

# THE CORPORATE PRACTICE OF MEDICINE BAR AND INTERGRATED DELIVERY SYSTEMS: A COLLISION COURSE?

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- I. Corporate Practice of Medicine Bar
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    3. Most states still have some type of prohibition.
    4. Prohibitions generally focus on core concern: protection of physician's professional autonomy from lay interference or commercial exploitation.
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      1. California has most developed doctrine.
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Medicine Bar  
Vice President General Counsel  
California Medical Association
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## **ALABAMA**

### **Statutes**

§34-24-51 (prohibiting unlicensed practice of medicine; exemptions for fellows, resident, interns or medical students while under supervision of physician in facilities approved by the Board of Medical Examiners).

### **Agency Opinions**

1992 declaratory rulings by the Alabama Medical Licensure Commission and the Alabama Board of Medical Examiners determined that the employment of physicians to provide medical services to patients at a clinic, where the employment agreements specifically required the physicians to make all decisions concerning the medical services provided to the patient, did not constitute violation of §34-24-51 Code of Alabama (unlicensed practice of medicine). This arrangement does not, according to the rulings, violate the prohibition against the unlicensed practice of medicine, because “the physicians treat patients in such manner as the physicians, in the independent exercise of the medical judgment, determine to be in the best interest of the patients subject only to the rules of the Executive Committee of the Brookwood Hospital Medical Staff which is comprised exclusively of licensed physicians.”

The ruling noted that the prohibition against the unlicensed practice of medicine was designed to protect patients from the danger of receiving medical treatment from any individual not qualified to practice medicine. It found, however, that under the facts in this case the patients at the clinic received medical treatment only from licensed physicians and the clinic was prohibited from influencing the manner in which physicians provided medical services to patients. As a result, the employment by the clinic of physicians duly licensed to practice medicine did not expose the patients to the danger which the statutes were intended to prevent. The Board observed:

Physicians are free to enter into contracts of employment for their professional services with professional corporations, nonprofit corporations, business corporations, partnerships, joint ventures or other entities, provider however, that the physician must exercise independent judgment in manner related to the practice of medicine and that his or her actions with respect to the practice of medicine must not be subject to the

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control of an individual not licensed to practice medicine. (Emphasis in original) ( *See* Declaratory Ruling of the Alabama Board of Medical Examiner, October 21m 1992.)

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### **ALASKA**

#### **Statutes**

A.S §08.64.170 (prohibiting unlicensed practice of medicine)

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### **ARIZONA**

#### **Statutes**

A.R.S. Title 32 §32-1454, 1455 (authorizing injunction against practice of medicine by one not licensed to practice or not exempt from licensing requirements)

A.R.S. Title 20 §§823 (medical corporation not deemed to be engaged in the corporate practice of medicine)

A.R.S. Title 20 §823 (corporation organized for purpose of establishing maintaining, and operating nonprofit hospital service or medical or dental or optometric service plans permitted)

A.R.S. Title 20 §(a) (nothing in this article shall be deemed to alter the relationship of physician and patient, dentist and patient, or optometrist and patient)

A.R.S. Title 20 §833(b) (no such corporation shall in any way influence a subscriber in his free choice of hospital, physician, dentist or optometrist other than to limit its benefits to participating hospitals, physicians, dentist and optometrists)

#### **Cases**

Funk Jewelry Co. v. State of Arizona (1935) 50 P.2d 945 (a corporation may not engage in the practice of medicine); State ex rel. Board of Optometry v. Sears, Roebuck, & Co. (1967) 427 P.2d 126 (although a corporation may not practice optometry by employing an optometrist, a corporation with no control over activities of optometrist who rented space in store had not established an employer-employee relationship).

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### **ARKANSAS**

#### **Statutes**

Title 17 §93-202 (practice of medicine)

Title 17 §93-401 (license required to practice medicine)

Title 17 §66-4902 (nonprofit hospital service corporations and medical service) corporations may contract with insurers and health care providers)

Title 17 §64-17101 (professional corporations permitted)

Title 17 §66-5201 (5205(c)) (HMO Act)

Title 23 §23-75-101 (nonprofit hospital service corporations and medical service corporations are statutorily permitted to operate by contracting with

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insureds and health care providers)

Title 23 §23-75-105a (nothing in this chapter shall be deemed to alter the relationship of physician and patient)

Title 23 §23-75-105b (the corporation shall not in any way influence the subscriber in his free choice of hospital or physician other than to limit its benefits to participating hospitals and physicians)

Title 23 §23-75-105c (nothing in this chapter shall be deemed to abridge the right of any physician or hospital to decline patients in accordance with the standards of practice of the physician or hospital and no such corporation shall be deemed to be engaged in the corporate practice of medicine)

### Cases

Melton v. Carter (1942) 204 Ark. 595, 164 S.W.2d 453 (statute declaring optometry a learned profession and prohibiting optometrists, physicians or surgeons from accepting employment from an unlicensed corporation is constitutional); Missionary Supporters, Inc. v. Arkansas Bd. of Dental Examiners (1959) 231 Ark. 38, 328 S.W.2d 139 (injunction upheld against the unlicensed practice of dentistry by a corporation, even though the corporation's services were in an area of the state where there was a serious need for dental service, and such services were wholly incidental to its main purpose of training missionary dentist).

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### **CALIFORNIA**

See attached documents for summary.

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### **COLORADO**

#### Statutes

CRS§12-36-129 (prohibiting unlicensed practice of medicine; specifically includes general prohibitions on corporations practicing medicine)

CRS §12-36-134 (“corporations shall not practice medicine” except professional service corporations and except as provided in 25-3-103.2)

CRS §25-3-103.2 (authorizing the employment of health care professionals by licensed certified hospitals located in a county with a population of less than one hundred thousand. The law contains certain limitations, including (1) no hospital employing a physician may limit or otherwise exercise control over the physician's independent professional judgment concerning the practice of medicine or diagnoses or treatment or require physicians to refer exclusively to the hospital; (2) no hospital employing a health care professional may offer that professional any percentage of fees charged to patients by the hospital or other financial incentive to artificially increase services provided to patients; (3) the bylaws of any hospital employing physicians cannot discriminate regarding credentials or staff privileges on the basis of whether a physician is an employee of, or a contracting physician with, the hospital. Any hospital which knowingly limits or controls a physician or attempts to do so shall be deemed to have violated hospital standards of operation and shall be held liable for such violations.)

#### Cases

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People Painless Parker Dentist (1929) 85 Colo. 304, 275 P.928; *cert denied* 280 U.S. 566 (1929) (corporation cannot practice dentistry directly or indirectly through licensed personnel); State Bd. of Dental Examiners v. Savelle (1932) 90 Colo. 177, 8 P.2d 693 (same); State Bd. of Dental Examiners v. Heitler (1932) 90 Colo. 191, 8 P.2d 699 (same); State Bd. of Dental Examiners v. Patch (1932) 90 Colo. 207, 8 P.2d 704 (same); State Bd. of Dental Examiners v. Walsh (1932) 90 Colo. 208, 8 P.2d 704 (same)

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### CONNECTICUT

#### Statutes

§20-9 (prohibiting unlicensed practice of medicine)  
§33-180, 33-181 (license pre-requisite to operating medical group clinic)  
§33-168 (registration of medical service corporations)  
§33-179a-c (health care centers may provide health care and employ others to provide health care)  
§33-179g (only one-fourth of board of directors of health care center must be engaged in the healing arts at least two of whom must be a physician and a dentist)

#### Cases

Lieberman v. Connecticut Bd. of Examiners in Optometry (1943) 130 Conn. 344, 34 A.2d 213 (optometrist occupying space in department store and receiving commission in addition to salary were guilty of unprofessional conduct because profit motive adversely affected the interests of the patient, who would not receive the optometrist's undivided loyalty); Obuchowski v. Dental Comm'n (1962) 149 Conn. 257, 178 A.2d 537 (dentist working with dental laboratory violated statute restricting ownership of dental facilities to licensed dentist) Mack v. Saars (1963) 150 Conn. 290, 188 A.2d 863 (corporate employment of optometrist at a fixed salary did not violate statutes prohibiting unlawful practice of optometry); Dental Comm'n v. Tru-Fit Plastics, Inc. (1970) 159 Conn. 362, 269 A.2d 265 (a corporation which assembled, packaged, and sold materials from which an individual could make a denture was not engaged in the practice of dentistry).

#### AG Opinions

*See* 28 Op. Atty. Gen. 248 (1954) (stating that practice of medicine and surgery is restricted to individuals and does not include corporations; nonprofit charitable hospitals are excepted)

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### DELAWARE

#### Statutes

24 Del. C. §1701 (limiting practice of medicine to "individuals")  
24 Del. C. §1731(b)(5) (prohibiting the unlicensed practice of medicine)  
24 Del. C. §1731(b)(9) (prohibiting assisting the unlicensed practice of medicine)

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8 Del. C. Ch. 6 (allowing corporate practice of medicine by professional service corporations if all shareholders are licensed in the same profession)

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### **DISTRICT OF COLUMBIA**

#### **Statutes**

§2-3301.2(7) (practice of medicine defined)

§2-3305.1 (license required to practice medicine)

§2-3305.14(12) (physician subject to disciplinary action for practicing with or aiding unlicensed person to practice)

#### **Cases**

*See* United State v. American Medical Ass'n. , (D.C. Cir. 1940) 110 F.2d 703, *cert. denied* , 310 U.S. 644 (1940) (a corporation that operates a clinic or hospital, employs physicians and receives the fees is unlawfully practicing medicine, although a nonprofit corporation offering care by its salaried medical staff to dues paying member was not engaged in the corporate practice of medicine) Silver v. Lansburgh & Bro. , (D.C. Cir. 1940) 111 F.2d 518 (corporation may employ licensed optometrist).

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### **FLORIDA**

#### **Statutes**

§456.327 (prohibiting the unlicensed practice of medicine)

§641.01 et seq. (Health Care Service Plans)

§641.17 et seq. (HMO Act) (providing for arrangements between physicians and HMOs.)

#### **Cases**

Dr. Allison, Dentist, Inc. v. Allison (1935) 360 Ill. 638, 196 N.E. 799, 800 (stating that doctors who were hired by corporations would “owe their first allegiance to their corporate employer and cannot give the patient anything better than a secondary or divided loyalty.”); State Bd. of Optometry v. Gilmore (1941) 147 Fla. 776 3 So. 2d 708 (physician employed as salaried optometrist by jewelry store violated statute prohibiting employment of optometrist by corporation); Rush v. City of St. Petersburg (Fla. Dist. Ct. App. 1967) 205 So. 2d 11 (where physician argued that a contract to provide radiological service to the city hospital was void on the ground that performance of the contract would result in the illegal corporate practice of medicine by the hospital, the court held that the hospital was not engaged in the illegal practice of medicine because the doctor-patient relationship was maintained); Cohen v. Department of Professional Regulation Bd. of Optometry , (Fla. Dist. Ct. App. 1981) 407 So. 2d 621 (affirming a finding of practicing optometry under a corporate name).

