

Highlights of AAEM's Legal Advocacy for Emergency Physicians

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Since the March/April 2013 issue, *Common Sense* has been celebrating AAEM's twentieth birthday. In bringing that celebration to an end, we now review some of the Academy's legal actions and related

efforts on behalf of individual emergency physicians and independent groups. AAEM is unique. It is the only emergency medicine (EM) professional society ever to take legal action against contract management groups (CMGs) in defense of emergency physicians. As you will see, the Academy's willingness to put the interests of individual emergency physicians over corporate interests has altered the course of EM.

Catholic Healthcare West (CHW) and Emergency Physician Medical Group (EPMG)

In November of 1997, one of the largest hospital chains in the country, CHW, announced the purchase of EPMG, a privately held emergency medicine group. For the first time, a large hospital system had taken over a large EM group, converting hundreds of private practice emergency physicians into hospital employees. Ominously, the \$36 million purchase price was to be recouped by CHW with revenue taken from the professional fees of those emergency physicians. EPMG's principal owners earned millions of dollars on the sale, and were then given jobs in the new CHW managed services organization, Meriten, which was essentially a contract management group. All current EPMG physicians — staffing eight of the 37 CHW hospitals — immediately became part of Meriten. Even more chilling, the independent emergency physician groups staffing the 29 CHW hospitals that were not part of EPMG were going to be forced under the control of Meriten, which planned to take a 28% fee from its emergency physicians for expenses and profit.

With 29 contracts at risk, the regional implications of this were profound. AAEM also recognized national implications, in that every large hospital system would see the opportunity to control and profit from their emergency physicians. After AAEM wrote letters of concern to the board of CHW, CHW in turn threatened AAEM. Undeterred and with AAEM's help, the practicing emergency physicians of CHW organized into the Affiliated Catholic Healthcare Physicians (ACHP). With the support of AAEM, ACHP — along with the California Chapter of AAEM and the California Medical Association — filed a lawsuit alleging violations of corporate practice of medicine (CPOM) and fee-splitting laws. The CMA recognized both the threat to emergency physician autonomy and the wider threat, as Meriten would also be positioned to control other hospital-based specialists. ACEP was asked to participate in these actions but declined, saying it was a private business matter.

The *amicus curiae* (friend of the court) brief filed by AAEM in this case can be found here: http://www.aaem.org/UserFiles/CAAmicusBriefCHWcase_2_.pdf.

Results: After initial court hearings seemed to go against it, CHW sold EPMG back to its original owners, who then reorganized EPMG into a fairer, independent, physician-owned group. If CHW had been successful in this endeavor it would have opened the door to other hospital chains taking over emergency physician groups large and small, dipping into emergency physicians' professional fees as a new source of revenue, and dramatically reducing the number of private emergency medicine groups. AAEM, at the time a fledgling organization, was the only EM society willing to stand with the ACHP physicians. This stand changed the course of EM in California. In the aftermath of this failed attempted takeover of EM, the chief medical officer (CMO) and chief executive officer (CEO) of CHW both resigned.

The links below are further readings on this matter:

- <http://www.aaem.org/em-resources/critical-em-and-practice-issues/corporate-practice/achp/epmg-purchase>
- <http://www.aaem.org/em-resources/critical-em-and-practice-issues/corporate-practice/achp/epmg-2>
- <http://www.aaem.org/em-resources/critical-em-and-practice-issues/corporate-practice/achp/epmg>
- <http://www.aaem.org/em-resources/critical-em-and-practice-issues/corporate-practice/achp/amici-curiae>
- <http://www.aaem.org/em-resources/critical-em-and-practice-issues/corporate-practice/resign>

Mount Diablo Hospital (MDH), California Emergency Physicians (CEP), and TeamHealth

In 2003, Quantum Health, a subsidiary of TeamHealth, the second largest EM contract management group (CMG) in the United States, lost its contract at Mount Diablo Hospital in Concord, California to CEP. Three of the emergency physicians there wanted to continue working at MDH, where they had each been on staff for years. One was even a former Medical Staff President. In response, Quantum Health filed suit against these doctors, seeking damages from them for their supposed role in the loss of the contract. The emergency physicians went to ACEP for help and were told, as in the CHW matter, that it was a private business matter. They then came to AAEM and were provided advice, support, and legal assistance. The doctors joined AAEM in a counter-suit against TeamHealth, alleging that TeamHealth was using corporate subsidiaries to hide its violation of California's prohibition on the corporate practice of medicine (CPOM). AAEM sought a declaratory judgment,

Continued on next page

requesting that all emergency department (ED) staffing contracts held by TeamHealth subsidiaries in California be voided, in light of California's CPOM laws. **This counter-suit was the first legal action ever taken against a CMG by an EM professional society.**

Results: All parties reached a settlement whereby TeamHealth dropped its lawsuits against the emergency physicians, who were able to continue working at MDH, and AAEM dropped its lawsuit against TeamHealth for violating California CPOM laws. In 2005, AAEM assisted in similar cases in Rhode Island and Indiana, also with favorable outcomes.

