As a result of the passage of the Patient Protection and Affordable Care Act ("PPACA" or "ACA") and the health care market dynamics, the CMA witnessed an unprecedented demand for information regarding Medical Foundations, Accountable Care Organizations (ACOs), and other organizational models. Physicians across the state are being asked to join new health care delivery organizations.¹ There are several well-publicized efforts by hospitals to create hospital-dominated medical foundations and/or ACOs. Accordingly, the CMA Board of Trustees created the Physician-Hospital Alignment Technical Advisory Committee (hereinafter referred to as the "TAC" or "Committee") in order for the committee to provide guidance to the CMA Board of Trustees (BOT) regarding newly proposed delivery models and physician-hospital alignment issues.

The Committee crafted a report that was adopted by the CMA House of Delegates (HOD) at its October 2010 annual meeting. The report provides ACO and Medical Foundation principles and provides general guidance from a physician perspective. See CMA HOD Report D-4-10; a copy of the HOD report is available on CMA's website www.cmanet.org. Below are excerpts from the report. For additional information and discussion regarding medical foundations, see CMA ON-CALL document #0218, "Legal and Practical Considerations Concerning Medical Foundations."

**Overview:** The Committee found that many physicians are concerned that hospitals are forming these organizations to exert more control over physician practices and to better position themselves financially in an environment of scarce resources. Some physicians, the committee found, would like to join these organizations (seeing, for instance, opportunities to increase their reimbursement rates and improve quality), but need to understand their rights. And some physicians are seeking to form their own ACOs.

The Committee agreed that one of the key provisions of the law is the requirement that the medical foundation provide medical services to its patients through a group of 40 or more physicians. The Committee discussed how by its plain meaning, and given the purpose underlying the exemption from clinic licensure (i.e., to benefit a multispecialty group of physicians), the statute contemplates that a medical foundation would contract with a medical group that, in turn, would make available the requisite number of primary care and specialist physicians to furnish professional services to clinic patients. This interpretation is consistent with the type of integration and coordination necessary for the physicians to conduct medical research and health education through the medical foundation. Moreover, this interpretation is also consistent with the principles underlying the corporate practice of medicine prohibition. The governing board of the foundation has less ability to influence the professional judgment of physicians who affiliate with the medical foundation through an integrated medical group. See Andrew J. Demetriou, "Medical Foundations and the Corporate Practice Doctrine: Toward a Rational Approach" Cal. Health Law News (1993).

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¹ For an overview of organizational options for physicians and physician groups, see CMA ON-CALL document #0200, "Medical Practice Options: Overview." For more information on governance issues physicians should consider when joining or forming new medical practice organizations, see CMA ON-CALL document #0239, "Governance Issues for Physician Organizations."
**Current Trends:** While new physician-sponsored medical foundations have been created, since the 1990s most of the new medical foundations have been organized by non-profit, tax exempt hospitals or health systems. As of late, however, initiatives by hospitals to organize medical foundations have been growing expeditiously. The 2010 Accountable Care Act calls for integrated delivery models to enhance quality at lower cost and Accountable Care Organization models can move forward without hospital participants. Accordingly, Hospitals without aligned physicians or physician groups view themselves increasingly at a competitive disadvantage and are seeking to quickly create medical foundations as a physician-hospital alignment strategy.

The Committee reviewed many of the hospital initiatives—some of which are explicit attempts to circumvent the corporate practice of medicine bar and compete against physician-led medical foundations. For instance, the Committee analyzed the proposal by the Hospital Council of Southern California (HASC), who engaged the Camden Group, to create the so-called mega- or master-foundation. This proposal, the Committee acknowledged, is particularly troublesome for all physicians regardless if they currently practice in a solo, small group, or large group setting. Indeed, hospitals explicitly indicated that they were interested in the mega-foundation proposal in order to compete against physician-led medical foundations and as a way to employ physicians, among other reasons. Under this proposal, the hospitals would join together to create a single foundation that they would collectively control and use to contract with physicians on an individual basis. Below is an example of how such an organization may look:
When analyzing the mega-foundation and other new efforts to create hospital dominated medical foundations, the Committee sought to differentiate the key characteristic of traditional models and these new, aggressive efforts. The table below identifies some of these characteristics:

