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#### California College of Midwives/ ACDM

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 December 31, 2002

### Teri Kizer, Analysist, Division of Licensing

Medical Board of California

1426 Howe Ave

Sacramento, CA 940303

RE: Feedback on Dr Chase�s Oct 6 letter -- proposed regulations for midwifery practice

Dear Ms Kizer,

Thank you for the opportunity to document our position relative to the proposal by Dr. Chase.

**Main Points:**

* Definition and development of regulation reflecting an �appropriate� Standard of Care for Licensed Midwifery practice
* Adoption of Regulations reflecting Judge Roman�s ruling in the Alison Osborn Decision relative to physician supervision provision of the LMPA
* Regulatory recognition that a midwife satisfies the ambit of the supervisory provision of the LMPA whenever a client is receiving concurrent care from an HMOs or private physician
* Recognition of the right of childbearing women to decline prophylactic medicalization without losing access to professional midwifery services per Judge Roman�s decision
* Regulations defining appropriate information on identified risk factors and an approved form for parental decline of medicalization consistent with Judge Roman�s ruling
* Collection of data on the nature of disciplinary actions taken against LMs since implementation of the LMPA in 1997
* Appropriate opportunities for input from state-licensed midwives and consumers for Midwifery Task Force meeting held by the MBC

**The California Legislature has mandated the Medical Board of California as follows:**

The Medical Practice Act provides for licensure of the practice of midwifery by the board's Division of Licensing and requires that the licensed midwife practice under the supervision of a licensed physician and surgeon.    This bill would require the board to adopt regulations defining the appropriate standard of care and level of supervision required for the practice of midwifery.

**Standards of Care:** The language in SB 1950 provides legislative authority for your agency to adopt the standards of care developed by California licensed midwives that reflect community-based midwifery practice and are faithful to the �midwifery model of care� as defined by the World Health Organization and the amendment (SB 1479) to the Licensed Midwifery Practice Act of 1993 passed in the fall of 2000.

Standards of care for California midwives would logically originate with professional midwifery organizations such as our College of Midwives or CAM. Documents formalizing practice standards for midwives have been written by several professional organizations: California College of Midwives, California Association of Midwives (CAM), and American college of Nurse Midwives. A specific variation of these sources have already been recognized as �appropriate� for community-based practice by Judge Roman in the Alison Osborn case in August of 1999.

Judge Roman�s decision also recognized the right of pregnant women to decline prophylactic medicalization of normal childbirth in the presence of an identified risk factor such as breech, vbac or twins. This topic, while obviously controversial, must be satisfactorily recognized in regulations defining appropriate informed consent/decline of medical advise and identify advanced midwifery skills where appropriate. Failure to acknowledge the right of healthy women to choose non-medical (i.e., physiological) care for normal birth would only lead to a resurgence of the use of lay birth attendants. At present parents can make this choice under section 2063 � religious exemptions clause, the emergency exemption clause, the category of �domestic remedies� or the recently passed SB 577.

De-professionalizing midwifery would be a giant step backwards in regard to consumer safety. A trained, experienced, skilled and appropriately equipped professional midwife functions as an educated observer with emergency response capacity. This guardianship role greatly enhances the safety of normal childbirth in healthy women and provides immediate care to the neonate during the crucial first 5 minutes after the birth when supplemental oxygen and assisted ventilation may be life-saving and is always protective of neurological function. This is equally, if not more important when risk factors are identified.

**Physician Supervision**: Judge Roman�s decision shows an in-depth understanding of the complexities of midwifery practice and also provides us with language relative to the regulations defining the �appropriate� level of physician supervision.  In particular, his decision about the type and level of supervision available to and utilized by Midwife Osborn is a model of rational thinking that deserves to be codified by the California Medical Board. In particular, Judge Roman called into question the historical assumption that supervision automatically equates with vicarious liability on the part of the supervising physician, thus offering us an opportunity to develop logical principles defining a workable relationship between doctors and midwives.

His decision states: *�*The parties readily acknowledge that �supervision� as set forth in Business and Professions Code section 2507(c) does not �require the physical presence of the supervising physician� and does not purport to involve, as set forth in Business and Professions Code section 3501 (f), the overseeing of activity or acceptance of responsibility for services rendered by licensed midwives as *required by such physicians for licensed physician assistants*. Clearly, a different standard was intended by the Legislature; however undefined.�  This acknowledges that California LMs provide care without �close supervision� and is consistent with nurse midwifery regulations promulgated by the Board of Registered Nursing.