We encourage you to read more about this complicated, interesting, and important case. A copy of the AAEM counter-suit can be found here: http://www.aaem.org/UserFiles/AAEMTeamHealthComplaint-Intervention_2_.pdf.

Several of its elements are truly shocking. Read the full story from Emergency Medicine News here: http://journals.lww.com/em-news/Fulltext/2004/03000/AAEM_Sues_Team_Health_for_Corporate_Practice_of.1.aspx.

Emergency Physicians Professional Association (EPPA) and EmCare

In 2004, EmCare, the largest emergency medicine CMG, acquired the contract at Methodist Hospital in St. Louis Park, Minnesota. EPPA, a private democratic group serving the hospital since 1969, was not even told the contract was up for bid until after the contract was awarded to EmCare. No request for proposals was issued.

EPPA's physicians initially reached out to ACEP for support through its state chapter, but were told this was not allowed by national ACEP. EPPA then asked AAEM for help. AAEM Past-President Dr. Robert McNamara flew to Minnesota and met with nearly 100 emergency physicians. The Academy offered legal counsel, went to the hospital on EPPA's behalf, and filed complaints with the state attorney general and Board of Medicine. In December of 2004, AAEM and EPPA jointly filed suit against EmCare for violating CPOM and fee-splitting laws, and filed suit against the hospital for breach of contract. A copy of the suit can be found here: <http://www.aaem.org/UserFiles/MNEmCarecomplaint.pdf>.

Results: Three weeks later, Methodist Hospital terminated its relationship with EmCare and re-contracted with EPPA. EPPA continues to serve Methodist Hospital and several other local hospitals. AAEM then sent a letter to every hospital administrator in the state of Minnesota, informing them of this matter and sending the message that AAEM is watching what they do with their EDs. This action had a chilling effect on the desire of layperson-owned CMGs to move into Minnesota, and they have been unable to establish a significant foothold in that state.

Read more from EM News at: http://journals.lww.com/em-news/Fulltext/2005/04000/EPs_Rehired_After_Contract_Group_Ousted.2.aspx.

PhyAmerica Bankruptcy

In 2003, PhyAmerica, one of the largest CMGs, went bankrupt. In 2004, Sterling Healthcare, another large contract management group, purchased PhyAmerica's bankrupt assets, including its ED contracts.

PhyAmerica then told its emergency physicians that their self-insured medical malpractice/legal defense fund had been exhausted. Two hundred PhyAmerica emergency physicians who had already been sued were told they no longer had malpractice coverage, and must pay all attorney fees and legal judgments out of their own pockets. And of course, PhyAmerica emergency physicians had no malpractice coverage for future suits.

In response, AAEM organized a Working Group from among the affected emergency physicians, handled logistics, and offered free legal counsel. The Academy also filed an amicus curiae brief before the Baltimore Bankruptcy Court.

Results: In April of 2005 a court order guaranteeing the protection of the physicians' personal assets was handed down. AAEM also negotiated with Sterling Healthcare for partial reimbursement of the emergency physicians' legal costs.

Restrictive Covenants in Tennessee

In 2005, legislation was introduced to allow restrictive covenants in physician employment contracts in Tennessee. AAEM and its Tennessee chapter strongly opposed these efforts and made this issue a top legislative priority for the next two years. Drs. David Lawhorn and Andy Walker testified before the House committee reviewing the bill, and explained to committee members how such non-compete clauses harm both patients in general and emergency physicians in particular.

Results: While TNAEM was not able to kill the bill entirely, emergency medicine was exempted. Emergency physicians in Tennessee remain free of restrictive covenants to this day.

Read more at EM News, http://journals.lww.com/em-news/Fulltext/2007/08000/EPs_Exempt_from_Tennessee_Law_Reinstating.2.aspx.

TeamHealth and the Memorial Hermann Hospital System (MHHS)

In 2007, MHHS, a large hospital network in Houston, awarded eight emergency department contracts to TeamHealth. Several emergency physicians contacted AAEM for assistance in this matter, including a private group with a 20-year history with MHHS, which was ousted in this move. AAEM and the private group — with AAEM's financial assistance — filed suit against TeamHealth and MHHS, citing violation of Texas CPOM laws. AAEM felt the case had substantial footing, as the Texas Medical Practice Act prohibits physicians from being employed by lay corporations for the practice of medicine. Additionally, previous Texas case law (*Flynn Brothers, Inc. v. First Medical Associates, Dallas 1986*) held that lay persons could not profit from an ED contract. AAEM's efforts were funded through donations to the AAEM Foundation.

