



Health Law Section

The Mississippi Bar

Fall 2017



Jonell Beeler

Message from the Chair

I am honored to serve as the Chair of the Health Law Section, and I am thankful for the great work being done by the Section Executive Committee members planning our Health Law Section 2017-2018 year activities.

As our first event of the year, on October 27, 2017, we will offer a CLE Seminar (1 ½ hours at lunch) debating the pros and cons of the Mississippi CON Program. We hope this Program will be timely and of interest to our Section Members. A description of the Program and the presenting panelists is set forth below, along with information on how to register. In addition, each of the panelists has contributed an article for this newsletter highlighting their arguments for or against the Mississippi CON Program.

In the Spring, the Health Law Section will offer a 6 hour (with one Ethics hour) CLE Program. This Pro-

gram will cover the many professional, regulatory, administrative, civil and criminal issues involved in tackling the serious Opioid Epidemic facing our State and its residents. Save the date of April 20, 2018, to attend this program.

The Health Law Section was a recent sponsor of the Mississippi Volunteer Lawyers Project. We have also approved the Section's grant of scholarships in the amount of \$500 each to be given to a University of Mississippi School of Law student and to a Mississippi College School of Law student.

We are planning the program for the Health Law Section Annual Meeting. If you have a recommendation for a program topic or speaker, please let us know.

Our Section is led by its Members for its Members. I appreciate the many volunteer hours dedicated by our

Members on Section activities. The ways in which you as a Section Member can participate in the Section include contributing articles for newsletters, planning continuing legal education seminars, writing articles and serving as CLE presenters, and presenting timely teleseminars. If you would like to participate in one of these ways, please contact me or a member of the Executive Committee.

Our goal is for the Section activities to benefit you as a Section Member. If there are issues you would like covered in an article, newsletter, CLE or teleseminar, please let us know.

Health Law Section CLE Seminar - Friday, October 27, 2017

Debating MS's CON Program CLE Seminar

The Mississippi Bar's Health Law Section presents "Debating MS's CON Program" CLE Seminar. This event will be held on Friday, October 27 at the Mississippi Bar Center in Jackson. Mississippi's Certificate of Need laws grant authority to the Department of Health to administer and supervise all state health planning and development responsibilities. This process places restrictions on certain health care activities in order to prevent unnecessary duplication of health resources and provide cost containment. The activities which require a certificate of need (CON) include the offering of certain designated health services, the development or establishment of new health care facilities, or the making of capital expenditures for health care projects in excess of designated limits. Free-market proponents are urging lawmakers to relax, update or remove these laws, claiming they are government barriers to patient care. This seminar will provide an overview of the CON process in Mississippi and differing views on its necessity. Panelists include attorneys Russ Latino, State Director of Americans for Prosperity and Richard Roberson, General Counsel for the Mississippi Hospital Association.

[Click here to download the registration brochure](#) or it is available on the next page.



THE MISSISSIPPI BAR



Health Law

1.5 Hours CLE Credit

About the Seminar

Agenda

Notes

Registration Form

Debating MS s CON Program

Friday, October 27, 2017 - MS Bar Center - 643 North State Street - Jackson

Cost: \$50, includes lunch

Why Mississippi Needs to Maintain Its Certificate of Need Regulations

By: Richard Roberson, General Counsel for the Mississippi Hospital Association

Every day, Mississippi healthcare providers dedicate themselves to taking the best care of their patients that they possibly can. They do so regardless of the patient's age, gender, race, color, religion, or ability to pay. They provide the best care they can whether it's a routine wellness visit or diagnosing a more complex and challenging condition. They provide quality care because that's what they are called to do.

According to the National Conference on State Legislatures, thirty six states plus the District of Columbia have Certificate of Need laws or variations of those laws. Mississippi is one of those states. Ten of the fourteen states without CON laws are west of the Mississippi River. All of these western states are geographically larger than Mississippi and all but California and Texas are less densely populated than Mississippi.