<table>
<thead>
<tr>
<th>CHARACTERISTICS OF TRADITIONAL MEDICAL FOUNDATION MODEL AND NEWER TRENDS</th>
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<tbody>
<tr>
<td><strong>Traditional Model</strong></td>
</tr>
<tr>
<td>• Physician-Centric</td>
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<tr>
<td>• Supports small geographies</td>
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<tr>
<td>• Physicians included in governance</td>
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<tr>
<td>• PSAs with medical groups that meet 40/10 MD requirement</td>
</tr>
<tr>
<td>• Medical group controls compensation, quality and recruitment</td>
</tr>
<tr>
<td>• Consistent with corporate bar</td>
</tr>
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The Committee also discussed and acknowledged that physicians are interested in exploring the medical foundation model for several reasons. For one, a medical foundation can purchase the tangible and intangible assets of a medical practice, thereby allowing a physician or group of physicians to "cash out" the entire value of their ownership interests. For another, many physicians seek the stability of a larger organization and, with it, the prospect of regular hours, reduced call coverage, income stability, access to improved medical technology, and minimal administrative duties. The Committee also discussed how a medical foundation can play an important role in the development and/or expansion of an integrated health care delivery system. The medical foundation models, the Committee noted, that are most favorable for physicians and their patients, contract with a medical group that meets the 40/10 requirement, do not interfere with the physician-patient relationship, have a well-funded commitment to medical research and health education activities and their key executive and medico-administrative leadership positions are held by physicians independent of the sponsoring organization.

However, the Legislature did not intend to provide a pathway for tax-exempt hospitals to organize and control a large group of physicians in the outpatient setting and, in doing so, circumvent the corporate practice of medicine prohibition. Indeed, existing CMA policy provides that it will "take all appropriate steps to ensure that the corporate practice of medicine bar is enforced and that no exceptions be made for foundations that do not meet the statutory requirements of Health & Safety Code §1206(l)...."

**Medical Foundation Principles:** The Committee discussed the importance of providing physicians overall guidance regarding the key features of medical foundations that can help guide CMA's advocacy and physicians and their decisions regarding medical foundation. The Committee was particularly careful to craft broad principles that address the negative characteristics of the new medical foundations while supporting physician led medical foundations. Accordingly, and based on the foregoing, the CMA House of Delegates adopted the following principles:
1. An organization that claims to qualify as a medical foundation and to operate a clinic exempt from licensure under Health & Safety Code §1206(l) should establish and maintain a website with a page/link exclusively dedicated to a description of the facts that support its compliance with each statutory requirement under Health & Safety Code §1206(l). This information should be updated annually. A medical foundation is defined by reference to the requirements necessary for exemption from licensure by the Department of Public Health. In particular, Section 1206(l) of the Health & Safety Code exempts from the clinic licensure laws: "A clinic operated by a nonprofit corporation exempt from federal income taxation under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954, as amended, or a statutory successor thereof, that conducts medical research and health education and provides health care to its patients through a group of 40 or more physicians and surgeons, who are independent contractors representing not less than 10 board-certified specialties, and not less than two-thirds of whom practice on a full-time basis at the clinic." Accordingly, on its website a foundation should disclose, among other things, the identity of the physician group(s) that it has a professional services agreement with, the names of the physicians who are members of that group(s), the type of charity care the foundation provided in the year being disclosed, a description of how the foundation is governed, a description of the medical research it conducted in the last 3 years, and a description of the health education it provided in the area being served by the foundation.

2. A medical foundation must contract with a medical group of 40 physicians representing not less than 10 board-certified specialties, at least 27 of whom work full time treating clinic patients. In order for the clinic to qualify for the exemption from licensure, a medical foundation must provide medical services to its clinic patients through a multi-specialty group of 40 or more physicians. At least 40 physicians need to be actual members (either owners or employees) of a formally organized group in order for the 40 physician-member group requirement for medical foundations to be met. Only through this degree of integration can the medical group provide the important patient protections envisioned by the Legislature in Health & Safety Code §1206(l). By its plain meaning, and given the purpose underlying the exemption from clinic licensure, the statute contemplates that a medical foundation would contract with a medical group that, in turn, would make available the requisite number of primary care and specialist physicians to furnish professional services to clinic patients. This interpretation is consistent with the type of integration and coordination necessary for the physicians to conduct medical research and health education through the medical foundation. This interpretation is also consistent with the principles underlying the corporate practice of medicine prohibition. Unquestionably, the "lay" governing board of the medical foundation will have less ability to improperly influence the professional judgment of the physicians who treat clinic patients if the physicians affiliate with the medical foundation through an integrated medical group. The medical foundation may contract with more than one medical group only if each medical group meets the 40/10 requirement. The medical foundation, however, should not be able to contract with multiple medical groups or individual physicians in order to reach the 40/10 requirement.