Results: Unfortunately, a state district court held that it did not have jurisdiction to hear the case. Despite an amicus curiae brief filed in support of AAEM by the Texas Medical Association, a state appeals court affirmed the district court's decision. The court of appeals held that AAEM lacked standing to challenge the contract between MHHS

Continued on next page

and TeamHealth, as well as the contracts between TeamHealth and its emergency physicians. One of the plaintiff physicians actually signed a contract with the TeamHealth subsidiary, but even then the court would not grant a declaratory judgment enforcing the state CPOM laws, holding that private individuals could not enforce the Texas Medical Practice Act. The court did leave open the possibility that physicians could file suit to nullify their contracts with a lay-owned corporation, as such contracts may violate state CPOM laws.

AAEM then appealed to the Texas Supreme Court, which refused to hear the appeal. As a result, neither the Academy nor the plaintiff physicians ever got the chance to argue the merits of their case before a judge or jury, and no judgment on the merits of AAEM's corporate practice of medicine claim was rendered. AAEM still believes it could win in court on the issue of the corporate practice of emergency medicine in Texas. Note that Texas is the home state of EmCare, and has one of the biggest populations of emergency physicians of any state.

Read more from EM News at: http://journals.ww.com/emnews/Fulltext/2010/08000/Breaking_News__Texas_Court_Refuses_AAEM_Suit.2.aspx.

Dr. Genova versus Banner Health

In January of 2010, emergency physician Dr. Ronald Genova contacted the hospital administrator on-call, the hospital CEO, requesting to implement a "Code Purple" to divert patients to other hospitals, because he believed the emergency department at North Colorado Medical Center could no longer provide appropriate and timely screening to patients in the ED due to excessive crowding. According to the facts alleged in Dr. Genova's lawsuit, a patient with a GI bleed had already collapsed in the waiting room bathroom while awaiting evaluation and two heart attack patients had just presented to the ED. According to Dr. Genova, the hospital CEO refused the request. Two weeks later, in apparent retaliation, Dr. Genova was removed from emergency department duties.

Results: Dr. Genova filed a lawsuit noting that his removal from the schedule violated EMTALA whistle-blower protections and the covenant of good faith and fair dealing implied in contracts by Colorado law. The federal District Court dismissed Dr. Genova's suit, citing that Dr. Genova signed away his right to sue the hospital when his group contracted to provide physician coverage of the emergency department. Dr. Genova then asked for AAEM's assistance. In November of 2012, Dr. Genova appealed, and AAEM filed an *amicus curiae* brief asking the appellate court to overturn the dismissal and have the allegations in the complaint adjudicated on its merits. AAEM argued that the District Court imposed too narrow a reading of EMTALA's whistle-blower protections. AAEM also argued that a hospital should not be allowed to insist on a waiver of the covenant of good faith and fair dealing, as that implied covenant serves not only to protect the physician but also patients. While the 10th Circuit Court of Appeals favorably discussed the arguments made by AAEM, it ultimately upheld the dismissal. Although AAEM is disappointed with the outcome, this case demonstrates the Academy's willingness to come to a member's aid when their practice rights are threatened.

The AAEM *amicus curiae* brief can be accessed at: <http://www.aem.org/UserFiles/Genovaamicuscuriaefiling.pdf>.

Conclusion

As you can see, the Academy has been extremely active in protecting the practice rights and livelihoods of thousands of emergency physicians who have nowhere else to turn for support in such matters. Far from tilting at windmills, most of our legal actions have been both successful and substantial, with immense practical benefits to the emergency physicians involved — including saving their jobs. There is still much to do, however, especially in an environment where lay-owned, corporate, contract management groups — which often have a very poor track record regarding restrictive covenants, due process, and other practice rights — control such a large proportion of emergency medicine jobs. Your AAEM membership, your active support of its work, your recruitment of new Academy members, and your donations to the AAEM Foundation provide the resources the Academy needs to be a successful advocate for the practicing emergency physician.

Two key components of AAEM's mission statement are:

- The personal and professional welfare of the individual specialist in emergency medicine is a primary concern to the American Academy of Emergency Medicine.
- The Academy supports fair and equitable practice environments necessary to allow the specialist in emergency medicine to deliver the highest quality of patient care. Such an environment includes provisions for due process and the absence of restrictive covenants.

The Academy has a duty to its membership to protect these ideals. On many occasions AAEM has fought for emergency physicians whose independent groups or practice rights were in jeopardy. As a result, several private emergency medicine groups have been saved — along with hundreds of jobs — and even more emergency physicians have had their practice rights protected. ■

Remarkable Testimony & Due Process Cases Requested

The Legal Committee is requesting your help! The AAEM Remarkable Testimony/Actions webpage highlights notable due process cases and testimony in malpractice cases that is "remarkable." The Legal Committee is seeking more cases to supplement this page. For more information and to submit a case for posting consideration, please see

<http://www.aem.org/aaemtestimony/>.