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To the Members of the
California Senate Appropriations Committee

Senator Anthony J. Portantino (Chair)
Senator Patricia C. Bates (Vice Chair)
Senator Steven Bradford
Senator Jerry Hill
Senator Brian W. Jones
Senator Bob Wieckowski

Dear Senators:

I am an attorney with some unique, non-publicly available factual information and some perspective which you might find useful in your deliberations on SB 276. I worked on the only Medical Board of California (“MBC”) resolved case involving a physician writing a vaccine exemption type letter. I currently represent several physicians who are under MBC investigation for writing what has been mischaracterized as “fake” exemption letters. I am also very familiar with the MBC’s efforts to obtain medical records from physicians via subpoena and from the courts.

Based on the above, I believe that Senator Pan was incorrect when he related to the Health Committee last week that the MBC has difficulty protecting the public against the so called “bad actors” writing “fake” exemptions because 1. The parents are in “cahoots” with the exemption writing physician, and therefore don’t file the complaints necessary to investigate these physicians, and 2. That the MBC has a hard time obtaining medical records and has a hard time convincing judges to release the records, presumably because of HIPAA or other privacy concerns. These MBC’s difficulties were apparently a substantial reason and created the need for SB 276.

While it is true that parents seeking medical exemptions typically do not file MBC complaints against their exemption writing doctors, complaints are in fact being filed against these physicians. I have recently seen a complaint filed by an HMO against a physician for vaccine exemptions given to a number of children. I believe that this HMO and possibly others are making similar complaints to the MBC.

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Furthermore, there is strong circumstantial evidence that schools, and in particular school nurses are also filing complaints against these physicians. I say this because several of my physician clients are the subject of investigations for exemptions written for a number of children in a particular school or school district. The only reasonable explanation for this is that the school authorities are filing these complaints, or at least providing information to the MBC's investigators (technically investigators of the Health Quality Investigation Unit of the Department of Investigations). It is possible that some investigators may be encouraging these complaints as a work-around to the fact that parents are not filing complaints. I think this demonstrates the MBC's ability to pursue physicians who write these exemptions, despite the fact that the families are not filing complaints. Based on my information, I believe that most of the physicians who write large numbers of medical exemptions are now under MBC investigation.

Senator Pan also stated that it is difficult for the MBC to obtain medical records from the courts because it is hard to convince the judges to turn over a physician's medical records. As an attorney who has litigated this issue, that is not true, at least for the past 15 years.

For your information, in 1977, the California Supreme Court first recognized a constitutionally protected patients' privacy right over medical records and denied the MBC (or technically its predecessor) access to a physician's medical records because good cause and a compelling need was not demonstrated. To my knowledge, the last time the California courts have turned down the MBC's request to compel compliance with an investigative subpoena was in 2004 (apart from mental health records which are covered by a more robust evidentiary privilege). Every other reported appellate court case has found in the board's favor. I myself lost two of these motions in last few years (unrelated to a vaccine issue). It is a matter of public record, that Dr. Bob Sears lost in his attempt to resist an MBC subpoena, last year. Just recently, Dr. Ron Kennedy of Santa Rosa was compelled by the Superior court to turnover medical records of his medical exemption cases which were the subject of complaints.

I know some of the other attorneys who have litigated these motions, and none of them have succeeded in convincing a Superior Court judge to quash the MBC's investigative subpoena for specific medical records. I'll go a step further and say that it's unlikely any judge in the future will turn the MBC down. The MBC has figured out what it has to say to obtain medical records from its licensees. Therefore, I would respectfully suggest that Senator Pan is incorrect in his assessment that the MBC is having difficulty convincing judges to order physicians to turn over medical records relating to vaccine exemptions.

In short, as a practitioner involved in these cases, I don't see the MBC's difficulties articulated by Senator Pan.

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Regarding the so called “bad actors,” the doctors writing these exemptions have a different understanding of what SB 277 requires or allows, and a different standard of practice from the majority of California’s physicians dealing with children. One of their problems may be that they took Senators’ Pan and Allen’s statements in supporting SB 277 seriously and literally concerning the scope of allowable medical exemptions. But that is a topic best explored another time and perhaps in a different forum.

As a litigator who works on medical board cases throughout the country, I do find it somewhat odd that physician groups are so keen on giving-up such an important part of medical decision making to state employees who have no physician/patient relationship, and do not even have to be physicians.

By way of comparison, the Commissioner of Insurance was shocked to learn that a large health insurer was utilizing a nurse rather than a medical director to make life and death coverage decisions. Here is an article discussing the issue, in case you might not have seen it. <https://www.newsmax.com/thewire/aetna-medical-director-nurses-decide/2018/02/12/id/842821/> The Insurance Commissioner reaffirmed his shock and discontent with this state of affairs quite recently, as a result of the carrier’s settlement of the questionable activity of having non-physicians making important medical decisions. <https://www.cnn.com/2019/04/26/health/aetna-settlement-california-investigation/index.html>. Some might find a disconnect between the Department of Insurance and the MBC’s views on who should make important medical decisions.

I would remind you that the Legislature has already determined that patients have the right to seek medical care and advice outside of conventional thinking, as embodied in Cal Bus. And Prof. Code Section 2234.1. The reason behind that right is, as you folks have wisely stated:

“Since the National Institute of Medicine has reported that it can take up to 17 years for a new best practice to reach the average physician and surgeon, it is prudent to give attention to new developments not only in general medical care but in the actual treatment of specific diseases, particularly those that are not yet broadly recognized in California.”

(Bus. and Prof. Code, Section 2234.1(c). Here is a link to the entire section. https://california.public.law/codes/ca_bus_and_prof_code_section_2234.1

The MBC, with the limited review by the courts may decide whether this alternative standard of care is valid, but nonetheless, it’s worth remembering your prior pronouncement as you deliberate the SB 276 remedy to the MBC’s asserted difficulties in protecting the public. Personally, I would welcome the Legislature weighing-in on

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whether California will continue to recognize the right of patients and physicians to seek and provide professional advice outside current conventional medical opinion, mindful of the important and complicated public health considerations involved in this issue.

For your information, I am not a lobbyist, and no client or organization is paying me to write this letter.

Thank you all for your legislative service.

Very truly yours,

Richard Jaffe