect on January 1, 2003. This measure was enacted for the specific purpose of enabling complementary and alternative healthcare practitioners to lawfully practice in California without violating the state's Medical Practice Act, subject to specified restrictions and conditions.

Background

Since early in this century, California's Medical Practice Act has prohibited any person from providing medical care to the sick or afflicted without a valid license to practice medicine, or a valid license to practice some other more narrowly defined healing arts profession, such as dentistry, chiropractic, nursing, or (more recently) acupuncture. Like most states, California's Medical Practice Act provides for a sweeping, virtually unlimited scope of practice for licensed physicians, and broadly prohibits any person who does not have a physician's or other healing arts license from providing any treatment for any condition. Specifically, Section 2052 of California's Business & Professions Code prohibits any person who is not a licensed physician from practicing, attempting to practice, advertising or holding himself or herself out as practicing, " ... any system or mode of treating the sick or afflicted..., 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 ...". Violation of this Section is a misdemeanor, as is aiding or abetting in its violation.[1]

Because of the breadth of the prohibition against practice by non-physicians contained in the Medical Practice Act, virtually any treatment by unlicensed practitioners, including complementary and alternative healthcare practitioners, has been illegal. In addition to prosecution that could result in fines and imprisonment, unlicensed practitioners also face potential action by the California Medical Board, the agency which administers the Medical Practice Act, which has the power to issue administrative cease and desist orders.

[1] Effective January 1, 2002, violation of Section 2052 may also be punished as a felony.

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SB-577 narrows the scope of healing arts practice that is reserved exclusively for physicians, provided certain conditions are met. The balance of this memorandum discusses more specifically the healing arts practices that may be performed by unlicensed individuals; the conditions for exemption from the Medical Practice Act; and related issues.

The Elements of SB-577

I. Purpose and Approach

SB-577 states that its purpose is to facilitate access by Californians to alternative and complementary health practitioners who do not require medical training and credentials. It further finds that millions of Californians are presently utilizing these services, and that these "non-medical complementary and alternative services do not pose a known risk to the health and safety of California residents". These recitations are important in understanding the approach established by SB-577 in allowing alternative and complementary health practitioners to legally function. SB-577 does not specifically authorize any particular form of healing arts practice. Instead, it recognizes that there are a wide variety of unlicensed healing arts practices and practitioners who can safely provide their services to the residents of California, without specifically identifying them. In effect, the legislature has determined that these practices do not pose a significant risk to the health and well-being of California citizens, and it is not necessary to protect the public by restricting them through a licensing or other regulatory requirement. This approach provides great freedom and flexibility for the development and practice of alternative and complementary medicine. At the same time, the legislature has imposed specific limits and conditions on practitioners who do not have a healing arts license, including disclosures that must be made to their clients, and to the public in any advertisement.

II. What is not permitted

The Medical Practice Act will continue to be applicable to anyone who performs any of the following services: (1) conducts surgery or any other procedure on another person that punctures the skin or harmfully invades the body; (2) administers or prescribes X-ray radiation to another person; (3) prescribes or administers legend drugs or controlled substances to another person; (4)

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recommends the discontinuance of legend drugs or controlled substances prescribed by an appropriately licensed practitioner; (5) willfully diagnoses and treats a physical or mental condition of any person under circumstances or conditions that cause or create a risk of great bodily harm, serious physical or mental illness, or death; (6) sets fractures; (7) treats lacerations or abrasions through electrotherapy; or (8) holds out, states, indicates, advertises, or implies to a client or prospective client that he or she is a physician, a surgeon, or a physician and surgeon.

Some of these items are discussed in greater detail below. Additionally, SB-577 does not authorize complementary and alternative health practitioners to practice or hold out in a manner which violates any other healing arts licensing statute, such as those for dentistry, acupuncture, nursing, physical therapy, etc.

III. Restrictions Related to the Risk of Treatment

One of the most important and ambiguous restrictions applicable to unlicensed practitioners is the proscription against the willful diagnosis and treatment of " ... a physical or mental condition of any person under circumstances or conditions that causes or creates a risk of great bodily harm, serious physical or mental illness, or death". The phrase "a risk of" was added by amendments accepted by the author in the Assembly Health Committee over the objection of the sponsor. With the addition of this language, this provision mirrors existing Business & Professions Code Section 2053, which subjects a person to potential felony as well as misdemeanor penalties for its violation.[2] The concept of "great bodily harm" is not an element of the unlawful practice of medicine, and is generally applied as an enhancement to a conviction for that offense. People v. Brown, (2001) 109 Cal.Rptr.2d 879. Thus, a practitioner who violates this requirement of SB-577 would not only lose the immunity from prosecution under the Medical Practice Act, but would be potentially subject to felony penalties.

[2] Section 2053 was repealed by SB-1950 (Chapter 1085, Statutes of 2002), effective January 1, 2003. However, the same legislation allows felony penalties to be applied for violation of Section 2052. As a matter of practice, felony penalties under a statute that can also be used for misdemeanor penalties are generally not requested by the prosecutor or imposed by the court absent aggravating circumstances such as serious harm, prior convictions, the relative sophistication of the victim, or fraud.

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The Assembly Health Committee amendments allow the Medical Practice Act to be invoked in situations where there is not direct causation between the actions of an alternative health practitioner and harm to the patient. The risk of serious harm alone is sufficient to trigger violation of the Medical Practice Act. However, the determination of whether the actions of an alternative health practitioner cause or create an actual risk of "great bodily harm, serious physical or mental illness, or death", is a factual question, ultimately subject to a judicial determination. The possible violation of this provision could be investigated by the California Medical Board, and prosecuted by proper enforcement authorities, including the State Attorney General and local district attorneys.

