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The Corporate Practice of Medicine Doctrine: Alive and Well, at Least for Now

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Regardless of federal health reform efforts on Capitol Hill, our health care delivery system is changing significantly. During the last few years, mergers among both large and small providers have proliferated. Physicians, hospitals, laboratories, information specialists and many other players in the health care field are jockeying to position themselves for the emerging health care market. Interestingly, a legal doctrine known as the "corporate practice of medicine, "which has existed in some form for over 100 years, poses a major hurdle for various health care business ventures. Many entrepreneurs and investors in the health care industry, who are skilled and able at raising capital, are finding it difficult to enter the market in states where the corporate practice doctrine inhibits their strategies. However, for those who seek to preserve the practice of medicine as a profession, the corporate practice doctrine offers some refuge.

The Corporate Practice of Medicine Doctrine—Historical Background

Many patients and providers fear that a business person, and not a physician, will determine which medical services are furnished and when. This concern over lay control, although more acute in today's world of managed care, is not new. Many states have grappled for years with the issue of physician independence and, in response, developed what has been known as the "corporate practice of medicine" doctrine. This doctrine prohibits non-professional corporate entities from furnishing medical services or hiring physicians to furnish professional services. (1)

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In states with no statutory corporate practice prohibition, the courts or the state Attorney General interprets the licensing statutes to prohibit non-licensed entities, such as business corporations, from furnishing medical services. Thus, the doctrine finds its roots not only in statutes but in state common law and state Attorney General opinions as well. To add yet another wrinkle, some states enforce their corporate practice of medicine prohibitions strictly while others do not.

In states that strictly apply the corporate practice doctrine, even a hospital may be prohibited from employing a physician or other health care professional to furnish professional medical services. Many states, however, have specifically exempted hospital, and in some cases HMOs (2), from the corporate practice doctrine, enabling those entities to employ physicians and other professionals. In states that have a corporate practice doctrine but no specific exemption for hospitals, it remains somewhat unclear whether hospitals can employ physicians (3). However, regardless of whether a state strictly enforces the corporate practice prohibition, business corporations whose lay administrators control the treatment decisions of their doctors face a substantial risk and the state Medical Board will view the corporation as engaging in unlicensed practice.

Will the Corporate Practice Doctrine Change with the Times?

As our health care delivery system evolves, businesses seek to employ physicians and other health care professionals, such as dentists, podiatrists and chiropractors. Corporations with large numbers of employees have in the past several years explored the creation of "company medical clinics" to serve their employees at lower costs. For example, U.S. Steel opened a $1.2 million clinic in Indiana, operated and managed by Corporate Health Dimensions, to provide a full range of primary care and diagnostic services; Deere & Company opened a similar clinic in Illi-

nois. These clinics employ licensed providers to furnish medical services despite the existence of state corporate practice prohibitions.

Interestingly, many types of now commonly accepted managed care plans, such as staff model HMOs, PPOs and other IPAs (4) which may employ or contract with health care professionals, are squarely at odds with the doctrine and policy that produced the corporate practice prohibition. In states that continue to adhere to a belief that lay persons should not influence professional medical services in any way, the corporate practice doctrine will surely preserve physician independence.

The restructuring of the health care industry should encourage any state that strictly enforces the corporate practice doctrine to reconsider its policy. Several proposals, as part of federal health reform, would preempt state corporate practice laws altogether, thereby paving the way for new ventures between health professionals and business. Until that time, states that strictly enforce the doctrine will limit opportunities available to professional and lay people.

Critics of the Corporate Practice Prohibition

There are those who believe that the corporate practice doctrine continues to safeguard the quality of professional medical care; others claim that the doctrine stands in the way of innovative new forms of medical organization that offer adequate medical care at reasonable cost. (5) Critics of the doctrine point out that its strict application prohibits teaching hospitals and prestigious research institutions from hiring practicing medical academics and scientists. Furthermore, under a strict application of the doctrine, federal Veterans hospitals, state mental hospitals, and municipal general hospitals could not retain specialists or employ residents and interns, and corporations could not engage "company doctors" to treat industry employees. Given that all of the above providers are integral parts of our health care system, critics argue that a doctrine riddled with statutory and other exceptions is a doctrine not worth having.