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### **GEORGIA**

#### **Statutes**

Title 43 §43-34-26 (prohibiting unlicensed of medicine)

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Title 43 §43-34-37(g) (prohibiting assisting unlicensed practice of medicine)

Title 14 chapter 7 -- Professional service corporations (limited to practicing one profession i.e. medicine and surgery or registered professional nursing).

Title 33 §33-18-1 *et seq* (nonprofit medical service corporations)

Title 33 §33-18-17(a)-(c):

- (a) Medical service corporations shall have the right to sell contracts providing for the payment of specified charges made by physicians furnishing medical services to the holders of the contracts, the beneficiaries and covered dependents as provided for in this chapter.
- (b) The contract shall not in any manner restrict the right of the holder to obtain the services of any licensed doctor of medicine, licensed doctor of dental surgery or a licensed podiatrist nor shall the contract attempt to control the relation existing between any holder or beneficiary of such contract in his position. The medical service corporations shall impose no restriction on the doctors of medicine, doctors of dental surgery, or podiatrists who treat their subscribers as to the methods of diagnosis or treatment. The private physician-patient relationship shall be maintained and a subscriber shall at all times have free choice of any doctor of medicine, doctor of dental surgery or podiatrist, who is a participating physician in the medical service corporation and who agrees to accept a particular beneficiary's patient.
- (c) It is the purpose of this co-section to make clear that the creation of the relationship of patient and physician depends upon the mutual assent of the parties. Contracts issued by the medical service corporation to the subscribers shall not constitute individually or jointly obligations of the participating physician servicing the plan.
- (d) No provision of this chapter should be construed as authorizing the corporate practice of medicine, dentistry, or podiatry; and medical service corporations shall not practice medicine, dentistry, or podiatry. No physician rendering service or called on to render to service to a member beneficiary or a covered dependent shall be construed to be an agent or employee of a medical service corporation; and the medical service corporation shall not be liable for the negligence, misfeasance, malfeasance, nonfeasance or malpractice of any physician rendering medical or surgical, dental or podiatric services to any such member, beneficiary or dependent.

### Cases

Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Examiners in Optometry (1963) 219 Ga. 364, 133 S.E.2d 374 (regulations which inhibited employment of optometrists by unlicensed persons or corporations were reasonable and in keeping with public policy); Lee Optical of Ga. Inc. v. State Bd. of Examiners in Optometry (1964) 220 Ga. 204, 138 S.E.2d 165 (although those who were examined were not charged for the service, corporation that employed licensed optometrist to examine eyes was engaged in the unlawful practice of optometry); Sherrer v. Hale (1982) 248 Ga. 793, 285 S.E.2d 714 (a business corporation cannot

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lawfully practice one of the learned professions, and it is against public policy for a business corporation to perform acts which constitute the practice of medicine.)

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### **HAWAII**

#### **Statutes**

H.R.S. §453-1 (defining practice of medicine)

H.R.S. §453-2 (prohibiting unlicensed practice of medicine)

#### **AG Opinions**

State Op. Atty. Gen. No. 80-5 (1980) (foreign professional (medical) corporation cannot be licensed in Hawaii)

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### **IDAHO**

#### **States**

§54-1804 (prohibiting unlicensed practice of medicine)

§54-1814 (prohibiting aiding or abetting any person in unauthorized practice of medicine)

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### **ILLINOIS**

#### **Statutes**

ILCS ch. 225 60/49, 60/50 (penalty for practicing without a license)

ILCS ch. 225 60/22 (32) (grounds for disciplinary action -- aiding or abetting unauthorized practice of medicine)

ILCS ch. 225 60/22 (11) (prohibition on allowing another person or organization to use their license to practice)

#### **Cases**

Dr. Allison, Dentists, Inc. v. Allison (1935) 360 Ill. 638, N.E. 799 (a covenant not to compete was unenforceable because the corporation was illegally practicing dentistry); Winberry v. Hallihan (1935) 361 Ill. 121, 197 N.E. 552 (the state may deny corporations the right to practice professions and has the right to insist on the personal obligation of the individual practitioner); People by Kerner v. United Medical Serv. (1936) 362 Ill. 442, 200 N.E. 157 (corporation that established a fixed fee, low cost medical clinical in Chicago in which all services were rendered by licensed physicians, whom the corporation paid, may not practice learned professions and may not do so by employing licensed physicians.); *See* People ex rel. Watson v. House of Vision (1974) 59 Ill. 2d 508, 322 N.E.2d 15, *cert. denied*, 422 U.S. 1008 (1975) (corporation enjoined from violating the Optometric Practice Act by allowing employees who were not licensed as optometrists to fit contact lenses); People ex rel. Ill. Soc'y of Orthodontists v. United States Dental Inst., Inc. (1978) 57 Ill. App. 3d 1029, 373 N.E. 2d 635 (school teaching dentistry that advised students on specific problems of patients, including diagnoses, was engaged in the unlawful practice of dentistry by a corporation in violation of the Dental



Practice Act and was enjoined.)

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## **INDIANA**

### **Statutes**

§25-22.5-8-1 (practice without a license unlawful)

§25-22.5-1-2(20), (21) (exception for licensed hospitals, private mental health institutions, health care organizations whose members are licensed professionals.)

§25-22.5-1-2(c) (above entities may employ physicians provided they do not “direct or control independent acts...or judgment of licensed physicians.”)

§27-8-7-1 to -21 (HMO Act)

§23-1.5-1-1 to -5-2 (Professional Corporation Act)

### **Cases**

State v. Williams (1937) 211 Ind. 186, 5 N.E.2d 961 (corporation may not practice medicine); Sloan v. Metropolitan Health Council of Indianapolis, Inc., (Ind. App. Dist. 1987) 516 N.E.2d 1104 (professional corporations may practice medicine).

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## **IOWA**

### **Statutes**

Iowa Code §§147, 147.2 (prohibiting unlicensed practice of medicine)

Iowa Code §135B-26 (allowing pathology and radiology services in hospitals)

Iowa Code Chapter 514B (HMO's authorized)

Iowa Code Chapter 496C (professional corporations authorized)

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### **Cases**

State v. Bailey Dental Co., (1931) 211 Iowa 781, 234 N.W. 260 (corporation enjoined from practicing dentistry through employment of licensed dentist); State v. Kindy Optical Co., (1933) 216 Iowa 1157, 248 N.W. 332 (corporation enjoined from practicing optometry through licensed employees); Christensen v. Des Moines Still College of Osteopathy & Surgery, (1957) 248 Iowa 810, 82 N.W.2d 741 (a corporation cannot qualify for a medical license, and an unlicensed person cannot have direct or indirect authoritative control of licensees in performing professional tasks); State v. Plymouth Optical Co., (1973) 211 N.W.2d 278 (contractual arrangement under which corporation rented space to optometrists (who were obligated not to let their business decline) violated the optometry licensing statute and enjoined the corporation from practicing optometry).

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### **AG Opinions**

#91-7-1 (July 12, 1991) (Donner to Szymoniak, State Senator) When asked

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whether a non-profit hospital corporation may provided medical services through employed physicians, where the contract expressly prohibits lay control of the physician's medical judgment, the Attorney General indicated that the distinction between profit and non-profit status is not the relevant determination in deciding whether an arrangement violates the corporate practice of medicine bar. After surveying earlier Iowa cases, the AG noted that:

[t]he common thread underlying the corporate practice prohibition is the vesting of improper dominion and control over the practice of a profession in a corporate entity. Where the corporation exerts undue dominion and control over the licensed professional, the corporation in essence becomes the “practitioner,” which is not permitted under the statute. However, not all relationships between a corporation and a licensed professional are prohibited. [Where] the licensed professional retains control over the relationship with the patient, the Court has declined to intervene by injunction. (p. 8)

Any finding of a violation of the corporate practice/employment prohibition would be based on a detailed factual review of the corporate-physician relationship at issue [with an analysis of the amount of dominion and control exercised by the corporation over the physicians].

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### **KANSAS**

#### **Statutes**

Kan. Stat. Ann. §65-2803 (prohibiting unlicensed practice of medicine); Kan. Stat. Ann. §65-2837(b)(15) (one who allows a person or organization to use license is guilty of unprofessional conduct).

#### **Cases**

Winslow v. Kansas State Bd. of Dental Examiners , (1924) 115 Kan. 450, 223 P. 308 (corporation may not practice dentistry through employees); State ex rel. Beck v. Goldman Jewelry Co. , (1935) 142 Kan. 881, 51 P.2d 995 (ousting corporation for employing optometrists); State ex rel. Fatzer v. Zale Jewelry Co. , (1956) 179 Kan. 628, 298 P.2d 283 (ousting corporation from practicing optometry through its employee in violation of state statute); Marks v. Frantz , (1958) 183 Kan. 47, 325 P.2d 368 (upholding the revocation of optometrist's license for practicing optometry as a corporate employee); *See* Copeland v. Kansas State Bd. of Examiners in Optometry , (1974) 213 Kan. 741, 518 P.2d 377 (upholding the revocation of an optometrist's license for violating the statute by practicing optometry as an agent of an unlicensed firm); The Kansas Supreme Court upheld the ban on corporate practice in 1991 in the case of Early Detections Center v. Wilson (Kan. 1991) 248 Kan. 869, 811 P.2d 860. Last year, however, a state district court ruled in Weiss v. St. Francis Regional Medical Center that the ban on corporate practice did not apply to not-for-profit hospital corporations. The Weiss case is currently on

appeal to the Kansas Supreme Court.)

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## **KENTUCKY**

### **Statutes**

Chapter 311, §311.565 (prohibiting unlicensed practice of medicine)

### **Cases**

*See Kendall v. Beiling*, (1943) 295 Ky. 782, 175 S.W.2d 489 (a corporation cannot lawfully engage in the practice of medicine, and the great weight of authority is that neither a corporation nor any other unlicensed entity may engage in the healing arts through licensed employees)

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## **LOUISIANA**

### **Statutes**

§§37:1271 (prohibiting unlicensed practice of medicine)

### **Cases**

*See Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 513 F.Supp. 532, 546 (E.D. La. 1981), rev'd, 686 F.2d 286 (5th Cir. 1982), rev'd, 466 U.S. 2 (1984) (in an antitrust action involving a contract by a professional medical corporation to provide anesthesia services to a hospital, court held that the hospital was not engaging in the unauthorized practice of medicine).