Some argue that Mississippi should eliminate its Certificate of Need ("CON") laws. Those individuals argue that the free market will determine what health care services are offered and where those services are offered. They also believe that eliminating CON laws will increase competition and thereby lower costs and improve quality of care. But, healthcare is not driven by the same forces that drive the free market. Hospitals do not operate like grocery stores, retail stores or restaurants. To compare the healthcare industry to these businesses demonstrates a lack of understanding of the healthcare system and the variety of factors that affect it.

One factor is that most of us don't pay the full costs of our healthcare services. Almost 600,000 Mississippians receive insurance under Medicare and nearly 750,000 are covered by Medicaid and CHIP. Some of these individuals are covered by both Medicaid and Medicare. The health exchange plans created under the Affordable Care Act cover almost 80,000 Mississippians. The State of Mississippi's self-insured health insurance plan for State and School Employees covers 180,000 current employees, spouses, dependents and retirees. Roughly 14% of our citizens are uninsured according to the U.S. Census Bureau and the Kaiser Family Foundation reports that 3% of Mississippians are covered by the military or Veterans Administration.

To be sure, federal and state government insurance – not the free market - dominate the health insurance market in Mississippi. Neither the government nor other third party payers incent providers to increase the costs of care. Nor do they encourage providers to have bloat and waste in the system. Providers do their best to control costs while continuing to provide the latest advances in medical research, equipment and facilities, as well as the skilled professionals which patients demand and deserve.

Education and licensure requirements for healthcare providers makes healthcare unique from other industries too. Physicians and other health care professionals determine what services are necessary and what care should be rendered. Medical and professional schools produce a limited number of qualified individuals each year and these individuals must pass strict state licensure requirements; therefore, the supply of those who diagnose and render care is limited. In addition, healthcare facilities are subject to strict federal and state licensure and certification

Why Mississippi Needs to Maintain Its Certificate of Need Regulations, *continued*

requirements. Not just anyone can operate a healthcare facility or become a healthcare provider. These requirements exist to protect the public are not dictated by the CON laws.

Federal provisions that not only mandate hospitals render emergency services regardless of ability to pay, but also require hospitals to provide charity care to those who meet certain financial thresholds make the provision of hospital services unique even among other healthcare providers. Mississippi hospitals provided nearly \$500 million in uncompensated care last year alone. In no other free market industry are quality services required to be provided with no requirement of payment. So let's be clear - the healthcare system is not subject to the same forces that drive the free market in other industries.

The reality is that many factors influence the costs of health care and the quality of health care outcomes. Because of these many factors, it is virtually impossible to attribute the costs to one particular factor, particularly a non-clinical factor such as CON laws. Nevertheless, comparisons regarding the costs of care in CON states versus non-CON states are mixed at best according to the non-partisan National Conference of State Legislatures. Costs vary from state to state and are influenced by many variables. Of those fourteen non-CON states mentioned above, eight have higher per capita health care expenditures than Mississippi according to data from the Kaiser Family Foundation.

At a September hearing at the Mississippi State Capitol, a group arguing to eliminate Mississippi's CON laws proposed that there would be a 42% increase in the number of hospitals if Mississippi were to eliminate its CON laws. Their research seems dubious at best given that five hospitals in rural parts of our state have closed since 2013 and, according to data reported to the Mississippi State Department of Health, the inpatient occupancy rates for our hospitals is less than 50% - hardly demonstrating a need for more inpatient hospital beds. Similarly, for imaging services, over one hundred facilities in Mississippi offer MRI services. Many operate part-time because the patient volume is not sustainable for full time services. Mississippi CON laws do not prevent access to care; capacity exists to take care of patients who need services.

Mississippi CON regulations safeguard against unnecessary and expensive duplication of services and facilities which will drive up costs and promote inefficiency. In non-CON states, providers often "cherry-pick" the more profitable services and locate those services in more affluent areas. These services are offered in facilities which are under no legal requirement to treat the patient regardless of the patient's ability to pay. This jeopardizes access to care because the more profitable service lines help offset the costs of those less profitable services which the community needs. During this time of uncertainty and instability in healthcare, any additional market de-stabilization and inefficiencies created by re-locating and duplicating services would jeopardize the viability of many hospitals and the access to the needed services they provide.