Nurse Midwifery As a Model: As you are already aware, the original passage of the LMPA mirrored the nurse midwifery statutes (defined as �equivalent but not identical�) from chapter 6 of the B&P code and contained both legislative and regulations language.  Logically the practice of LMs would reflect those of nurse-midwives as stipulated in Chapter 6, section 2746.5, which authorizes CNMs "to attend cases of normal childbirth and provide prenatal, intrapartum and postpartum care". BRN regulation CCR 1463 specifies that "nurse-midwives may provide supervision, care and advise to women during interconceptual periods, conduct deliveries on his/her own responsibility ... including preventive measures and the detection of abnormal conditions in the mother and child, obtaining physician assistance and consultation when indicated or providing emergency care until physician assistance can be obtained". (emphasis added)

The preamble to this section states: �The following amendment is to recognize nursing as a dynamic field that is evolving�. This body of enabling statues authorizes nurses and nurse-midwives to perform functions that are, in some instances, �identical to those performed by a physicians�. However, these functions as authorized to nurse midwives by enabling legislation are *not* the practice of medicine. This same principle would apply to licensed midwives.

The theory of �Distinct Calling�: By these criteria, professional midwives are agents in their own behalf � a legal status known as a �distinct calling� � and are statutorily authorized to provide normal ante, intra, postpartal and postnatal midwifery care without �close� supervision (a fact acknowledged in Judge Roman�s ruling). The principle here hinges on the expert or �distinct� nature of the skill in question, as �close supervision� can only be exercised when the supervising authority has a greater mastery of the skill than the agent or employee being closely supervised. By statute, midwifery is *not* the practice of medicine (section 2507e).

Midwifery is distinct in origin, in philosophy, in training and in practice both from the practice of medicine. Physicians, while trained, skilled and licensed to practice medicine, are *not* themselves licensed as midwives and are neither trained or experienced in midwifery, especially as a �physiological� (i.e., non-medical) discipline provided in a domiciliary (i.e., non-medical) setting. To avoid incurring unnecessary or �vicarious� liability, a physician would not contract to �supervise� (or purport to exercise control) over the practice of midwifery but would instead defer to the �distinct calling� of the midwife in regard to the conduct of normal midwifery services.

The legal distinction between the practice of midwifery and that of medicine, when fully acknowledged, should protect the physician from liability for domiciliary (non-medical, non-institutional) midwifery care. This reflects the legal concept of �distinct calling�, which delineates litigious culpability along the lines of the enabling legislation's statutory definition of a healthcare professional's scope of practice. As acknowledged by Judge Roman, the appropriate standard of care for midwifery is distinct from that of allopathic medicine.

Thus it is the distinct calling of midwives to practice midwifery and the distinct calling of physicians to practice medicine. With this in mind, physician liability would be limited to negligent commission or omission of medical care provided. The doctor would be shielded from culpability for the care provided independently by the licensed midwife. Other aspects of vicarious liability would also be in abeyance. For example, the doctrines of �borrowed servant� and �caption of the ship� are not applicable to independently licensed healthcare professionals such as midwives who provide care without �close supervision�. This means �vicarious� liability would apply *only* to those situations where the midwife is a bona fide employee or agent of the physician. Obviously this would not be the case for community-based midwifery practice, as no physician employs a LM to provide home-based birth services as agent or employee for the doctor�s obstetrical patients.

Creative Use of Regulations ~ Consumer Protection thru Improved Access to Physician Services: When a midwife enters into an arrangement with a physician for medical interface, it is to the advantage of client families by creating continuity of care between the two professions, as well as access to consultative services, referral and emergency services. Therefore, the best protection of the consumer would be passage of regulations that acknowledge the distinct calling of LMs so as to provide protection for physicians from threat of vicarious liability litigation. This would address the false assumption by malpractice carriers that any interaction between a doctor and a LM creates vicarious liability and instead open the way for physicians to make themselves available whenever the mother or baby have a medical need. The language currently used in the BRN regulation for CNMs would be an excellent foundation for this:

 ��..midwives may provide supervision, care and advise to women during inter-conceptual periods, conduct deliveries on his/her own responsibility ... including preventive measures and the detection of abnormal conditions in the mother and child, obtaining physician assistance and consultation when indicated or providing emergency care until physician assistance can be obtained"..

This is protective and preventative and in alignment with the intent of the licensing law to safeguard the consumer.

Date Collection on Disciplinary Actions: We request a breakdown of the number and types of disciplinary actions taken against LMs since implementation of the LMPA in 1997.

Midwifery Task Force Meeting: We request longer and more centrally located meetings of the midwifery task force so as to ensure appropriate opportunities for input from state-licensed midwives and consumers.

Please feel free to contact me if you have any questions.

Faith Gibson. LM, CPM

Executive Director, ACDM/California College of Midwives

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cc:

            Senator Liz Figueroa;s Office, Tenth District, California Senate

        Ron Joseph, Director MBC

        Frank Cuny, CEO, California Citizens for Health Freedom

        American College of Nurse Midwives, California Chapter

        Carrie Sparavohn, LM, President, California Association of Midwives

        Renee Anker, LM, California Advocating Licensed Midwifery

Three Wise Women would have...

Asked directions, Arrived on time, Delivered the baby, Helped Mary into a dry nightie, Sent Joseph out for more straw, Made a fresh bed for the new parents, Properly disposed of the placenta, Given breastfeeding advise, Cleaned up the stable, Made a casserole, Brought practical gifts *and* there would be Peace on Earth.

Happy Holy Days!



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