### **Agency Opinions**

A Statement of Position by the Louisiana Board of Medical Examiners dated August 20, 1992, concluded that a physician's employment by a corporation other than a professional medical corporation is not per se unlawful under the Louisiana Medical Practice Act. According to the board, the focus of such inquiries should be on the amount of control the corporation is allowed to exercise over the physician:

it is our opinion, that is, that a corporation may not necessarily be said, by the mere fact of employing a physician to practice medicine, and by the fact alone, to be itself practicing medicine. As contemplated by the Medical Practice Act, and as frequently reiterated herein, the essence of the practice of medicine is the exercise of independent medical judgment in the diagnosing, treating, curing or relieving of any bodily or mental disease, condition, infirmity, deformity, defect, ailment, or injury in any human being....If a corporate employer seeks to impose or substitute its judgment for that of the physician in any of these functions, or the employment is otherwise structured so as to undermine the essential incidents of the physician patient relationship, the Medical Practice Act will have been violated. But if a physician employment relationship is so established and maintained as to avoid such intrusion, it will not run afoul of the Medical Practice Act.

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## **MAINE**

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### Statutes

32 §3270 (prohibiting unlicensed practice of medicine)

32 §3282-A(2)(D) (aiding and abetting the practice of medicine by unlicensed person is grounds for discipline)

### Cases

*See Small v. Maine Bd. of Registration & Examination in Optometry*, (Me. 1972) 293 A.2d 786 (to prove a violation of a statute prohibiting optometrists from associating with a corporation, the state must show an association for profit, improper practice of optometry by the corporate entity, and that the effect of the association was to enable the entity to engage in improper practice).

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## MARYLAND

### Statutes

Health Occupations §§14-301, 14-601 (license required; unlicensed practice of medicine prohibited)

Health Occupations §14-404(18) (physician subject to discipline if practices medicine with an unauthorized person or aids an unauthorized person in the practice of medicine)

Corporations and Associations §5-104 (professional corporation may not perform any professional service except through employees and agents who are licensed to perform the professional service in the state)

### Cases

*Dvorine v. Castleberg Jewelry Corp.*, (1936) 170 Md. 661, 185 A. 562 (holding that corporation selling eyeglasses was not engaged in the practice of optometry when it employed a registered optometrist who was compensated by salary and commission); *Backus v. County Bd. of Appeals*, (1960) 224 Md. 28, 166 A.2d 241 (interpreting statutory provision prohibiting issuance of dental license to any corporation or entity and noting that state laws generally forbid the practice of medicine or dentistry by a corporation through licensed employees).

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## MASSACHUSETTS

### Statutes

Chapter 112 §2 (prohibiting unlicensed practice of medicine and requiring registration from physicians)

Chapter 156A §2 (professional corporation may only render professional services through its officer, employees and agents who are duly authorized to render such services)

### Cases

*McMurdo v. Getter*, (1937) 298 Mass. 363, 10 N.E.2d 139 (enjoining corporation from practicing optometry by employing licensed practitioners); *Kay Jewelry Co. v. Board of Registration in Optometry*,

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(1940) 305 Mass. 581, 27 N.E.2d 1 (finding constitutional an amendment to statute which prohibited the sharing of fees by one not authorized to practice optometry); *See Silverman v. Board of Registration in Optometry*, (1962) 344 Mass. 129, 181 N.E.2d 540 (holding that a board regulation prohibiting optometrists from practicing on the premises of a commercial establishment was valid, as the board could conclude that the optometrist's presence in a commercial establishment could result in mercantile practices and lowering of professional standards).

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### MICHIGAN

#### Statutes

Michigan Comp. Laws §333.17011 (prohibiting the unlicensed practice of medicine)

#### Cases

*People v. Carroll*, (1936) 274 Mich. 451, 264 N.W. 861 (the knowledge to practice dentistry must be separate from the power of control); *See Toole v. Michigan Bd. of Dentistry*, (1943) 306 Mich. 527, 11 N.W.2d 229 (holding that a rule prohibiting fee splitting by dentists did not prohibit the practice of dentistry by partners, but noted that the practice of dentistry by corporations was prohibited).

#### Other

Physicians may practice in a professional corporation under the Professional Services corporation Act.

Recent legislation authorized limited liability companies in Michigan which have the attributes of both the corporation and the partnership. According to Michigan Corporation and Securities Bureau, however, professional corporations and limited liability companies may contract with hospitals to provide medical services through the hospital without directly employing physicians, which would run contrary to the corporate practice of medicine doctrine.

Apparently, the Attorney General has been asked to consider whether a nonprofit corporation may provide medical care services to the public through employed physicians, or whether the practice of medicine through a corporate structure is limited to corporations incorporated under the Professional Services Corporation Act.

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### MINNESOTA

#### Statutes

§147.081 (prohibiting the unlicensed practice of medicine)

§ 147.09(i) (aiding and abetting an unlicensed person in practicing medicine is grounds for disciplinary action)

#### Cases

*Granger v. Adson*, (1933) 190 Minn. 23, 250 N.W. 722 (holding that a layperson furnishing results of urinalysis and blood pressure tests and

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advising clients about diet and exercise is illegally practicing medicine and stating that it is improper and contrary to statute and public policy for a corporation to indirectly practice medicine by hiring a licensed physician); Williams v. Mack , (1938) 202 Minn. 402, 278 N.W.585 (holding that a licensed optometrist may lawfully be employed by a corporation to supervise its business of selling eyeglasses).

### **AG Opinions**

In an opinion written October 5, 1955 (92-B-11), the Attorney General found that a nonprofit corporation organized to contract on behalf of its members with doctors for rendering medical services, and specifically prohibited from intervening in the professional relationship between the physician and patient would be for “a lawful purpose” and permissible under the Minnesota Nonprofit Corporation Act:

The distinction made by the cases between business corporations and nonprofit corporations is based upon sound considerations of public policy and persuasive reasoning. The objectionable features of the “corporate practice of medicine,” or of any other profession, as stated by the Minnesota Supreme Court and by the numerous other courts that have considered the problem, are that the exploitation of the profession leads to abuses and that the employment of the doctor by a business corporation interposes a middleman between the doctor and the patient and interferes with the professional responsibility of the doctor to the patient. The corporation considered here would be nonprofit and has a provision in its articles of incorporation prohibiting the corporation from intervening in the professional relationship between the doctors and the member-patients and confining the corporate activities to the economic aspects of medical and dental care. Therefore, a corporation so organized would not be subject to the objections urged against the business corporations that have been held prohibited from entering this field.

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## **MISSISSIPPI**

### **Statutes**

§73-25-1 (prohibiting the unlicensed practice of medicine)

### **Cases**

Hardy v. Brantley , (Miss. 1985 471 So.2d 358 (Although a hospital cannot legally practice medicine, it can held liable for the negligence of its physicians whether the physicians are independent contractors or employees. The court reasoned that, although professional corporations, like hospitals, cannot legally practice medicine, imposing liability on the professional corporation or hospitals does not have the effect of requiring it to engage in the practice of medicine.)

### **Agency Opinions**

In Mississippi, the position of the Mississippi State Board of Medical Licensure is that the Board does not concern itself with the form or type of

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business arrangements entered into by a medical licensee provided that certain prerequisites are met:

1. The physician employed or associated with the entity is licensed by the Board.
  2. The method and manner of patient treatment and the means by which patients are treated are left to the sole and absolute discretion of the licensed physician.
  3. The manner of billing the amount of fees and expenses charged to a patient for medical services rendered must be left solely to the discretion of the licensed physician.
  4. At no time shall a physician enter into any agreement or arrangement under which consideration or compensation is received as an inducement for the referral of patients, referral of medical services or supplies or for admissions to any hospital.
  5. The business arrangement and the actions of the physician in relation to it cannot be contrary to or in violation of the federal anti-kickback statutes.
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### MISSOURI

#### Statutes

RSMO §334.010 (prohibiting unlicensed practice of medicine)

#### Cases

State v. Scopel , (Mo. 1958) 316 S.W.2d 515, 518 (prohibition on practice by any person other than a registered physician); Ordo v. Missouri Dental Bd. , (Mo. Ct. App. 1985) 689 S.W.2d 825 (reversing the suspension of dentist for violation of assisting an unlicensed corporate entity to practice dentistry by contracting to provide dental services on the grounds that mere execution of the contract was not illegal and it could not be shown that the dentist had ever performed under the contract).

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### MONTANA

#### Statutes

Mont. Code Ann. §37-3-301 (prohibiting the unlicensed practice of medicine)

Mont. Code Ann. §37-3-322(23) (providing that practicing medicine as a partner, agent, or employee of or in joint venture with a person who does not hold a license constitutes unprofessional conduct. However, §37-3-322(23) does not prohibit: (a) the incorporation of an individual licensee or group of licensees as a professional service corporation under Title 35, chapter 4; (b) a single consultation with or a single treatment by a person or persons licensed to practice medicine and surgery in another state or territory of the United States or foreign country; or (c) practicing medicine as the partner, agent, or employee of or in joint venture with a hospital, medical assistance facility, or other licensed health care provider. However, (i) the partnership, agency, employment, or joint venture must be

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evidence by a written agreement containing language to the effect that the relationship created by the agreement may not affect the exercise of the physician's independent judgment in the practice of medicine; (ii) the physician's independent judgment in the practice of medicine must in fact be unaffected by the relationship; and (iii) the physician may not be required to refer any patient to a particular provider or supplier or take any other action the physician determines not to be in the patient's best interest.)

### Cases

United States v. Kintner , 216 F.2d 418 (9th Cir. 1954) (“it may be assumed that [Montana's] courts would infer...and intention to prohibit a corporation from practicing medicine”).

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## NEBASKA

### Statutes

§71-102 (prohibiting unlicensed practice of medicine)

### Cases

State Electro-Medical Institute v. Platner , (1905) 74 Neb. 23, 103 N.W. 1079(refusing to construe the medical licensing statute to prevent licensed practitioners from forming a corporation and making contracts in the corporate name and finding that such conduct did not violate public policy.) (Note: In both cases all the principals were licensed physicians so that the corporation in question was similar to a modern professional service corporation.); State Electro-Medical Institute v. State , (1905) 74 Neb. 40, 103 N.W. 1078 (holding that a statute prohibiting the unlicensed practice of medicine did not apply to a corporation, as a corporation, is incapable of practicing medicine because a corporation cannot diagnose a disease or determine a remedy. Making contracts and collecting compensation is not practicing medicine and no professional qualifications are necessary to do these things)

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## NEVADA

### Statutes

§630.160 (prohibiting the unlicensed practice of medicine)

§630.304(3) (prohibiting practicing medicine under another name)

§630.305(1) providing that grounds for disciplinary action includes receiving compensation from a corporation which is intended to influence the physician's objective evaluation or treatment of the patient)

§695C.050(3) (a corporate health maintenance organization is a special, exempt entity under chapter 695C. Its activities are not deemed the practice of medicine.)