Opponents of the corporate practice doctrine also suggest that the prohibition historically has been used selectively to attack only those organizational forms that are unconventional and threatening to established practice formats (6). For example, in a California Attorney General Opinion from 1982, an "industrial medical corporation" was barred from operation under the doctrine because it "is not an institution which is traditionally through of as being within the health care delivery system as are hospital and clinics.

There are those who fear that medicine's corporate affiliations tend to over commercialize the profession, which may compromise a physician's loyalty and interfere with the physician/patient relationship. However, others argue that in today's changing health care market, these concerns must be balanced against legitimate efforts to furnish efficient and affordable care. Economic considerations play a vital role in today's health care delivery system. A strict application of the corporate practice doctrine by state courts or Attorneys General would take away the legislators' flexibility in drafting laws that authorize innovative heath care delivery. Some commentators go so far as to say that when courts enforce the corporate practice doctrine, they mistakeningly suppose they are enforcing the legislators' *public* protection policies, when in fact they are enforcing the physicians' *economic* protection policies. §

Many critics of the corporate practice prohibition also argue that states' Medical Practice Acts adequately protect against the incompetent practice of medicine and the public misrepresentation of credentials and qualifications. Both of these concerns are addressed if a health care business corporation employs only licensed physicians, critics proclaim. After all, it is not the for-profit business corporation itself which furnishes medical care, it is the physicians who are employed by the entity. (9)

Finally, critics also urge that, apart form the corporate practice doctrine, there are multiple safeguards to assure the continuing primacy of the physician-patient relationship and the quality of care. For instance, peer review, state and federal certification requirements and practice guidelines ensure that providers of health care meet certain standards. A health care provider (owned by non-professional persons) that employs licensed physicians to furnish services will, despite its lay control, still be subject to state and federal certification and quality control standards. Furthermore, state malpractice laws (10) and statutes such as the Health Care Quality Improvement Act also serve to ensure a minimum level of care for patients. However, the question remains——are minimum standards established by these quality review mechanisms too low?

Business and Medicine: Entrepreneurs Beware:

The impact of the corporate practice doctrine can best be illustrated by recent activities in state courts and among

state Attorneys General. For example:

1. Several years ago, the Michigan State Medical Society asked State Attorney General Frank Kelly to decide whether non-profit corporations can practice medicine. In doing so, Kelly reviewed the state's century-old corporate practice doctrine, which prohibited not-for-profit companies from practicing medicine. The Michigan Hospital Association asked Kelly to modernize the doctrine, claiming that "in today's health care environment, physicians already are subject to a variety of regulations and stipulations." In 1993, the Michigan Attorney General found that non-profit hospitals and other non-profit corporations may provide medical services through employed physicians (11).

2. In Cleveland, Ohio, Metrohealth-St Luke's Medical Center sought to make physicians from four medical specialty groups its employees. The physicians, who were opposed to the idea of becoming "employees," sued the hospital, in part contending that the employment arrangement would violate Ohio's corporate practice prohibition. Ohio is one of several states which strictly adheres to the corporate practice doctrine.

3. In California, a hospital (North Bay Health care System) and a physician group (the Fairfield Medical Group) joined forces in November of 1993 by forming a "medical foundation." The hospital purchased physician assets and records and set up the new not-for-profit foundation, instead of a business corporation, to comply with California's corporate practice of medicine law.

4. Vanguard Healthcare Group, Inc., a health care company based in Pennsylvania, offers obstetrical and gynecological services through employed physicians. However, in order to comply with the state corporate practice law, a complex corporate structure was created. A professional corporation called OB/GYN Associates was created for the express purpose of complying with the corporate practice doctrine and state regulations. The professional corporation is owned by senior *medical* personnel and employs the physicians who contract with Vanguard. (12)

5. The Kansas Supreme Court in 1991 ruled in *Early Detection Center v. Wilson* (13) that a general corporation is prohibited from providing medical services. Based on its reading of the Kansas Healing Arts Acts, the professional Corporation Law of Kansas and various other Kansas statutes, the Court found that Early Detection Center could not employ a licensed professional to provide professional services because the corporation would, in effect, be practicing the profession. Note that in a recent case, the Kansas Supreme Court ruled that a *hospital* could employ physicians, finding that the corporate practice of medicine doctrine did not bar such an employment arrangement. (14)

6. The Texas Attorney General found that a business corporation could not employ physicians to administer and prescribe synthetic narcotic drugs to drug-dependent persons (15). The Texas Attorney General found that such employment amounts to the unlawful practice of medicine by a corporation. The physician who was employed by that business corporation was found guilty of aiding or abetting, directly or indirectly, the practice of medicine by any person not duly licensed to practice medicine.