Why Mississippi Needs to Maintain Its Certificate of Need Regulations, *continued*

Mississippi healthcare providers remain committed to providing quality services at the lowest cost necessary to maintain access to quality care. To reduce its healthcare costs, Mississippi would be better served by investing in education and preventive healthcare to stem the high prevalence of disease states such as hypertension, diabetes, stroke, heart disease and obesity. These conditions produce poor healthcare outcomes and quality of life for our citizens and are more expensive for healthcare providers to treat. The healthcare system would also benefit from better alignment between the payment and delivery systems, but that's an article for another day. Mississippi hospitals will continue to assist our patients and policymakers to improve the quality of life for all Mississippians.

Richard Roberson is General Counsel and Vice President for Policy and State Advocacy for the Mississippi Hospital Association. Prior to joining MHA, Richard was in private practice with Bradley Arant Boult Cummings where he represented a variety of healthcare clients including hospitals, physicians, nursing homes, dentists, physical therapist, and pharmacists. He also spent nearly fifteen years with the State of Mississippi including service at the Mississippi Division of Medicaid under the administrations of Governors Haley Barbour and Phil Bryant and as a Special Assistant Attorney General under Attorney Generals Mike Moore and Jim Hood.

Richard Roberson, General Counsel, Vice President of Policy and State Advocacy, MS Hospital Association; 116 Woodgreen Crossing, Madison, MS 39110; Phone: 601-368-3390; Email: RRoberson@mhanet.org

The Abbreviation for “Certificate of Need” is CON for a Reason

By: Russ Latino, State Director of Americans for Prosperity

At its core, the debate over “Certificate of Need” (CON) law is an economics question about how best to increase access to and quality of medical care.

The need to address this question is particularly acute in Mississippi. The Commonwealth Fund’s Annual State Health System Ranking puts Mississippi in last place. The Association of American Medical Colleges Physician Workforce Data Book again puts Mississippi in last place for active physicians per 100,000 citizens. Nearly 60% of Mississippi’s population lives in Health Professional Shortage Areas.

It bears offering some insight into what CONs are, how they came about, and whether they’ve lived up to their stated purpose.

First, what is a CON? It is a government permission slip for various activities in the health care industry—from opening a hospital to increasing the supply of beds, from starting ambulatory or outpatient centers to buying certain medical equipment, and from practicing certain procedures to operating a nursing home.

This process has little, if anything, to do with the quality of care to be provided or the qualifications of the provider. Rather, it is an unelected government official’s assessment of consumer demand. It is an economic rarity with no direct equal—one which includes the opportunity for existing providers to voice objection to a competitor’s operation.

How did CON law start? In 1974, Congress passed the Health Planning and Resources Development Act, which required states to enact CON programs to remain eligible for certain federal funding. CON laws were supposed to serve three basic functions: (1) lower cost; (2) increase charity care; and (3) protect access to services in rural areas. By 1980, 49 states, including Mississippi, had done so.

Has it lived up to its promise? Early on it became evident that CON regulations were not achieving their purpose. In the mid-80s, Congress repealed the law requiring CONs as a condition for federal dollars. Since the repeal of the Health Planning and Resources Development Act, 14 states have done away with their CON laws.

In the states that have maintained their CON laws, there is no evidence of reduced health care cost or increased access for indigent or rural populations. In fact, studies have shown reduced costs in non-CON states. Studies have likewise shown an increase in hospitals and ambulatory surgical centers, including rural hospitals and ambulatory surgical centers, in non-CON states.

This is not unexpected. Very few economists would argue that restricting supply and competition leads to increased quality, heightened access, and lower cost in any market.

The Abbreviation for "Certificate of Need" is CON for a Reason, *continued*

Mississippi's CON laws cover a litany of facilities, medical practices, procedures, and equipment. In a recent white paper, The Mercatus Center assessed the impact of our CON laws, finding that health care cost would decline, and access and quality of care would increase, if Mississippi did not subject would-be providers to the impediments of CON law. The process in Mississippi discourages health care providers from entering our state and further discourages physician entrepreneurship. It can be long, drawn out, contentious and costly.

