REPORT OF THE BOARD OF TRUSTEES

B of T Report 14-I-18

Subject: Protection of Physician Freedom of Speech (Resolution 5-I-17)

Presented by: Jack Resneck, Jr. MD, Chair

Referred to: Reference Committee on Amendments to Constitution and Bylaws (Todd M. Hertzberg, MD, Chair)

INTRODUCTION

Resolution 5-I-17, introduced by the American Academy of Pain Medicine (AAPM), consisted of the following proposals:

RESOLVED, That our American Medical Association strongly oppose litigation challenging the exercise of a physician’s First Amendment right to express good faith opinions regarding medical issues; and be it further

RESOLVED, That our AMA’s House of Delegates encourage the AMA Litigation Center to provide such support to a constituent or component medical society whose members have been sued for expressing good faith opinions regarding medical issues as the Litigation Center deems appropriate in any specific case.

The reference committee heard testimony that physicians had been sued for expressing their opinions on such politically sensitive issues as the treatment of chronic pain or the potential benefits of medical marijuana. Physicians testified that these lawsuits are expensive, produce anxiety, and impact physicians’ willingness to speak publicly on controversial public issues. While testimony generally supported the resolution, concerns were raised regarding the term “good faith,” which the reference committee found to be “a complex and sensitive issue.” The resolution was referred to the Board of Trustees in order to investigate the optimal language needed to accomplish the goals of Resolution 5.

This report is submitted in response to that referral. Notably, though, the scope of the House referral and thus of this report is much narrower than the heading, “Protection of Physician Freedom of Speech,” might suggest. Physician freedom of speech encompasses far more than the subject of Resolution 5. In conformity with the Board’s interpretation of the request from the House, this report is focused on the specific proposals of Resolution 5 and particularly on the term “good faith.”

FIRST RESOLVE

The Board believes that the term “good faith” should be omitted from AMA policy based on the first resolve of Resolution 5. Thus, AMA policy would appropriately read as follows:

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RESOLVED, That our American Medical Association strongly oppose litigation challenging the exercise of a physician’s First Amendment right to express opinions regarding medical issues.

The problem with the “good faith” limitation is that there is no simple test of whether a specific opinion has been made in good faith or in bad faith. For example, suppose a physician were to opine on a medical issue without disclosing that the physician’s interests were financially conflicted regarding that issue. As another example, suppose a physician were to advocate for a specific treatment option, but the physician had previously recommended a different option and failed to acknowledge this discrepancy. As a third example, suppose a lawsuit were brought against a physician because of the physician’s opinion on a medical issue, and the lawsuit, without setting forth a further basis for the statement, alleged that the opinion had been rendered in “bad faith.” Each of these examples might suggest that the physician’s opinion lacked good faith, but the ultimate determination of that issue would require a much fuller factual development than has been set forth.

AAPM introduced Resolution 5 to protect physicians’ First Amendment right to express opinions. A tenet of First Amendment law is that expression of opinions should be encouraged, and the bad faith ones will be ultimately discredited in the “marketplace of ideas.” The truth will prevail. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014). If the AMA is to stand behind the right of free expression, it should not be undercut by a policy requiring that it ascertain at some point whether a physician’s opinion has been expressed in good faith.

If the first resolve of Resolution 5 is modified as suggested, it will be similar, but not quite identical, to existing Policy H-460.895, “Free Speech Applies to Scientific Knowledge,” which states as follows: “Our AMA will advocate that scientific knowledge, data, and research will continue to be protected and freely disseminated in accordance with the U.S. First Amendment.”

SECOND RESOLVE

The Board believes that the second resolve of Resolution 5 would be undesirable. During the June 2017 Open Meeting of the Litigation Center, AAPM publicly discussed the abusive litigation which led to Resolution 5. Thus, the Litigation Center is aware of the problem and is already committed to taking whatever appropriate steps may be available to assist AAPM and its members.

Unfortunately, the problems AAPM faces are not, at least presently, readily susceptible to assistance from the Litigation Center. Abusive litigation must be combatted under the procedures available through the legal system. The Litigation Center has communicated closely with AAPM to ascertain the point at which assistance might be helpful. The various lawsuits that have been brought against AAPM and its members have simply not reached that point – if the point will ever be reached.

As it happens, though, adoption of the first resolve, with the modification suggested above (*viz.*, deletion of the “good faith” requirement), will increase the likelihood that the Litigation Center will ultimately be able to support AAPM. In other words, the Litigation Center would find it difficult to support AAPM if it had to convince itself that the physicians in question had written or spoken in good faith. With the removal of the good faith impediment, the Litigation Center can premise its support on the general principle of protecting free speech, without a detailed analysis of the facts underlying a specific case.
The Board and the Litigation Center appreciate that AAPM has been respectful of the discretion accorded to the Litigation Center. Nevertheless, the second resolve suggests that the Litigation Center might benefit from additional encouragement from the House of Delegates. Such encouragement, in this situation, would be unnecessary and might undercut the ability of the Litigation Center to act according to its determination of how the interests of the AMA can be best served through advocacy in the courts.

RECOMMENDATION

The Board of Trustees recommends that the following be adopted in lieu of Resolution 5-I-17 and the remainder of this report be filed:

1. That our American Medical Association strongly oppose litigation challenging the exercise of a physician’s First Amendment right to express opinions regarding medical issues. (New HOD Policy); and


Fiscal Note: Less than $500