MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED:	July 20, 2011
ATTENTION:	Medical Board Members
SUBJECT:	Petition to Repeal Section 1349 of Title 16 of the California Code of Regulations
STAFF CONTACT:	Kurt Heppler, Staff Legal Counsel

EXECUTIVE SUMMARY:

Issue

The matter before the Board is a petition to repeal Section 1349 of Title 16 of the California Code of Regulations (Section 1349), which relates to partnerships between physician and doctors of podiatric medicine. Section 1349 is attached for your convenience.

Pursuant to the provisions of section 11340.7 of the Government Code, the Board may: 1) grant the petition, which means that the Board would commence the regulatory process to repeal section 1349; 2) deny the petition, which means that section 1349 would remain intact; or 3) grant other relief or take other action that may be warranted.

Legislative and Regulatory Background

Prior to 1995, state law authorized physicians to practice in partnerships provided that the other members of the partnership were physicians. The same was true for doctors of podiatric medicine (DPMs), who could partner with other DPMs. Section 1349 was consistent with state law because it prohibited partnerships between these two licenses types where fees were combined or shared. State law did not explicitly authorize blended partnerships between physicians and DPMs.

In 1995, the California Legislature amended section 2416 of the Business and Professions Code (section 2416) to authorize these 'blended' partnerships provided that the majority of partners and partnership interests in the partnership are physicians. Section 2416 also constrains the practice and voting power of the DPMs within a blended partnership.

The petitioner, the California Podiatric Medical Association (CPMA), asserts that given the change in the law, section 1349, which has been in effect for decades, no longer has statutory support and must be repealed. CPMA states that its members would like to form partnerships with physicians and that section 1349 is an unsupported impediment to that formation process.

Business Combinations

As most members are aware, physicians may practice as a sole proprietor, in a partnership, or in a medical corporation. Physicians are not permitted to practice in a general (lay) corporation because public policy dictates that lay persons may not direct the practice of medicine. (See Bus. & Prof. Code, § 2400.)

The same analysis may be applied to partnerships. Under a general partnership, all partners are to receive a share of the profits but also have an equal role in directing the operation of the business. (Corp. Code, § 16401, subds. (b) and (d)) Public policy would not be best served by having lay partners direct the partnership's practice of medicine.

As mentioned earlier and consistent with public policy, physician-DPM partnerships have statutory limitations, as follows: (1) a majority of the partners and partnership interests in the partnership are physician[s] and surgeons or osteopathic physicians and surgeons, and (2) *a partner who is not a physician and surgeon shall not practice in the partnership or vote on partnership matters related to the practice of medicine that are outside his or her scope of practice.* (Bus. & Prof. Code, § 2416.) (*Emphasis added.*)

There is some uncertainty regarding the meaning of the "no practice" language of section 2416. The proponents of the petition and a previous opinion by the Department of Consumer Affairs Legal Office suggest that the no practice limitation means that DPMs can actually practice in the partnership but cannot exceed the scope of their license. Any other reading, they argue, would lead to an absurd result: a podiatrist could form a partnership (with the requisite number of physicians and surgeons) in which he or she could not practice. On the other hand, one could argue that a licensee's practice should always be limited to the scope of his or her license and that a business arrangement or business combination does not alter that scope. Furthermore, the language of subdivision (b) of section 2416 is not grammatically consistent with proponents' argument since the phrase 'outside the scope of his or her practice' would presumably only apply to voting on specific partnership interests.

Recommendations

Whenever the Board exercises its licensing, regulatory or disciplinary functions, public protection shall be its highest priority. (See Bus. & Prof. Code, § 2001.1.) Candidly, the repeal of a regulation that has been on the books for several decades is certainly a significant act.

Members may want to consider alternatives to the outright repeal of section 1349, including:

1) Directing staff to hold an interested parties meeting to study the matter further, perhaps consult with the Osteopathic Medical Board of California and the Board of Podiatric Medicine, then bring the results of those efforts back to the Board;

2) Directing staff to begin the process of amending section 1349 to prohibit fee sharing partnerships between physicians and surgeons and DPMs that do not conform to the provisions of section 2416;
3) Endeavoring to resolve the inconsistency of the statute first and then addressing the regulatory issue.