Chapter 89 (Professional Corporation Act) (permitting corporate practice of medicine)

Chapter 78 (General Corporation) (not authorizing corporate practice of medicine)



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**NEW HAMPSHIRE**

**Statutes**

N.H. Rev. Stat. Ann. §§329-17, 329-24 (prohibiting the unlicensed practice of medicine).

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**NEW JERSEY**

**Statutes**

§45:9-22 (prohibiting the unlicensed practice of medicine)

§13:35-6.16 (allowing physicians and other health care professionals to practice together as a single partnership or professional association)

§13:35-6.16(f)(3(i) (“A practitioner may be employed...within the scope of the practitioner's licensed practice and in circumstances where quality control of the employee's professional practice can be and is lawful supervised and evaluated by the employing practitioner. Thus, a practitioner with a plenary license shall no be employed by a practitioner with a limited license...”)

§13:35-6.16(h) (formally recognizing right of physicians to participate in organized managed care plans subject to certain requirements, including that the physician retain “authority at all times to exercise professional judgment within accepted standards of practice regarding care, skill and diligence in examination, diagnosis and treatment of each patients” and “authority at all times to inform the patient of appropriate referrals to any other health care providers.”)

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**NEW MEXICO**

**Statutes**

N.M. Stat. Ann. §61-6-15(10) (prohibition on permitting another to use medical license)

N.M. Stat. Ann §61-6-15(16) (prohibition on fee splitting)

N.M. Stat. Ann §61-6-20 (prohibition on practicing without a license)

N.M. Stat. Ann §53-6-9 (professional corporation shall render professional services only through its officers, employees, and agents who are duly licensed)

**AG Opinion**

NMAG Opinion NO. 87-39 (July 30, 1987) concluded that a corporation organized and controlled by non-physicians may provide medical services to the general public through employed physicians unless it is prohibited by state [which the AG finds it is not] or it exercises lay control of medical judgment or engages in lay exploitation of the medical profession in a manner prohibited by public policy. The opinion suggests the corporate practice bar may be outdated:

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Many of the earlier 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. ... These market forces may redound to the benefit of consumers of health care, and restraints on the commercial practice of physicians that inhibit their “affiliating with non-physicians or engaging in other novel arrangements which may provide more convenient or accessible health care service to the public” may invite the scrutiny of the F.T.C. See Remarks of Acting FTC Chairman, Terry Calvani, 5 Trade Reg.Rep. (CCH) P50,479 at 56,279 (2/20/86).

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### NEW YORK

#### Statutes

N.Y. Educ. Law §6522 (prohibiting the unlicensed practice of medicine);  
N.Y. Educ. Law §6527(l) (nonprofit medical corporation or hospital service corporation may employ licensed physicians);  
N.Y. Bus. Corp. Law §1501 (Physicians may form professional service corporations.)

#### Cases

People v. Woodbury Dermatological Inst., (1919) 192 N.Y. 454, 85 N.E. 697 (corporation may not practice medicine without express legislative authority); Stern v. Flynn, (N.Y. Sup. Ct. 1935) 154 Misc. 609, 278 N.Y.S. 598 (corporation may not practice optometry); State v. Abortion Information Agency, Inc., (1972) 69 Misc. 2d 825, 323 N.Y.S.2d 579 (N.Y. App. Term), *aff'd*, 285 N.E.2d 317 (1972) (abortion referral agency which hired and paid doctors to perform abortions violated public policy forbidding a corporation from practicing medicine by hiring doctors to act for it); United Calendar Mfg. Corp. v. Huang, (N.Y. App. Div. 1983) 463 N.Y.S.2d 497 (In a dispute over patient lists, the court held that a corporation could not practice medicine, and therefore it could not have patients. The court also held that an arrangement whereby the corporation received a gross percentage of the physician's earnings constituted illegal fee splitting.); Albany Medical College v. McShane, (1985) 66 N.Y.2d 982, 489 N.E.2d 1278, 499 N.Y.S.3d 376b (the court characterized the claim that the medical college could not share in fees generated by physicians who are faculty members “farfetched at best.” Because the college has a corporate charter empowering it to promote medical science and instruction, its treatment of patients did not constitute the illegal corporate practice of medicine or illegal fee splitting.)

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### NORTH CAROLINA

#### Statutes

§90-18 (prohibiting the unlicensed practice of medicine)  
Chapter 55B (Professional corporation Act)  
Chapter 57C (Limited Liability Act) (extending the benefits of limited liability to existing professional service corporations)

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### NORTH DAKOTA

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### Statutes

§43-17-16 and §43-17-34 (prohibiting unlicensed practice of medicine);  
§43-17-31(10) (prohibiting or practicing under a false or assumed name)  
§43-17-42 (added in 1991) (authorizing hospital employment of physicians provided that the employment contract contains specific language that the hospital's employment with the physician may not affect the exercise of the physician's independent judgment in the practice of medicine and that the physician's independent judgment in the practice of medicine is in fact unaffected by the physician's employment relationship with the hospital.)

### AG Opinions

(October 23, 1990) (concluding that only physicians may practice medicine) (note that opinion predates §43-17-42)

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## **OHIO**

### Statutes

§473 - Ohio Medical Practice Act  
§4731.09 (license requirements can only be met by individuals)  
§4731.22(B)(4) (prohibiting physicians from engaging in the division of fees for referral of patients or for receiving a thing of value in return for a specific referral of a patient to utilize a particular service or business)  
§4731.41 (prohibiting the unlicensed practice of medicine)  
§1785 et seq. - professional corporations authorized  
§1785.02 (only licensed professionals can be shareholders in a professional association)  
Chapter 339 (county hospital administrators are given express authority to hire physicians, nurses, and other personnel as necessary)  
Chapter 1742 (HMOs authorized)  
§1742.30 (HMOs meeting the requirements of R.C. 1742 shall not be construed to be practicing medicine)

### cases

State ex rel. Bricker v. Optical company , (1936) 131 Ohio St. 217, 2 N.E.2d 601 (corporation cannot practice a profession either directly or indirectly through employees), Cleveland Clinic v. Sombrio , (1966) 6 Ohio Misc. 48, 215 N.E.2d 740 (In an action brought by a corporation to recover the balance due on an account, the Municipal Court of Akron overruled a motion to strike the claim on the ground that the service rendered constituted the corporate practice of medicine. The court stated that, although the practice of medicine by a corporation may have been repugnant to the common law, the legislature could authorize physicians to organize a corporation for a group practice of medicine.

### AG Opinions

1990 Atty. Gen. Op. No. 90-072 (professional association may render

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professional services only through officers, employees, and agents who are themselves duly licensed or otherwise legally authorized to render professional service); 1952 Atty. Gen. Op. No. 52-1751 (corporation, whether or not organized for profit, may not lawfully engage in the practice of medicine)

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### **OKLAHOMA**

#### **Statutes**

Title 59 §§491, 492 (prohibiting the unlicensed practice of medicine)

Title 59 §510 (allowing firms, associations, or corporations to engage in the practice of medicine as long as each and every member of such firms, associations, or corporations is duly licensed to practice medicine and surgery in the state of Oklahoma.)

Title §2601 et. seq. (Nonprofit hospitals service in medical indemnity corporations)

Title 36 §2613 -Relationship of physician and patient. ("Nothing in this article shall be deemed to alter the relationship of physician and patient. No such corporation shall in any way influence the subscriber in his free choice of hospital or physician, other than to limit its benefit to participating hospitals and physicians. Nothing in this article shall be deemed to abridge the right of any physician or decline patients in accordance with the standards and practices of such physician or hospital and no such corporation shall be deemed to be engaged in the corporate practice of medicine.")

#### **Medicine**

*See Williamson v. Lee Optical, Inc.*, (1955) 348 U.S. 483 (The Supreme Court upheld an Oklahoma statute prohibiting a retail corporation from renting space to any person to perform eye examination in a retail store. The court stated that the regulation was on the same constitutional footing as denying corporation the right to practice dentistry, and was an attempt to free the profession from the taint of commercialism).

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### **OREGON**

#### **Statutes**

Or. Rev. Stat. §677.080 (prohibiting the unlicensed practice of medicine).

#### **Cases**

*See State ex rel. Sisemore v. Standard Optical Co.*, (1947) 182 Or. 452, 188 P.2d 309(enjoining a corporation from practicing optometry because employment of an optometrist by the corporation may affect an optometrist's loyalty to the patient.)

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### **PENNSYLVANIA**

#### **Statutes**

63 PA. Const. Stat. Ann. §422.10 (prohibiting the unlicensed practice of

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medicine).

### Cases

See Neill v. Gimbel Bros. , (1938) 330 Pa. 213, 199 A. 178 (corporation may not practice optometry by hiring incensed employees).

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## RHODE ISLAND

### Statutes

R.I. Gen Laws §5-37-12 (prohibiting the unlicensed practice of medicine)

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## SOUTH CAROLINA

### Statutes

§40-47-260 (prescribing penalty for unlicensed practice and providing that the penalty applies to any corporation aiding and abetting a violation);

§40-47-60 (prohibiting practice without a license)

### Cases

Ezell v. Ritholz , (1938) 188 S.C. 39 S.E. 39, 198 S.E. 419 (one who practices a professional cannot properly act as an agent of a corporation or business partnership whose interests are commercial in character);

Wadsworth v. McRae Drug Co. , (1943) 203 S.C. 543, 28 S.E.2d 417 (stating that, although a corporation may not engage in the practice of medicine through licensed employees, it may not escape liability for the negligence of its employee by claiming the employee was improperly engaged in practicing medicine by dispensing drugs in the corporation's drug store).

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## SOUTH DAKOTA

### Statutes

§36-4-8 (unlicensed practice of medicine is a misdemeanor)

§36-4-8.1 (specifically prohibiting a corporation from the practice of medicine or osteopathy, but allowing employment agreements with the physician provided that the agreement or relationship does not: (1) in any manner directly or indirectly supplant, diminish or regulate the physician's independent judgment concerning the practice of medicine or the diagnosis and treatment of any patient; (2) result in profit to corporation from the practice of medicine itself, such as by a corporation charging a greater fee for the physician's services than the physician would otherwise recently charge as an independent practitioner; and (3) remain effective for a period of more than three years, after which it may be renewed by both parties annually.

§47-11 et seq. (medical corporations authorized).

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## TENNESSEE

### Statutes

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TCA §63-6-201 (prohibiting unauthorized practice of medicine)

TCA §§48-3-401 et seq. (authorizing professional corporations)

### Cases

*See State ex rel. Loser v. National Optical Stores Co.*, (1949) 189 Tenn. 433, 225 S.W.2d 263 (stating that the rule is uniform that a corporation cannot practice one of the learned profession and that a corporation cannot employ a licensed practitioner, the court held that a corporation which employed physicians to conduct eye examinations was unlawfully practicing optometry.)

