

CERTIFICATE OF NEED PROCESS CAN BE
A DICEY PROPOSITION FOR THE UNINFORMED

In Seasoned Players' Hands, Michigan's CON Program Is Still a Complex 'Game'

Forget the economic downturn momentarily; ignore what pollsters and pundits are saying about consumer confidence and budget deficits. There's one industry that continues to weather both the best and the worst of times. You might even recognize some of the leaders of the "board." Parker-Brothers, for one, has produced more than 1,800 board games in its 116-year history. Monopoly alone is sold in 80 countries and available in 26 languages. And chess, dating to 3000 B.C., remains among the world's favorites when it comes to competition across the table. Annually, board-game enthusiasts worldwide account for \$2 billion in sales.

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The

CON

Process Game



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Whether they're competing around the kitchen table—lining up game pieces—or doling out salaries, building up forces or real-estate holdings, what happens around the Certificate of Need (CON) table affects all Michigan residents, and not always equally. But then, what game doesn't have winners and losers?

Michigan's CON program is among the most stringent in the nation, by design: it surrounds issues of healthcare cost, quality and access, and seeks to find balance on a sometimes uneven playing field, in an always complex industry. While some states have either dismantled their programs altogether, are on the verge of doing so, or are trying to rebuild them, Michigan is staying the course, and, following a CON evaluation report commissioned by the Michigan Department of Community Health in 2003, it doesn't appear that CON will go away any time soon.

The CON program is the first stepping stone toward facility expansion, new construction or equipment acquisition that is projected to exceed \$2.715 million or that applies to any of 16 defined healthcare programs or services. Confused? No wonder. The application itself runs more than 200 pages in length and encompasses even more guidelines.



Melissa D. Cupp

Enter **Melissa D. Cupp, '03**, of Wiener Associates in Lansing, Michigan. Cupp is one of a handful of attorneys with an administrative health law certification who has further "specialized" in CONs. She was attending law school and working at the firm when she first stepped onto the CON

board game. Today, she estimates 98 percent of her time is spent on CONs. Sometimes that means navi-

gating the application process for new and longtime healthcare clients throughout Michigan who don't have to navigate the process often or don't have the manpower—or willpower—to go it alone. Or it may mean moving the game pieces along the board for other clients who need Cupp's strategic thinking and problem-solving skills to find a winning strategy. And, in some cases, she becomes a guide, of sorts, for out-of-state healthcare providers who aren't familiar with Michigan's healthcare climate, environment or regulations.

The CON program is specific to any capital expenditure exceeding \$2.715 million and/or to 16 defined clinical programs and services, including inpatient bed expansion, for example, MRI or CT acquisition, new facility construction, and even medical helicopter transport.

"It's sometimes a rude awakening," says Cupp, "especially for out-of-state providers when they come to Michigan with the intent of, say, building a new facility or bringing services to a specific region in the state. There's a huge CON umbrella that keeps them from doing that—an umbrella that's intended to

protect Michigan residents by ensuring that their proposal meets our state's cost, quality and access standards."

Among the most dicey propositions facing the Department of Community Health, providers, payers and purchasers is bed capacity; while some areas throughout the state may find themselves "under-bedded," resulting in backlogs in emergency departments for people needing admission to an inpatient facility, according to CON standards, all areas of the state are "over-bedded." This problem is exacerbated by some organizations that have "moth-balled" beds for which they're licensed, to preserve them for future use, should that need come to pass, but that currently are not utilizing them for patient care.

With changes in CON laws in 2002, there's been more flexibility in making changes to Certificate

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of Need standards and allowing the Certificate of Need Commission to be more responsive to the needs of the state and its citizens. “When a client has a project that doesn’t quite fit into the existing regulatory structure, we are able to create opportunities for them by working with the CON Commission and other interested parties throughout the state to change the regulations. Today, the changes can be made over the course of six months to a year, rather than two years or more under the previous law,” Cupp says.

Just as board-game players may cry out, “not fair,” Cupp says, to some degree, there is a “have vs. have not” set-up in Michigan surrounding available bed capacity, and also around the purchase and acquisition of equipment and services. “The CON program is in place to help balance citizens’ access to quality healthcare resources, with the ever escalating costs of those resources,” explains Cupp. For example, most of us will need at least one MRI scan in our lifetime. CON allows for a reasonable number of MRI units in the state, but an entrepreneurial diagnostic imaging company from east, west or south of Michigan’s border, with the financial backing to set up shop in any corner of the state, can’t do so without CON approval, no matter how strong the company’s financial proposal. Score one for Michigan healthcare providers in that scenario, by making sure only appropriate services and programs make their way to patients. However, there is the flip side of that die, when patients have to travel long distances for advanced cancer treatment, for example, because their community isn’t large enough to support full use of sophisticated, costly medical equipment.

Need, Cupp is quick to point out, sometimes is defined in unique ways when it comes to meeting the Certificate of Need requirements, but so long as a CON application meets the state’s standards, there’s no commission or committee that can rule against it. Thus, oftentimes, even consumers are confused when a city ends up with more than one of the same

program or service. That’s possible, she says, because population, demographics, and adherence to CON standards may have all been met by two distinct providers.

While many providers have in-house staff deftly managing the process from start to finish, others seek out Wiener Associates to make all the right moves on their behalf. Sometimes, she admits, the CON process can resemble a game of Battleship®, with one provider trying to block another’s moves in order to retain market share.

While Cupp steadies the game players’ hands, makes sure the rules are followed and any deviations in play addressed, she also spends a great deal of her time lobbying for changes to create a more friendly and competitive healthcare market throughout Michigan. That can mean drafting new language to the existing CON laws, finding alternatives for CON applicants that suit their tastes and their communities’ needs, or “strategizing,” the part of Cupp’s job she says is her favorite.

“There’s an end I’m working toward, but rules I have to live by. I have to find that little piece of the puzzle that helps our clients do the same—meet their ends and abide by the rules.”

And that, no matter how you roll the dice, turns up fewer losers and a lot more winners. All part of the CON game of risk, chance, strategy, and—in some cases—a very good cut from the deck.

PROS AND CONS OF THE CON: *To read more about Michigan’s CON program, log on to www.michigan.gov/mdch and view the CON Evaluation Report, where you can read the report in its entirety, or order a copy on CD.*



Wiener Associates is a bipartisan governmental-affairs law firm in downtown Lansing, Michigan. The firm’s founder, **Richard N. Wiener, ’76**, is an adjunct professor at MSU College of Law and a member of the college’s Board of Trustees. **Melissa D. Cupp, ’03**, and **Peter B. Ruddell, ’01**, are associates with the firm.