Please note that neither first two alternatives nor the outright repeal of section 1349 resolves the statutory construction issue. I would be happy to address any questions you may have.

June 28, 2011 Via Facsimile: (916) 263-2387

Linda Whitney, Executive Director
Medical Board of California
2005 Evergreen Street, Suite 1200
Sacramento, CA 95815

Re: Petition by California Podiatric Medical Association to Repeal 16 CCR §1349

Dear Ms. Whitney:

On behalf of the California Podiatric Medical Association, we are writing to request that the California Medical Board repeal 16 CCR §1349. That regulation forbids "combining" or "sharing" of fees" as between podiatrists and physicians even in partnerships. Such prohibition is fundamentally incompatible with the Legislature's authorization of physician-podiatrist partnerships, specifically, Bus. & Prof. Code §2416, which expressly authorizes partnerships between podiatrists and physicians. Accordingly, 16 CCR §1349 should be repealed.

Section1349 states:

> Nothing in Section 2416 of the code or this article shall be construed to authorize a partnership agreement in which fees are combined or shared between a physician and surgeon(s) and a podiatrist(s) or any other licensed professional, not a physician and surgeon.

The reference in that regulation to B & P Code §2416 is to a *prior* version, which did *not* authorize partnerships between podiatrists and physicians. That prior version provided:

> Physicians and surgeons and podiatrists may conduct their professional practices in a partnership or group of physicians and surgeons or a partnership or group of podiatrists, respectively.

In 1995, the legislature reversed course via Senate Bill 609 (Rosenthal), which changed the law expressly to authorize physician-podiatrist partnerships. B & P Code §2416 now provides as follows:

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> Physicians and surgeons and doctors of podiatric medicine may conduct their professional practices in a partnership or group of physician and surgeons or a partnership or group of doctors of podiatric medicine, respectively. Physician and surgeons and doctors of podiatric medicine may establish a professional partnership that includes both physician and surgeons and doctors of podiatric medicine, if both of the following conditions are satisfied:
>
> (a) A majority of the partners and partnership interests in the professional partnership are physician and surgeons or osteopathic physician and surgeons.
>
> (b) Notwithstanding Chapter 2 (commencing with Section 15001) of Title 1 of the Corporations Code, a partner who is not a physician and surgeon shall not practice in the partnership or vote on partnership matters related to the practice of medicine that are outside his or her scope of practice. All partners may vote on general administrative, management, and business matters.

The California Medical Association supported SB 609. (Senate Floor Analysis, September 6, 1995)

Senate Bill 609 was sponsored by the California Medical Board. As explained in the July 10, 1995, Assembly Health Committee Bill Analysis, "[e]xisting law authorizes physicians and podiatrists to form professional corporations, but not partnerships." The Medical Board's intent in altering B & P Code §2416 presumably was to conform the law governing podiatrist-physician partnerships to the more permissive law governing podiatrist-physician professional corporations.

At its core, a partnership is a type of business arrangement whereby revenues and expenses are shared. Thus, "[a] person who receives a share of the profits of a business is presumed to be a partner in the business" even in the absence of an express partnership agreement. (Corp. Code § 16202(c)(3)) And, unless otherwise agreed to by a partnership, "[e]ach partner is entitled to an equal share of the partnership profits and . . . is chargeable with a share of the partnership losses in proportion to the partner's share of the profits." (Corp. Code § 16401(b))

No California statute forbids any sort of "combining" or "sharing" fees as between podiatrist-physician partners. Indeed, except for the limitations set forth in B & P Code §2416 subsections (a) and (b), the California Code's treatment of podiatrist-physician partnerships is no different from its treatment of partnerships composed exclusively of physicians or exclusively of podiatrists.

Clearly, 16 CCR §1349 is irreconcilably incompatible with governing statutory law. Because that regulation contravenes California law, the California Podiatric Medical Association respectfully requests that it be repealed. Both the California Medical Association and the California Orthopedic Association have informed us that they are in accord with this petition.

Sincerely,

Marcie Ellen Berman

Marcie Ellen Berman,
on behalf of the California Podiatric Medical Association