### AG Opinion

Opinion No. 88-152 (August 25, 1988) (concluding that, among other things, a general business corporation (as opposed to a professional corporation) engaging in the business of providing professional anesthesia services to medical facilities would appear to constitute a violation of §63-6-201 et seq. (practice without a license). The opinion relied heavily on Loser (corporation is not a “person” within the context of licensing statutes, and a corporation cannot practice medicine), and noted that there is a lack of more recent authority on this issue.)

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## **TEXAS**

### Statutes

Tex. Rev. Civ. Stat. Ann. art. 4495(b)

§§3.07, 3.08 (prohibiting the unlicensed practice of medicine)

§§3.06(f) (allowing a county or municipal corporation or hospital district to contract with a physician to provide services)

§3.06(g) & (h) (allowing a nonprofit clinic that is operated by a nonprofit hospital or organization and that primarily serves a financially indigent population from contracting with a physician, billing and collecting fees as the physician's agent, and paying the physician a minimum guarantee to assure the physician's availability)

§5.01 (generally disallowing the corporate practice of medicine)

### Cases

Garcia v. Texas State Bd. of Medical Examiners, 384 F.Supp. 434 (W.D. Tex. 1974), *aff'd*, 421 U.S. 995 (1975) (upholding statute prohibiting laymen from forming corporations for the practice of medicine); *See Flyann Bros. Inc. v. First Medical Assocs.*, (Tex. App. 1986) 715 S.W.2d 782 (contracts giving non-physician partner majority of profits and the right to trade and commercialize on partner's medical license violated statute prohibiting aiding the unlicensed practice of medicine by an person, partnership, or corporation).

### AG Opinions

The Attorney General of the state of Texas affirmed in 1989 that “arrangements by which a corporation formed by non-physicians employs physicians to render medical services to the corporation's clients

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consistently have been held to constitute both the unlawful practice of medicine by the corporation and the violation by the employee -- physician of the prohibitions in §3.08(12) of the Medical Practice Act, V.G.C.S. Article 4495(b).” *See* Attorney General letter, April 24, 1989.

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### **UTAH**

#### **Statutes**

Utah Code Ann. §58-1-501 (practicing medicine as a partner, agent, or employee of, or in joint venture with, any person not holding a license, may result in revocation of medical license).

#### **Cases**

*See* Golding v. Schuback Optical Co., (1937) 93 Utah 32, 70 P.2d 871 (corporation hiring licensed optometrists did not violate statute prohibiting unprofessional conduct because it is not practicing optometry and is not subject to injunction as contrary to public policy)

#### **Other**

Informal letter dated September 8, 1993 from the Director of the Utah Department of Commerce Division of Occupational & Professional Licensing concludes that medical clinics may be owned by non-physician investors provided the clinic is not engaged in the practice of medicine. If clinic subject physicians to lay interference and professional medical matters, the clinics are engaged in unlawful practice of medicine (e.g., a clinic may not usurp the physician's role in determining what tests or procedures should be ordered or performed, or when a patient should be referred to a specialist).

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### **VERMONT**

#### **Statute**

§1314 (prohibiting the unlicensed practice of medicine);  
§1354(21) (license may be revoked for permitting physician's name or license to be used by a corporation when the physician is not in charge of treatment.)

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### **VIRGINIA**

#### **Statutes**

§54-1-2902 and 54.1-2929 (prohibiting the unlicensed practice of medicine).  
§54-1-2941 (allowing schools of medicine, osteopathy, podiatry or chiropractic and state-run health care entities to employ and contract with licensed practitioners)  
§13.1-542 through 13.1-556 (professional corporation statute)

#### **Cases**

Stuart Circle Hosp. v. Curry, (1939) 173 Va. 136, 3 S.E.2d 153 (hospital

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may engage in limited practice of medicine through its agents who are licensed to practice)

### **AG Opinion**

According to a 1992 Virginia Attorney General opinion on December 7, 1992, the corporate practice of medicine doctrine has not been adopted in Virginia statute or court decisions. The opinion points out that statutes prohibiting physicians practice in connection with commercial or mercantile establishments were repealed in 1986. The opinion concludes that a hospital may retain a physician as an employee as long as the physician exercises control over the diagnosis and treatment of the patient, the physician's professional judgment is not improperly influenced by commercial or lay concerns and the physician-patient relationship is not altered.

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## **WASHINGTON**

### **Statutes**

RCW 18.71.021 (prohibiting the unlicensed practice of medicine)

RCW 18.100 (Professional Service Corporation Act)

### **Cases**

Morelli v. Elsar , (Wash. (1988)) 110 W.2d 555, 756 P.2d 129 (partnership agreement between physician and non-physician to operate a medical clinic illegal because it placed control of the clinic with partners not licensed to practice medicine)

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## **WEST VIRGINIA**

### **Statutes**

§30-3-15(b) (authorizing medical corporations) (“A medical corporation may practice medicine and surgery only through individual physicians duly licensed to practice medicine and surgery in the state...but such physicians...may be employees rather than shareholders of such corporation.... Nothing contained in this article is meant or intended to change in any way the rights, duties, privileges, responsibilities, and liabilities incident to the physician-patient...relationship, nor is it meant or intended to change in any way the personal character of the physician-patient...relationship.”)

### **Cases**

See Eisensmith v. Buhl Optical Co. , (1934) 115 W. Va. 776, 178 S.E. 695 (statute forbidding a licensed optometrist from practicing under a name other than his own prohibited the practice of optometry by a corporation through a licensed optometrist);

### **AG Opinion**

46 Op. Atty. Gen. 202 (1955) (unlicensed person, association or corporations cannot employ a licensed physician to practice medicine on its behalf); 44 Op. Atty. Gen. 5 (195) (hospital employing a licensed physician



on a salary is unlawfully practicing medicine)

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## **WISCONSIN**

### **Statutes**

Wis. Stat. Ann. §448.03 (prohibiting the unlicensed practice of medicine).

### **Cases**

*See State ex rel. Harris v. Kindy Optical Co.*, (1940) 235 Wis. 498, N.W. 283 (optometry is not a profession; a corporation may employ licensed optometrists)

### **AG Opinions**

WIAG OAG 39-86. According to this 1986 Attorney General opinion, corporations other than service corporations may not practice medicine and may not provide medical services through employed professionals. The opinion interprets §448.08(1) (Wisconsin fee-splitting statute) and §448.03(1) (prohibiting any person from practicing medicine without a license).

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## **WYOMING**

### **Statute**

WS Stat. §33-26-301 (prohibiting unlicensed practice of medicine)

WS Stat. §33-26-303 (requirements for qualification for license)

WS Stat. §33-26-410 (penalty for violation of license requirement or aiding and abetting violation of license requirement is a misdemeanor)

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## **California's Corporate Practice of Medicine Bar**

### **GENERAL RULE**

Business & Professions Code Section 2400 generally prohibits lay individuals, corporations and organizations from practicing medicine.

### **RATIONALE**

First, only physicians are licensed by the state to practice medicine based on professional competence, responsibility and sanction. Second, the physician-patient relationship is one of trust and confidence and the interposition of corporate entity between the physician and the patient can destroy that relationship.

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### **Specific Prohibitions**

| Authority  | Holding  |
|--|--|
| Business and Professions Code Section 2400; <u>Pacific Employer Insurance Co v. Carpenter</u> (1935) 10 Cal.App.2d; 592; <u>People v. Pacific Health Corporation</u> (1938) 12 Cal.2d 156, 55 Ops. Cal. Atty. Gen. 39 (1972) | For profit corporation may not lawfully employ or contract with physicians to practice medicine. |

Painless Parker v. Board of Dental Examiners (1932) 216 Cal. 285

A corporation's practice of dentistry cannot be upheld on the grounds that the corporation merely manages,

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### *General Principles*

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|   | conducts and controls the “business side” of the practice and that only licensed dentists are employed to perform dentistry.<br><u>Marik v. Superior Court</u> (1987) 191 Cal.App.3d 1136In dicta, court states that corporate practice bar encompasses business decisions since purchase of medical equipment could be impacted by medical considerations such as type of equipment needed, scope of practice, skill levels required by operators of the equipment, and medical ethics. |
| <u>Guilliams v. Hollywood Hospital</u> (1941) 18 Cal.2d 97  | A hospital is not practicing medicine in violation of law when it merely agrees to care for patient in the usual manner, i.e. furnish accommodations and maintain attendants, such as nurses.  |
| 63 Ops. Cal. Atty. Gen. 723 (1980)  | Opinion suggests that personal service corporation may not employ physicians to provide services to health facilities and others.  |
| 65 Ops. Cal. Atty. Gen. 223 (1982)  | General business corporation may not lawfully engage physicians to perform pre-employment physical examinations on and diagnose and treat employment related injuries sustained by employees of another entity with whom a contract to furnish those services even though the physicians performing them do so as independent contractors, and not employees of the general business corporation.  |
| <u>California Association of Dispensing Opticians v. Pearle Vision Center, Inc.</u> (1983) 143 Cal.App.3d 419 | Corporation's franchise program violates prohibition against corporate practice of healing arts since corporation had power to control many facets of the practice of optometry including: <ol style="list-style-type: none"><li>1. Site and equipment,</li><li>2. Finances,</li><li>3. Treatment decisions such as types of eyeglasses to be used, and</li><li>4. Choice of laboratory.</li></ol>   |
| 11 Ops. Cal. Atty. Gen. 236 (1942)  | Employment by hospital of physicians and subsequent billing of patients of rates that have no bearing to physician's salary constitutes illegal practice of medicine.  |
| 54 Ops. Cal. Atty. Gen. 126 (1942)  | Hospital may not employ physician to provide emergency services only, even if hospital charges for professional services an amount proportionate to the physician's salary.  |
| 55 Ops. Cal. Atty. Gen. 103 (1972)  | An agreement between a medical director of an electroencephalography department in hospital constitutes unlawful practice of medicine where, according to the terms of the contract: 1. The physician's judgment regarding medical equipment is limited. 2. Medical staff members have absolute and unbridled right to seek consultations with physician. 3. There is an unlimited   |

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obligation on the part of the physician to assist medical staff members in the preparation of clinical reports for publication 4. The doctor neither sets his own fees or has any control over the receipt or collection of such fees. The fact that similar agreements were in widespread use was not relevant to conclusion of illegality. 58 Ops. Cal. Atty. Gen. 883 (1975)

To the extent a pathologist practices medicine (i.e. diagnose, prescribe, etc.) as laboratory director of hospital's laboratory, non-professional corporate laboratory that employs pathologist is unlawfully engaged in the practice of medicine.

