Comparative Report on Other State Midwifery Regulatory Programs
The California Experience

This Report is provided to the Association of Texas Midwives in connection with an ongoing review of state regulatory programs governing midwifery licensure and practice. It reflects legal and Internet research regarding midwifery licensure and regulation of midwifery practice in the State of California, as well as interviews with key regulatory personnel. At the request of the leadership of the Association of Texas Midwives, I have from time to time reviewed the legislative and regulatory regimes governing the practice of midwifery in states other than Texas. This research was conducted to provide a basis for comparison regarding differing regulatory models and to determine the pros and cons of the varying state models.

One of the primary issue under consideration in these comparisons is whether, under the laws and regulations of another state, licensed midwifery is regulated by a midwifery board or by some other mechanism, including being under the jurisdiction of the board of another profession, such as medicine or nursing. California was chosen as one of the states for this study because the state midwifery practice law, the Licensed Midwifery Practice Act, is one of the few state laws which confer regulatory jurisdiction over midwifery to the state Medical Board.

State: **California**

Statute: **"Licensed Midwifery Practice Act of 1993," Cal. Business & Professions Code, §§ 2505 - 2521**

Regulatory Body: **Medical Board of California (within the State of California Department of Consumer Affairs)**
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Executive Summary. I reviewed the legislation and proposed regulations setting standards for midwifery practice in California and interviewed two professional staff members within the Department of Consumer Affairs who work with the Medical Board on a daily basis. Both Anita Scuri, legal counsel for the California Medical Board, and Linda Whitney, Chief of Legislation for the Medical Board, stated strong opinions that it was a mistake to place the profession of midwifery under the jurisdiction of another profession. Both were of the opinion that midwives should regulate the practice of midwifery within the state. Both recognized that midwifery is not the practice of medicine and both believed that medical practitioners are fundamentally incapable of understanding a profession whose viewpoint is so different from that of medicine. They stressed that this inability to comprehend the midwifery model of care severely hampered the Board's ability to regulate effectively. As a result of this impasse, the Board was unable to meet statutory deadlines or fulfill legislative mandates and functioned poorly both in its regulatory function and in disciplinary functions.

Review and Assessment of Regulatory System: The California regulatory system closely ties midwifery practice to medical practice, which has led to frustration and confusion, both within the two professions and within the regulatory system. The major problems are that the statute requires midwives to be "supervised" by physicians, without defining what the legislature means by "supervision," and that jurisdiction over the profession of midwifery has been given to the profession of medicine. The Medical Board of California has regulatory jurisdiction over the practice of midwifery in that state. The scope of that jurisdiction includes licensure, development and enforcement of educational standards, professional discipline, and development and promulgation of regulations. From a legal and professional perspective, these requirements are inappropriate since midwifery is not the practice of medicine and since it is intrinsically anticompetitive to permit one profession to regulate its competitors, particularly since midwives have no role in their own professional regulation.

To inquire into how this model works from a practical and regulatory standpoint, I interviewed two members of the professional staff of the California Department of Consumer Affairs. I wanted to understand the system from the inside and to do so through the neutral perspective of department staff members, rather than the opinion of either a licensed midwife or a physician. I spoke by telephone with Anita Scuri, senior legal counsel for the Department of Consumer Affairs, who is assigned to advise and counsel the Medical Board and its staff, and Linda Whitney, Chief of Legislation, a member of the Board's staff. Both Ms. Scuri and Ms. Whitney were very candid in their appraisal of the California system and both consented to my use of their names.

Anita Scuri, J.D.: Ms. Scuri, an attorney, has been assigned as legal counsel to the Medical Board since 1994, shortly after the Licensed Midwifery Practice Law was enacted. She frankly stated her assessment that the California regulatory model is seriously flawed and should not be replicated by other states. She stated that, over her years working with the Board, she has come to recognize that it is neither appropriate nor efficient for one profession to be regulated by another distinct profession. The California Board consists of four physician and three public members (the husband of one public member is a physician). She believes that it is not a workable model for a medical board to regulate the profession of midwifery. The primary reason, she explained, is that, in practice, physicians are unable to separate themselves and the practice of medicine from the practice of other professions. They cannot recognize or understand any alternative model of care – other than a medical model – and are unable to think from the perspective of another profession or to distinguish it from their own background. Thus, although the Licensed Midwifery Act states that midwives do not practice medicine, and a California court decision has held that midwifery is not the practice of medicine, physicians seem unable to conceive of a model for delivery of health care services that is something other than medicine. This conceptual failure can be found, she stated, even among physicians who were acting in good faith, which she believes to be the case with the California board members.

Furthermore, the public members on such a board tend to follow the lead of the physicians whenever clinical or professional issues are under consideration so that, in effect, the public members do not serve to counterbalance the physician majority. No midwives or other professionals are on the Board.