3. A medical foundation should not provide medical services outside its service area through a "satellite" unless it demonstrates that the physicians who practice outside the service area are members of the medical group and have a strong and meaningful nexus to the medical group practice that provides services within the service area. The service area of the foundation should be limited to a single county or within 30 minutes or 15 miles of that county. There is a strong and meaningful nexus to the medical group practice that provides services within the service area if the following characteristics are present:
(1) The physicians practicing outside the service area share medical records through an electronic health record system or paper system such that there is only one chart with one medical record number which is used by both the providers at the satellite and the other providers that practice within the service area.

(2) The compensation of the physicians practicing outside the service area at the satellite is governed by the same compensation committee that governs the compensation of the physician members practicing within the service area.

(3) The physicians share financial risk and are subject to the same peer review body regardless of whether they practice outside or within the service area.

(4) The physicians who practice outside the service area share a common tax identification number with the physician members of the medical group practice that provides services within the service area.

4. **Medical decisions must be made by the Medical Group.** Physicians are the medical professionals best qualified by training, education, and experience to provide diagnosis and treatment of patients. Clinical decisions must be made by the physician or physician-controlled medical group. The CMA supports true collaborative efforts between physician groups and medical foundations as long as the governance of those arrangements ensures that physicians control medical decisions consistent with CMA's "Decision-Making Authority for Integrated Entities Criteria."

5. **The medical group that contracts with the medical foundation should be physician controlled and governed by an elected board of directors.** Two thirds (2/3) of the medical group physicians must be shareholders/partners or eligible shareholders/partners who have the right to vote. Independent physicians must own and control the medical group through which they render services to clinic patients. If not, then the medical foundation, or its sponsoring organization(s), could effectively co-opt their medical judgment. The legislative history of Health & Safety Code §1206(l) is clear that the licensure exemption was intended to benefit a multispecialty medical group owned and controlled by physicians who, for fund raising reasons, organized and operated their clinic through a tax-exempt, nonprofit corporation. The public policy underlying the statute would be frustrated if the affiliated medical group is owned and/or controlled by a single physician (or a small number of physicians) whose economic interests are aligned with the medical foundation or its sponsoring organization(s); i.e., the so-called "friendly" professional corporation model. While alignment requires collaboration between and among the parties, ownership of the medical group, and governance by physicians who are independent of the medical foundation, will promote a medical decision making process that is consistent with CMA's "Decision-Making Authority for Integrated Entities Criteria."

6. **Medical foundations intimately tied to hospitals joined to ACOs must negotiate in good faith with hospital-based providers and other community physicians whose ability to decline participation in an ACO is limited as a result of federal or state law or regulation.**

The HOD also concluded that CMA should encourage physicians to make informed decisions before starting, joining or affiliating with an organization that operates or proposes to operate a clinic exempt from state licensure pursuant to Health & Safety Code §1206(l). While CMA should provide general information to members regarding legal and practical issues they should consider before starting or joining a medical foundation, CMA should encourage physicians and physician groups to retain their own,
independent legal and financial advisors to help guide them through the complex process of forming, joining or affiliating with a medical foundation.

* * *

The preceding discussion confirms that the legal and practice issues concerning medical foundations are complex. CMA is unable to provide specific legal advice to each of its more than 35,000 members. While we hope this information is helpful, physicians are urged to seek the advice of a health care attorney experienced in these matters when considering the pros and cons of the transactions associated with medical foundation affiliation.

For information on other legal issues, use CMA ON-CALL, or refer to CMA's California Physician's Legal Handbook. This book contains legal information on a variety of subjects of everyday importance to practicing physicians. Written by CMA's Legal Department, the book is available on a fully searchable CD-ROM, or in a seven-volume, softbound format. To order your copy, call (800) 882-1262 or visit CMA's Bookstore at www.cmanet.org.