7. In 1993, the Texas State Board of Medical Examiners sued a physician who was employed by a non-licensed corporation called the "Human Relations Institute." The Texas Appeals Court found that the psychiatrist had aided or abetted the practice of medicine by an unlicensed corporation in violation of the state's Medical Practice Act (16).

Conclusion

Many health professionals and patients are concerned about the undue influence of lay persons on medical decision-making. Despite such concerns, states that have reconsidered the corporate practice doctrine are scaling back its scope. As the New Mexico Attorney General stated in a 1987 opinion: "[m]any of the earlier [corporate practice] decisions in this area may not be germane to the health care environment today. A market demand for integrated health care delivery has emerged in recent years" (17). Furthermore, the corporate practice doctrine may be completely abolished by national health reform. Weakening or eradicating the corporate practice doctrine will offer new opportunities in the health care market by facilitating

the employment of health professionals by business corporations or lay persons.

Endnotes

1. Under a variation of the corporate practice of medicine doctrine, state licensing boards may revoke licenses of professional who assist a corporation to practice medicine unlawfully. Salaried physicians or other professionals hired by business corporations (or hospital in states which do not permit hospitals to employ physicians) are subject to the claim that they are engaging in "unprofessional conduct," that they are engaged in fee-splitting, and that they have aided or abetted an unlicensed person (the hospital) to practice medicine. State licensing boards have broad discretion when applying such principles.
2. *See,* for example, Annotated Code of Maryland, § 19-704 (explicitly authorizing HMOs to employ licensed physicians).
3. In a recent case, the Supreme Court Kansas found that the state's corporate practice doctrine did not prohibit hospitals from employing physicians. *St Francis Regional Medical Center, Inc. v. Weiss*, Kan. Sup. CT.No. 68,845 (March 4, 1994)
4. In most states, HMO's are licensed as insurers. However, in many states, there are currently no laws authorizing the licensure of other managed care entities, such as PPOs and IPAs. As a result, these business entitles are not generally employed health care professionals to furnish medical services.
5. Mark Hall, *Institutional Control of Physician Behavior*: Legal Barriers to Health Care Cost Containment, 137 U. Pa. Law Review, 431, 511 (1988)
6. *Id.* At 514
7. Cal.OP.Att'y Gen. No. 81-1004 (April 7, 1982)
8. Hall, *Institutional Control of Physician Behavior,* at 515 (emphasis in original).
9. *See* New Mexico Op. Atty, Gen, No. 87-39 (July 30, 1987) (corporations organized and controlled by non-physicians may provide medical services through employed physicians as long as there is no explicit statutory prohibition).
10. **See Alan L. Hillman,** "Health Maintenance Organizations, Financial Incentives, and Physicians' Judgments, " 112 Annals Internal Med., 891. See also *Bush v. Drake*, No 86-25767 NM-2, slip op. (Mich. Cir. Ct. Saginaw Cty, April 27, 1989) (woman sued a staff model HMO alleging that a doctor was influenced to order fewer tests, resulting in a late diagnosis of cancer).
11. Steve Raphael, "Can Non-Profits Practice Medicine? Kelly To Decide," 9 Crains Detroit Business 34, at 4 (Aug. 23, 1993).
12. Tricia Desilets, "Vanguard Health Has One Man Show," *The Legal Intelligencer, p.9 (Nov. 15, 1993).*
13. 811 P.2d 860 (Kan. 1991)
14. *St. Francis Regional Medical Center, Inc. v. Weiss*, Kan. Sup. Ct. No. 68,845 (March 4, 1994)
15. Texas A.G. Op. JM-1042 (1989).
16. See *Guerrero-Ramiurez, M.D. v. Tex. State Bd. Of Medical Examiners,* 1993 Tex. App. LEXIS 3399, at *27 (1993).
17. 1987 N.M. A.G. Op. No. 87-39, at *12.