Secondly, she has observed that pressures from organized medicine, such as the state OB/GYN association, can lead to regulatory stalemate and inaction. This has been a serious problem in California, resulting in lengthy delays and, ultimately, failure to fulfill the legislature's mandates. An additional problem that has resulted from assigning jurisdiction over midwifery to a different profession is that no midwives participate in disciplinary processes for members of their own profession. Licensed midwives who are subjected to the disciplinary process are not being judged by their peers, because midwives themselves play no role in discipline of other midwives. The Board members' inability to comprehend a separate midwives model of care, judging instead on the basis of a medical model, can sometimes result in poor decision in disciplinary cases as well as an overall misinterpretation of legislative intent.

This inability to view midwifery practice outside the medical perspective, coupled with outside professional pressures from organized medicine, have led to serious regulatory problems in California, chief among these being an inability to take action on legislative mandates on a timely basis. Ms. Scuri explained that, in the 2000 legislative session, the California legislature adopted an amendment [SB 1950] to the practice act which required the Medical Board to adopt regulations that would define the appropriate standard of care for midwifery practice in the state [§ 2507(f)]. Other legislation passed at that time [SB 1479] contained specific findings that childbirth is a natural event, that the midwifery model of care is different from the medical model, and a guarantee that parents would have the right to choose the midwifery model of care. The statutory deadline for promulgating the new regulations on practice standards was July 2003. The Board, however, was unable to grapple with the notion of midwifery standards, as opposed to medical standards, and was pressured by the state OB/GYN society, which lobbied in favor of maintaining a medical model and requiring direct physician supervision of licensed midwives. As a result, the Board completely missed the statutory deadline. It took nearly an additional 18 months before the Board finally approved a set of proposed regulations adopting midwifery practice standards and guidelines. These proposed guidelines are currently going through the public comment period and, therefore, have not yet been adopted. It may be two years after the deadline before they are adopted.

Linda Whitney, Chief of Legislation: Ms. Whitney was also very forthcoming and candid, stating frankly her view that, since midwifery is not the practice of medicine, it should not be placed under the control of an agency that is based upon a medical model because the one profession cannot understand the other profession. She echoed Ms. Scuri in her opinion that the Medical Board has "run up against many roadblocks" in terms of even beginning to understand midwifery practice. This is extremely problematic because the Board is required to fulfill a

legislative mandate to implement a law premised upon recognition of the midwifery model of care. It has lead to an inability to develop regulations as required by the statute and has resulted in a largely dysfunctional process within the board. She stated that the Board's Committee on Midwifery took a long time to even understand and get educated about midwifery, even those members who supported midwifery had trouble separating this understanding from their own medical background and education. She said that physicians on the panel had trouble understanding or accepting the concept of a normal delivery because they have been trained to think in terms of risks and crises, of morbidity and problems that might arise, rather than normalcy (which characterizes the vast majority of births). Ms. Whitney also cited pressures from organized medicine as a reason for Board inaction and dysfunction. For example, she said, the Board was confronted on the one hand by the president of the state OB/GYN association which took the position that no one should be permitted to have a home birth while, on the other hand, a state statute explicitly recognized the right of women and families to have a home birth.

Ms. Whitney also stated that language in the statute which speaks of medical supervision of midwives has caused serious problems in the state and has become a barrier to midwifery practice. Malpractice insurance companies in the state have refused to cover physicians who attend or "supervise" home births, so midwives are unable to find physicians who will fulfill the statutory requirement. I note that, from the record it appears that the Board ended up in a complete stalemate with respect to the statutory mandate that it develop regulations to define what is meant by "supervision" and to determine various levels of supervision. In fact, a review of the history and other materials on the Medical Board website indicates that the Board ultimately abdicated that responsibility over a year ago by referring the entire question of physician supervision to the California Attorney General for a formal opinion. Ms. Whitney's direct telephone number is 916-263-2389.

In conclusion, it appears that it is inadvisable to place the regulation of midwifery under the jurisdiction of a medical board. It would seem that many of the factors that resulted in dysfunction within the California Medical Board model could just as easily result if a nursing board were accorded jurisdiction over midwifery. In many states (Iowa and Maryland come to mind), organized nursing has vociferously opposed licensure and regulation of midwives other than certified nurse-midwives. This has been the case even in states where certified nurse-midwives were in favor of licensed midwifery legislation. Additionally, nurses receive their professional training within the same system as physicians and nurses – particularly those who work in hospitals or as physician employees – function within the paradigm of the medical model of care. It is likely that the same mutual incomprehension experienced within the California Medical Board would result if nurses were saddled with the responsibility to regulate licensed midwifery. Finally, many certified nurse-midwives report that Nursing Boards fail to understand the midwifery aspects of CNM practice, resulting in poorly-crafted regulations and inappropriate disciplinary actions. If a lack of understanding and empathy already exists between nursing boards and CNMs, one can anticipate that a nursing board model for midwifery regulation would likewise be a poor fit.