### *Insurance*

Pacific Employer Insurance Co v. Carpenter; (1935) 10 Cal.App.2d 592; Benjamin Franklin Life Assurance Co. v. Mitchell (1936) 14 Cal.App.2d 654

Indemnity insurance company which provides policy, in consideration of insurance premium paid, furnishes services of designated physician to insured and does not provide indemnification, violates corporate practice bar.

Provisional Directors of Medical Corporation

Marik Superior Court (1987) 191 Cal.App.3d 1136

Provisional director of medical corporation must be a physician or other "licensed person" as defined in Corporations Code Section 13401.5

## Exceptions to the Corporate Practice Bar

### Authority

#### Holding

Business and Professions Code Section 2400; 16 California Code of Regulations 1340

The employment of physicians on a salary basis by licensed charitable and eleemosynary institutions, foundations, or clinics, is permissible so long as no charge for professional services rendered patients is made by any such institution, foundation, or clinic.

People v. Pacific Health Corp. (1938) 12 Cal.2d 156

Fraternal, religious, hospital, labor and similar benevolent organizations may lawfully furnish medical services to members where the medical service is rendered: (a) To a limited group as a result of a cooperative association through membership OR (b) As a result of employment by a corporation which has an interest in the health of its employees, AND WHERE: 1. physicians are not employed or used to make a profit for shareholders, 2. the public is not solicited to purchase medical services of a panel of physicians, and 3. institution is organized as a non-profit corporation or association.

### Charitable Institutions *Clinics*

Business and Professions Code Section 2401

A clinic operated primarily for the purpose of medical education by a public or private non-profit university medical school, which is approved by the Division of Licensing or the Board of Osteopathic Examiners, may charge for professional services rendered to teaching patients by licenses who hold academic appointments on the faculty of such university, if such charges are approved by the physician in whose name the charges are made.

25 Ops. Cal. Atty. Gen. 198 (1955)

A physician may be employed on a salary basis in an employee or an employer clinic which is operated without profit to the operators or any person and operated for the purposes of

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|                               |   | preventing and treating accidental injuries and caring for the health of the employees comprising the group. Community clinic may employ physicians where:   |
|                               | 58 Ops. Cal. Atty. Gen. 291 (1975)  | <ol style="list-style-type: none"> <li>1. Clinic is licensed and operates as a non-profit clinic,</li> <li>2. Clinic limits its services to members of a specific group defined by such characteristics as income, occupational status, or voluntary association, and</li> <li>3. Charges, if any, are based upon a patient's ability to pay.</li> </ol> |
| <i>Counties</i>               | <u>County of Los Angeles v. Ford</u> (1953) 121 Cal.App.2d 407                      | Accredited non-profit educational institutions (i.e. medical schools) may enter into contracts with county board of supervisors to have physicians on faculty render medical services to indigents where the institution does not solicit the public for the services.   |
|                               | <u>County of San Diego v. Gibson</u> (1955) 133 Ca.App.2d 519                       | County board of supervisors may contract with medical research foundation for the purposes of securing medical and teaching services for indigents.  |
| <i>Health Plans</i>           |   | Health & Safety Code Section 1395(a) Health care service plans regulated pursuant to Knox-Keene Health Care Service Plan Act (Health & Safety Code Section 1340 et seq.) may contract with or employ physicians.   |
|                               | 58 Ops. Cal. Atty. Gen. 571 (1975)  | Corporations organized pursuant to federal Health Maintenance Organization Act of 1973 (42 U.S.C. § 300e) may employ a licensed physician.   |
|                               | <u>California Physician Service v. Garrison</u> (1946) 28 Cal.2d 790                | Non-profit medical service corporation formed for the purpose of defraying or assuming cost of professional services does not violate corporate practice bar when contracting with physicians.   |
| ( <i>Health Plans Cont.</i> ) | <u>Complete Service Bureau v. San Diego Medical Society</u> (1954) 43 Cal.2d 201    | Non-profit medical service corporation may contract with physicians to provide low cost medical services to members so long as corporation does not interfere with physician's practice of medicine.   |
|                               | <u>Hospitals Blank Palo Alto-Stanford Hospital Center</u> (1965) 234 Cal.App.2d 377 | Hospital may contract with physicians to provide radiology services so long as contract does not impair the physicians freedom of action.  |
| <i>Hospital Districts</i>     | Health & Safety Code Section 32129  | Board of directors of district hospital may contract with physicians on such basis as does not result in profit or gain to district from services rendered and as allows board to ensure that fees and charges, if any, are reasonable, fair and consistent with basic   |

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|   | commitment of district to provide adequate health care to all residents within its boundaries.   |
| <u>Letsch v. Northern San Diego County Hospital District</u> (1966) 246 Cal. App.2d 673 | District hospital may contract with radiologist so long contract does not interfere with the practice of medicine.   |
| <i>Insurance</i> Insurance Code Section 10133   | Insurers may contract with physicians for discounted rates so long as insurer does not furnish or directly provide medical services, directly control or participate in the selection of the physician or exercise medical professional judgment.                            |
| <i>Professional Corporations</i> Business & Professions Code Section 2402               | Medical Corporations can employ physicians so long as requirements of the Moscone-Knox Professional Corporations Act are met.  |
| Corporation Code Section 13401.5  | Podiatric, psychological, nursing, marriage family and child counseling, clinical social work, physician assistant, optometric, and chiropractic corporations may employ physicians so long as physicians practice within the scope of practice of the relevant corporation. |

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### **THE CORPORATE PRACTICE OF MEDICINE BAR/DECISION- MAKING AUTHORITY FOR INTEGRATED ENTITIES CRITERIA**

#### **A Framework for Compliance**

As the health delivery system is evolving, physicians are increasingly being presented with new contractual arrangements which would result in the consolidation of their practices with lay entities. The perceived need to consolidate arises from, among other things, pressure to contain costs and to compete for managed care contracts, limits on reimbursement and the ability to access new markets for capital. In assessing whether to enter into these contractual arrangements, physicians must consider the prohibition against the corporate practice of medicine. CMA has developed a document to assist physicians in analyzing the implications for proposed ventures on their professional autonomy and the corporate practice bar. This document, entitled "Decision-Making Authority for Integrated Entities Criteria" lists the major areas of interest to physicians contemplating practice in an integrated entity and assigns the decisionmaking authority concerning these areas to the appropriate decisionmaker given the need to protect professional medical judgment - physician group, lay entity, or some level of collaboration between the two.

#### **Corporate Practice Prohibitions**

California's law prohibiting lay individuals, organizations and corporations from practicing medicine, either directly or indirectly, remains strong. Business & Professions Code §2052 and §2400. This prohibition, known as the corporate practice of medicine bar, generally prohibits lay entities from hiring or employing physicians or other health care practitioners, or from otherwise interfering with a physician or other health care practitioner's practice of medicine. It also prohibits most lay individuals, organizations and for-profit corporations from engaging in the business of providing health care services indirectly by contracting with health care professionals to render such services.

**a. Policies Supported by the Corporate Practice Bar.**

The corporate practice bar arose out of the early stages of the industrial revolution. Corporations at that time employed physicians and sought to either (a) provide medical services to their employees or (b) market physician services to the public. Although initially, many of these corporations were controlled by physicians, eventually lay people exercised significant control over the way in which these physicians practiced. Critics of these arrangements asserted that physicians were forced to maintain excessive patient loads and had their independent judgment compromised, thereby jeopardizing the quality of care they were able to provide. While some physicians did not object to these arrangements as the corporations offered them a way to earn a living, organized medicine believed that the maintenance of medical autonomy required protection from commercial pressures, and developed ethical restrictions categorizing certain commercial activities as unethical. Although these standards were ultimately attacked by the Federal Trade Commission as being anticompetitive, Legislatures and courts throughout the country articulated prohibitions against the corporate practice of medicine in one form or another.

The proscription against the corporate practice of medicine provides a fundamental protection against the potential that the provision of medical care and treatment will be subject to commercial exploitation. The corporate practice bar ensures that those who make decisions which affect, directly or indirectly, the provision of medical services (1) understand the quality of care implications of those decisions; (2) have a professional ethical obligation to place the patient's interest foremost; and (3) are subject to the full panoply of the enforcement powers of the Medical Board of California, the state agency charged with the administration of the Medical Practice Act.

Recognizing the potential for improper invasions into the physician-patient relationship and the need for deference to the physician's professional judgment, the California courts and Legislature have protected physicians from the pressures of the commercial marketplace for many years. See Business and Professions Code §§ 2052, 2265 and 2400. These provisions make it unlawful for a lay person to practice medicine or exercise control over decisions made by physicians. A physician who aids and abets the unlawful practice of medicine can be guilty of a crime and subject to the disciplinary powers of the Medical Board.

**b. Additional Considerations.**

Contractual arrangements which raise corporate practice issues can also raise serious fraud, abuse and inurement issues. For example, if a physician enters into a contractual relationship with a lay entity and the contract results in the lay entity receiving excessive profit, serious antikickback considerations are raised pursuant to California's Business & Professions Code §650 and its federal Medical and Medicaid analog of 42 U.S.C. §1320a-7b. These provisions prohibit the payment of receipt of compensation for the referral of patients. Potential penalties for engaging in these activities include but are not limited to, exclusion from Medicare,

loss of medical license, hefty fines and imprisonment.

Further, physician and lay entity “joint ventures” which involve organizations that receive exemption from federal income taxes pursuant to the Internal Revenue Code §501(c)(3) are currently subject to exacting scrutiny by the IRS. As these organizations are required to be organized for charitable, religious, or educational purposes, they will lose their exempt status where there is inurement of private benefit to an individual (unless the private benefit is found to be merely incidental to an overriding public benefit). The purpose of this prohibition is to ensure that private individuals who are in a position to control or otherwise influence the organization not be able to obtain personal financial benefit at the expense of the tax exempt entity. Thus, in any “integrated entity” care must be taken to ensure that the inurement/private benefit prohibitions are not violated.

**c. CMA's “Decision-Making Authority for Integrated Entities” Criteria.**

Recently, many physicians have received offers to consolidate their practices with a hospital or health system to create an “integrated delivery system” which would provide both health professional and health facility services. Although California remains as one of the staunchest defenders of the bar, even California law has relaxed in recent years to accommodate some of the new types of health care delivery systems which are developing.

In light of these developments, the California Medical Association's Board of Trustees authorized the formation of a Technical Advisory Committee (TAC) to examine the issues surrounding the corporate practice of medicine bar and the various financial and contractual arrangements currently in place between hospitals, physicians, and other interests and to develop a response to those arrangements.