As noted earlier, the overall design of SB-577 contemplates that the provision of services by alternative and complementary health practitioners is inherently not dangerous. These requirements make it clear that such practitioners are prohibited from performing procedures that put their clients at risk for great bodily harm or serious illness.

IV. Conditions

SB-577 requires a practitioner to do all of the following prior to providing services to a client:

> "Section 2053.6(a) ...
>
> (1) Disclose to the client in a written statement using plain language the following information:
>
> (A) That he or she is not a licensed physician.
> (B) That the treatment is alternative or complementary to healing arts services licensed by the state.
> (C) That the services to be provided are not licensed by the state.
> (D) The nature of the services to be provided.
> (E) The theory of treatment upon which the services are based.
> (F) His or her educational, training, experience, and other qualifications regarding the services to be provided.

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(2) Obtain a written acknowledgement from the client stating that he or she has been provided with the information described in paragraph (1). The client shall be provided with a copy of the written acknowledgement, which shall be maintained by the person providing the service for three years.

Section 2053.6(b) The information required by subdivision (a) shall be provided in a language that the client understands...."

These requirements are generally straightforward. A form that can be utilized to assist practitioners in making these disclosures is included with this memorandum. However, the description of the services to be provided and the theory of treatment upon which the services are based are items that will have to be filled in by each practitioner. Generally, the description of the services to be provided need not be highly detailed (however, see discussion below under "Consent Issues"). The description should, however, be sufficient to give the client a basic comprehension of the procedure that is being performed, including an understanding of how it will be administered, what it is expected to accomplish, and the likely results. It should describe any risks or discomfort that the patient might experience during the procedure. Likewise, the theory of treatment must be expressed in a manner that is comprehensible to the patient. It should include neither technical jargon nor terms that are undefined.

Of some concern is the requirement that the written disclosure must be provided in a language that the client understands. In practice, this could be difficult. It is conceivable that the client may understand the information contained in the disclosure through verbal communication, but be illiterate in English. If the client is not literate in English, a practitioner will have to translate the disclosures and provide them in written form to the client in a language he/she does understand.

V. Consent Issues

Although SB-577 requires a practitioner to obtain a written acknowledgement from his or her client stating that he or she has been provided with the disclosures that are required by SB-577, nothing in the act speaks to obtaining consent from the client for the procedure to be performed.

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A reasonable reading of SB-577 is that a client who signs an acknowledgement of having received all of the required disclosures has received enough information to make an informed decision and by proceeding with the procedure has provided consent. However, practitioners should consider obtaining written consent in connection with the client's acknowledgement of disclosure information required by SB-577.

It is essential for practitioners to obtain the actual consent of the client prior to administering treatment. Even if the treatment is effective, and no harm comes to the patient, unconsented treatment may subject the practitioner to civil prosecution for battery.[3] Practitioners should be aware that consent may not be validly given if the client: lacks capacity to give consent; does not understand the disclosures provided by the practitioner; or raises questions about treatment that are not answered or comprehended.

The courts have determined that for medical procedures that are complex, "informed consent" is required. Cobbs v. Grant, 8 Cal.3d 229. This standard has been specifically developed for medical procedures, and it is not certain that informed consent will be required for any type of treatment by an alternative health practitioner. Additionally, the requirements of informed consent are that the patient must first be informed of: (1) the nature of the procedure; (2) the risks, complications, and expected benefits of the procedure; (3) any alternatives to the treatment and their risks and benefits; and (4) potential conflicts of interest. The first two requirements are similar to the statutory disclosures mandated by SB-577. As a matter of practice, practitioners may also wish to disclose financial or other conflicts of interest (e.g., research) they may have in treating or referring a client prior to providing treatment of making a referral; and at least ask the client if medical treatment has been provided or considered.

VI. Record Keeping

SB-577 requires an alternative health practitioner to obtain a written acknowledgement from his/her client of the receipt of information contained in the required disclosures, to provide a copy of the written acknowledgment to the client, and to maintain the original acknowledgement

[3] A civil battery, generally, is an intentional act causing a harmful or offensive touching.

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for three (3) years. The most effective way to accomplish this is probably by having the client sign the disclosure statement acknowledging that he/she has reviewed and understands its content. There is no requirement relating to the location of these records, or how they may be stored or accessed. It is clear, though, that the treating practitioner is responsible for their maintenance, and must be able to produce them during the required three (3) year period.

VII. Confidentiality

SB-577 is silent regarding the protection of information concerning clients and their health conditions or treatment. However, there are extensive federal and state laws governing the confidentiality of health information. California's "Confidentiality of Medical Information Act" ("CMIA") (California Civil Code Section 56.10, et. seq.) prescribes extensive rules defining patient medical information and the requirements for disclosing such information. More recently, as part of the federal Health Insurance Portability and Accountability Act ("HIPAA"), the federal government has enacted sweeping rules governing the use and disclosure of "protected health information", as defined. The determination of whether alternative health practitioners will be subject to either the CMIA or HIPAA is fact dependent, and beyond the scope of this memorandum. Practitioners should be sensitive to the possibility that one or both of the laws may apply to their practice, and seek appropriate counsel.

VIII. Liability

While SB-577 allows alternative health practitioners to practice without violating the Medical Practice Act, it specifically does not provide any immunity from liability for civil claims. Thus, a client may sue an alternative health practitioner for monetary damages or other relief based upon negligent acts or omissions, intentional harm, fraud, or under other theories of civil remedies. As discussed earlier, services for which consent is not given could result in a claim of battery, and failure to comply with the specific requirements of SB-577 could subject practitioners to penalties under the Medical Practice Act, including potential felony prosecution if the practitioner puts the client at risk of serious harm.

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