The Federal Trade Commission also looks critically at CON laws. The FTC has issued guidance that these laws are anti-competitive, protect monopoly behavior, and don't serve the interests of public health and safety in any measurable way. The FTC has remained consistent in this position through successive administrations of different political parties.

There is a certain absurdity in the notion that a single government employee can better assess the needs of a community and the demand for a service than a provider conducting market research and placing its own capital at risk. Of course, this absurdity can be grave in those instances where denial of a CON leads to limited or no access in emergency situations.

As a state, our goal should be the creation of an atmosphere that provides for an endless array of health care options to consumers, with the understanding that competition drives down costs and increases both access and quality. This can begin with incremental reduction in CON hurdles and a return to market principles.

Russ Latino is the State Director of Americans for Prosperity and an AV-rated attorney, whose practice, prior to joining AFP, focused on commercial and constitutional litigation.

Russell Latino, MS State Director, Americans for Prosperity; 800 Avery Boulevard, Ste. 203 Ridgeland, MS 39157; Phone: 601-760-0308; Email: rlatino@afphq.org

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The Mississippi Bar
Health Law Section
P.O. Box 2168
Jackson, MS 39225-2168

Rene' Garner
Section and Division Coordinator
Phone: 601-355-9226
Fax: 601-355-8635
Email: rgarner@msbar.org

We are on the
web!

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Upcoming Events

Friday, April 20, 2018
**Health Law Section Annual CLE Seminar
to focus on the Opioid Epidemic.
Mississippi Bar Center in Jackson**

Thursday, July 12, 2018
**Health Law Section Annual Meeting
Sandestin Hilton - Destin, Florida**

Write for the Health Law Section Newsletter

The Health Law Section newsletter is now accepting articles on health law topics for publication in the newsletter. If you have an idea for an article, you may submit it to Health Law Section Newsletter Editor Conner Reeves at

CReeves@msmaonline.com

Please include a short description of the article. The Health Law Section Committee will consider your proposal and will notify you of whether your proposal has been accepted. The committee reserves the right to reject proposals. Please note that when you submit your article for publication in the newsletter, you will be granting The Mississippi Bar the nonexclusive right to publish your article.

Health Law Section 2017-2018 Executive Committee

Chair

Jonell Beeler
Baker Donelson
P O Box 14167
Jackson, MS 39236-4167
Phone: (601) 351-2427
Fax: (601) 592-2427
Email: jbeeler@bakerdonelson.com

Vice Chair

Julie Mitchell
Mitchell Day Law Firm, PLLC
618 Crescent Blvd Ste 203
Ridgeland, MS 39157-8664
Phone: (601) 707-4036
Fax: (601) 213-4116
Email: jbmitchell@mitchellday.com

Secretary

Blake Adams
Phelps Dunbar LLP
PO Box 1220
Tupelo, MS 38802-1220
Phone: (662) 690-8120
Fax: (662) 842-3873
Email: blake.adams@phelps.com

Past Chair

Jenny Tyler Baker
Copeland Cook Taylor & Bush
PO Box 10
Gulfport, MS 39502-0010
Phone: (228) 863-6101
Fax: (228) 868-9077
Email: jtbaker@cctb.com

Member at Large (8/2015-7/2018)

Jeff Cook
Forrest General Hospital
78 Bellegrass Blvd
Hattiesburg, MS 39402-1904
Phone: (601) 288-4453
Fax:
Email: jwcook@forrestgeneral.com

Member at Large (8/2016-7/2019)

Conner Reeves
MS State Medical Assoc
1810 Brecon Dr
Jackson, MS 39211-5714
Phone: (601) 853-6733
Fax: (601) 853-6746
Email: creeves@msmaonline.com

Member at Large (8/2017-7/2020)

Nikki Huffman
Carr Allison
14231 Seaway Rd Ste 2001
Gulfport, MS 39503-4635
Phone: (228) 864-1060
Fax:
Email: nhuffman@carrallison.com



Mitchell, Adams, Beeler and Reeves