The TAC concluded that because a number of the issues raised by the various business arrangements presented to physicians and/or their medical groups are similar, it made sense to examine the broader issues of control with respect to the administrative and clinical aspects of the practice of medicine. The TAC members agreed that certain aspects required complete physician control, other aspects required that physicians have at least shared control with the lay entity, and other aspects did not necessarily require physician involvement. Accordingly, the TAC felt that their task could be best accomplished by identifying first the principal administrative and professional decisions which would be made by integrated entities and then defining whether those decisions should be made by physicians, the lay entity, or both.

The TAC developed a list of those decisions which would affect, directly or indirectly, the practice of medicine and assigned the decision making authority of those decisions to the appropriate party - physician or lay entity - and level of decision making authority the physician group or lay entity should exercise - exclusive, consultative, shared or joint.

The TAC's decisionmaking scheme is set forth in the charge entitled “Decision-Making Authority for Integrated Entities Criteria,” attached as Attachment A. A more detailed description of the levels of decision-

making authority adopted by the TAC is contained in Attachment B.

These criteria and their placement on the chart reflects the TAC's careful deliberation and consideration of responses received following the solicitation of input from over 180 interested persons/entities. This chart has been adopted by CMA's Board of Trustees along with the recommendation that "CMA continue to support the bar of the corporate practice of medicine and interpret that bar to permit arrangements between physicians and lay entities only if the governance of those arrangements are consistent with the "Decision-Making Authority for Integrated Entities Criteria."

When reviewing this "Decision-Making Criteria," it is imperative that a number of points be considered. First, in response to CMA's solicitation for input, one commentor questioned whether the categorization needed to be designed differently depending upon whether the health system follows a group, staff or network model. CMA believes that for the chart's purposes, the assignment of authority does not need to change in light of the fact that the chart presents a minimum level of physician involvement and that if the integrated entity wishes to shift more decision-making authority to physicians, such a shift would still be consistent with the corporate practice of medicine bar and therefore acceptable.

Second, CMA wishes to emphasize that the chart contemplates that decisions be made by practicing physicians, and not licensed physicians who hold essentially administrative positions. The policy supporting the corporate practice bar requires that the medical decisions be made by the physicians responsible for patient care, not those individuals who make the business decisions for the entity. Consequently, even when the business decisionmaker happens to be licensed as a physician, unless that individual also spends a substantial amount of time practicing clinical medicine, he or she would not qualify as a "practicing" physician for the purposes of the criteria.

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## **CORPORATE PRACTICE OF MEDICINE BAR TAC**

### **"AUTHORITY" DEFINED**

Department of Health and Human Services

**OFFICE OF INSPECTOR GENERAL**

NOVEMBER 1991

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## **OFFICE OF INSPECTOR GENERAL**

The mission of the Office of Inspector General (OIG), as mandated by Public Law 95-452, as amended, is to protect the integrity of the Department of Health and Human Services' (HHS) programs as well as the health and welfare of beneficiaries served by those programs. This statutory mission is carried out through a nationwide network of audits, investigations, and inspections conducted by three OIG operating components: the Office of Audit Services, the Office of Investigations, and the Office of Evaluation and Inspections. The OIG also informs the



Secretary of HHS of program, and management problems, and recommends courses to correct them.

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## **OFFICE OF AUDIT SERVICES**

The OIG's Office of Audit Services (OAS) provides all auditing services for HHS, either by conducting audits with its own audit resources or by overseeing audit work done by others. Audits examine the performance of HHS programs and/or its grantees and contractors in carrying out their respective responsibilities and are intended to provide independent assessment of HHS programs and operations in order to reduce waste, abuse, and mismanagement and to promote economy and efficiency throughout the Department.

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## **OFFICE OF INVESTIGATIONS**

The OIG's Office of Investigations (OI) conducts criminal, civil, and administrative investigations of allegations of wrongdoing in HHS programs or to HHS beneficiaries and of unjust enrichment by providers. The investigative efforts of OI lead to criminal convictions, administrative sanctions, or civil money penalties. The OI also oversees State Medicaid fraud control units which investigate and prosecute fraud and patient abuse in Medicaid program.

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## **OFFICE OF EVALUATION AND INSPECTIONS**

The OIG's Office of Evaluation and Inspections (OEI) conducts short-term management and program evaluations (called inspections) that focus on issues of concern to the Department, the Congress, and the public. The findings and recommendations contained in these inspection reports generate rapid, accurate, and up-to-date information on the efficiency, vulnerability, and effectiveness of departmental programs.

This report was prepared under the direction of Mark R. Yessian, Ph.D., Regional Inspector General, Office of Evaluation and Inspections, and Martha B. Kvaal, Deputy Regional Inspectors General, Office of Evaluation and Inspections, Region I. Participating in this project were the following people:

### **Boston Region Headquarters**

Russell W. Hereford, Ph.D., *Project Leader* Allan S. Levin

Lori B. Rutter W. Mark Krushat

Barbara R. Tadescio

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## **EXECUTIVE SUMMARY**

### **PURPOSE**

The purpose of this study is to assess State laws prohibiting hospital employment of physicians. It responds to a congressional request that the Office of Inspector General study the effect of these laws on the availability of trauma and emergency care services. Our study focuses on

(1) the extent to which hospitals across the country are prohibited from hiring physicians; (2) the general impact of these prohibitions on hospital operations; and (3) their more specific impact on hospitals' ability to provide emergency services and comply with the Federal patient transfer law.

## **BACKGROUND**

State prohibitions on hospital employment of physicians derive from laws requiring that individuals must be licensed to practice medicine. In some States, judicial decisions dating to the 1930's have interpreted these laws to preclude hospitals from employing physicians for the purpose of practicing medicine. The rationale for the prohibitions on employment of physicians is based on the potential for conflict between a physician's loyalty to the patient and the financial interests of the corporation. Opponents of the prohibitions contend that the doctrine is a vestige of an earlier era and that in the current health care system hospitals need the authority to control all aspects of health care delivery and personnel within their walls, including medical care.

The Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508) requested that the Office of Inspector General study whether these prohibitions have a particular impact on hospital emergency departments.

Our study uses data from (1) a mail survey of a national random sample of hospital administrators; (2) interviews with a purposive sample of over 50 hospital administrators, medical association and hospital association officials, and other individuals knowledgeable on issues related to the corporate practice of medicine; and (3) a review of legal and policy literature.

## **FINDINGS**

### ***Few States prohibit hospitals from employing physicians.***

Only five States -- California, Colorado, Iowa, Ohio, and Texas -- clearly prohibit hospitals from employing physicians. Even in these States, certain types of hospitals and providers are exempt from these prohibitions.

In some other States, there is uncertainty over whether State laws defining the practice of medicine preclude hospitals from employing physicians.

### ***State prohibitions on hospital employment of physicians have some adverse impact on hospital operations.***

Thirty-eight percent of hospital administrators responding to the survey from the five States that prohibit hospital employment of physicians indicate that these prohibitions impose legal, recruitment, or administrative costs.

Forty-one percent respond that the prohibitions make it more difficult to staff medical services.

Twenty-four percent say that the prohibitions make it more difficult to staff basic emergency services.

Thirty percent say that the prohibitions make it more difficult to provide specialty emergency services.

***However, these prohibitions do not appear to present a major overall problem for hospitals.***

Thirty-three percent of hospital administrators responding to the survey from the five States that prohibit hospital employment of physicians report that they are not even aware that these prohibitions apply in their State.

Hospital administrators in these five States cite a number of factors other than prohibitions on hospital employment of physicians as more important limitations on their ability to assure specialty coverage in their emergency departments. These factors include a shortage of specialty physicians, low reimbursement rates, fear of increased malpractice liability, and disruption of their private practices.

When asked about the impact of the Federal patient transfer law on their hospital, none of the administrators responding from the five States identified prohibitions on physician employment as an obstacle to compliance.

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## **INTRODUCTION**

### **PURPOSE**

The purpose of this study is to assess State laws prohibiting hospital employment of physicians. It responds to a provision in the Omnibus Budget Reconciliation Act of 1990<sup>[1]</sup> [1] requesting that the Office of Inspector General study the effect of these laws on the availability of trauma and emergency care services.

Our study focuses on (1) the extent to which hospitals across the country are prohibited from hiring physicians; (2) the general impact of these prohibitions on hospitals; and (3) their more specific effect on hospitals' ability to provide emergency care services and comply with the Federal patient transfer law.

### **METHODOLOGY**

Our study utilized three primary data-gathering approaches (see appendix A):

- (1) We mailed a survey regarding issues related to hospital emergency department coverage to a national random sample of 598 hospital administrators; nationwide, 447 (74.7 percent) responded. This analysis utilizes a subsample of 115 of those hospitals from States that prohibit hospital employment of physicians.
- (2) We conducted interviews with a purposive sample of more than 50 hospital administrators, medical society and hospital association officials, and other individuals knowledgeable on issues related to the corporate practice of medicine.
- (3) We reviewed and analyzed statutes, case law, and literature on the corporate practice of medicine.

### **BACKGROUND**

***Prohibitions on Hospital Employment of Physicians: The Corporate Practice***

## *of Medicine*

State prohibitions on hospital employment of physicians derive from laws requiring that individuals must be licensed to practice medicine. In some States, these laws have been interpreted to preclude hospitals from employing physicians for the purpose of practicing medicine. While physicians may be employed for nonpatient care duties ( *e.g.* , teaching or administration), hospitals may not receive professional fees when physicians treat patients.

Prohibitions on hospital employment of physicians are a subset of a larger issue referred to as the corporate practice of medicine doctrine. This doctrine arouses passionate debate among those versed in its intricacies. Articles discussing the corporate practice of medicine have included such titles as “An Outmoded Theory in Need of Modification,”<sup>[2]</sup> “An Anachronism in the Modern Health Care Industry,”<sup>[3]</sup> “The Growth of the Medical-Industrial Complex May Be Hazardous to Your Health,”<sup>[4]</sup> and “Pressure to Serve Two Masters.”<sup>[5]</sup> On a more fundamental level, the debate over the corporate practice of medicine doctrine is an argument over who will control the delivery of medical care. This contention focuses on whether physicians should make decisions free of external constraints or whether outside parties (a hospital administrator, for example) should be able to exert control over physician behavior.

### ***Rationale for Corporate Practice Prohibitions***

The rationale for prohibiting employment of physicians is described in a number of legal decisions that date to the 1930's. The California Supreme Court in 1932 determined that it is impossible to separate the regulated practice of care from the business practice because “either one may extend into the domain of the other.”<sup>[6]</sup> A 1938 decision in the same State held that letting a corporation hire and control physicians would lead to “divided loyalty and impaired confidence” between the interests of the corporation and the primacy of the patient's needs.<sup>[7]</sup>

An Illinois case of the same era reiterated that a corporation's “employees must owe their first allegiance to their corporate employer and cannot give the patient anything better than a secondary and divided loyalty.”<sup>[8]</sup>

That court also concluded that “to practice a profession requires something more than the financial ability to hire competent persons to do the actual work. It can be done only by a duly qualified human being, and to qualify something more than mere knowledge or skill is essential. The qualifications include personal characteristics, such as honesty, guided by an upright conscience and a sense of loyalty to clients or patients, even to the extent of sacrificing pecuniary profit, if necessary.”<sup>[9]</sup>

In 1975 a Federal court upheld a Texas ruling that denied a license to a clinic organized to provide health care to low-income patients, because the board of directors did not comprise physicians. The court's opinion summarizes a range of issues related to corporate practice prohibitions: “Who and what criteria govern the selection of medical and paramedical staff members? To whom does the doctor owe his first duty -- the patient or

the corporation? Who is to preserve the confidential nature of the doctor-patient relationship? Who is to dictate the medical and administrative procedures to be followed? Where do budget considerations end and patient care begin?"<sup>[10]</sup>

### ***Opposition to Corporate Practice Prohibitions***

Opponents of prohibitions on hospitals' ability to employ physicians maintain that the legal doctrine is a vestige of an earlier time, when health care was "a cottage industry, made up of independent professionals operating as solo practitioners."<sup>[11]</sup> Today's health care industry differs substantially from the one in which the corporate practice prohibition originated. "Financial pressure on both the individual and system levels is causing the provision of medical care to be approached quite differently."<sup>[12]</sup> The emergence of health maintenance organizations, provider networks, and other managed care approaches means that "the fee and the number and type of units of service authorized are increasingly being monitored and controlled very often by parties outside of the traditional health care provider community."<sup>[13]</sup>

A former general counsel to the American Hospital Association reported that the corporate practice prohibition adversely affects hospitals in particular. "The ancillary services that contribute to medical treatment of the patient are usually performed by hospital employees. If a hospital may not legally practice medicine, may it practice nursing or pharmacy? How is the hospital to direct and correlate and make them available to the physician when he needs them in the treatment of his patient? It is essential if hospitals are to continue as centers of organized medical care, that their governing boards have authority to exercise the kinds of control over personnel-- including certain professional personnel -- without which the boards cannot discharge their responsibility to make the various services available when they are needed."<sup>[14]</sup>

### ***Potential Impact on Emergency Services***

Prohibitions on hospital employment of physicians might affect emergency care adversely in one of two ways. First, these laws could limit the availability of basic emergency physicians. Second, prohibitions on employing physicians could adversely affect hospitals' ability to have available specialty services (such as neurosurgery, plastic surgery, and orthopaedics) required by traumatized patients or obstetrical services for women who enter the emergency department in active labor.

Under the Federal patient transfer law<sup>[15]</sup> hospitals must meet a number of specific requirements regarding examination and treatment of persons with emergency medical conditions and women in labor. Medicare-participating hospitals must provide for an appropriate medical screening examination for any individual who comes to a hospital emergency department. If the person has an emergency medical condition, the hospital must either provide further examination and treatment necessary to stabilize the medical condition or, under narrow circumstances, provide for the appropriate transfer of the individual to another medical facility. This statute defines the term "emergency medical condition" and specifies

conditions under which a transfer to another medical facility is appropriate. Subsequent amendments to the statute also include as a condition of participation in Medicare that hospitals maintain a list of physicians who are on call for duty to provide treatment necessary to stabilize an individual with an emergency medical condition.

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## **FINDINGS**

### **FEW STATES PROHIBIT HOSPITALS FROM EMPLOYING PHYSICIANS .**

*Only five States - California, Colorado, Iowa, Ohio, and Texas - clearly prohibit hospitals from employing physicians. Even in these States, certain types of hospitals and providers are exempt from these prohibitions .*

With the recent passage of legislation in North Dakota<sup>[16]</sup> and Montana<sup>[17]</sup> expressly permitting hospitals to employ physicians, only the five States cited above clearly prohibit the practice. Hospitals in these five States comprise 23 percent of all U.S. hospitals.<sup>[18]</sup> Even in these five States, the prohibition on hospital employment of physicians does not apply in all situations, according to those we interviewed and our legal review. The exceptions to the prohibition are based on factors such as hospital auspices, physician specialty, or organizational arrangement. In California, for example, the prohibition does not apply to clinics operated by university medical schools or to public hospitals. In Iowa, Colorado, and Ohio, teaching hospitals may hire faculty as well as residents and interns for purposes of education. In Iowa, pathologists and radiologists are exempt from the provisions. In 1991, Texas enacted legislation permitting public hospitals to employ physicians directly, providing statutory authority for a practice that was already widespread among many rural hospital districts. Health maintenance organizations in each of these five States also are able to hire physicians, either directly or through contracts with physician groups.

*In some other States, there is uncertainty over whether State laws defining the practice of medicine preclude hospitals from employing physicians .*

In some States the lack of clarity over whether prohibitions on the corporate practice of medicine apply to hospital employment of physicians creates some confusion. Legal literature on the subject reveals that the application to hospitals of general provisions forbidding nonlicensed persons from practicing medicine simply has been ignored or not enforced in recent years.<sup>[19]</sup>

Two recent State court decisions raise the possibility that hospital employment of physicians might be prohibited, even though the decisions do not address that specific issue. A 1991 Kansas Supreme Court decision<sup>[20]</sup> and a 1988 judgment from the Washington State Supreme Court strengthened general restrictions on the corporate practice of medicine by ruling that nonphysicians may not be partners in medical practices. These decisions, however, fail to distinguish between general corporations and licensed hospitals. According to individuals we

interviewed in these two States, health care providers are concerned that a literal interpretation of the decisions could pose threats to the arrangements that many hospitals use to provide medical staff.

**STATE PROHIBITIONS ON HOSPITAL EMPLOYMENT OF PHYSICIANS HAVE SOME ADVERSE IMPACT ON HOSPITAL OPERATIONS .**

*Thirty-eight percent of hospital administrators responding to the survey from the five States that prohibit hospital employment of physicians indicate that these prohibitions impose legal, recruitment, or administrative costs .*

Legal costs can be incurred in two broad areas. First, hospitals must assure that physician-hospital contracts do not violate the State prohibition on corporate practice of medicine. According to administrators and attorneys we interviewed, these contracts are fairly standard and do not pose a major problem.

Second, and more importantly, legal issues may arise when a hospital wishes to change its organizational structure, either to take advantage of new business opportunities or to address financial pressure. State prohibitions on the corporate practice of medicine make the legal requirements governing organizational arrangements more complex and cumbersome. For example, prohibitions on hospital employment of physicians mean that a hospital may not own a medical practice. In California, hospitals may form medical foundations, as a way of controlling medical practices, although the specifications for such an arrangement are detailed and specific.<sup>[22]</sup> Similarly, in Ohio we discovered some rather complicated arrangements that hospitals undertake to manage medical practices.<sup>[23]</sup>

State prohibitions on hospital employment of physicians can make recruitment more difficult by limiting medical staffing options that are available in States that permit hospitals to employ physicians. Prohibitions on employment do not allow hospitals to offer financial guarantees to physicians. These guarantees could be used to alleviate medical school debts or expenses associated with establishing a new practice.<sup>[24]</sup> Several people we interviewed noted that the prohibition on employing physicians presents a particular difficulty for hospitals attempting to recruit physicians in rural areas, where including financial guarantees in a recruitment package would make the offer more attractive to physicians.

In locations where competition with health maintenance organizations (HMOs) is vigorous, the prohibition on hospital employment of physicians may limit hospitals' ability to compete for physicians. Because HMOs are able to offer salaries, income guarantees, and regular working hours to physicians, hospital administrators with whom we spoke believe that these organizations have a competitive advantage in recruitment efforts.

Finally, hospital administrators contend that the prohibition on hospital employment of physicians can impose administrative costs by limiting their leverage over members of their medical staff. Administrators assert that these costs are incurred not only in staffing services but, more important, by limiting their ability to control the practice patterns and costs

of individual physicians. The prohibition on a hospital's ability to receive any part of the physician fee means that hospitals are not able to develop risk-sharing arrangements directly with physicians. Administrators contend that such arrangements would improve their ability to control costs by giving physicians a stake in the hospital's cost containment efforts.

***Forty-one percent of hospital administrators responding to our survey from the five States indicate that these prohibitions make it more difficult to staff medical services .***

State prohibitions on hospital employment of physicians deprive hospitals of one option they believe could help them provide medical staff in their facilities. In our areas of operations -- inpatient services, outpatient clinics, basic emergency care, and specialty emergency care -- administrators indicate that being able to employ physicians would help meet some of their needs.

One particular problem cited by administrators we interviewed was difficulty in developing outpatient clinics owing to a lack of physician coverage. Because they believe that clinic patients are not covered by insurance, physicians fear that they will not be paid for medical services provided to them. If a hospital were able to use salaried physicians, it could establish a hospital-owned group practice based in the outpatient department. One official said that if hospitals were able to hire physicians, it would be easier to develop a hospital-based prenatal practice focusing on primary care for newborns, or an obstetrical practice for low income women. Another administrator advocated the establishment of a hospital-based pediatric practice that could also provide coverage for the emergency room.

***Twenty-four percent of hospital administrators responding to our survey from the five States say that the prohibitions make it more difficult to staff basic emergency services .***

Basic emergency medical services are provided to patients when they present at the hospital emergency department. These services include identification, evaluation, and assessment of the patient's condition; treatment and administration of medical care; and stabilization of the patient's condition. In recent years, emergency medicine has been recognized as a distinct medical specialty,<sup>[25]</sup> with over 13,000 practitioners.

In States where hospital employment of physicians is permitted, our survey data show that some administrators do take advantage of the employment option available to them. Twenty-six percent of respondents from the States that permit employment said that they employ physicians for provision of basic emergency services.

In the five States that prohibit hospital employment of physicians, 89 percent of administrators report that they contract for services with either one physician group, individual physicians, or emergency department management companies to provide basic coverage. These arrangements are used by 76 percent of hospitals in States that permit hospitals to employ physicians.<sup>[26]</sup>



***Thirty percent of hospital administrators responding to our survey from the five States say that the prohibitions on hospital employment of physicians make it more difficult to provide specialty emergency services .***

Notwithstanding the responses of the administrators from these five States, our data suggest that being able to employ physicians for specialty emergency care may not make a difference. Even in those States where the option of physician employment is available, hospitals are no more likely to hire physicians to provide specialty emergency services. Ninety-three percent of administrators responding to our survey from States that permit hospitals to employ physicians use on-call members of their active medical staff, rather than directly employed staff, to provide specialty coverage in the emergency department, as do 95 percent of those administrators responding from State that prohibit employment of physicians.

**HOWEVER, STATE PROHIBITIONS ON HOSPITAL EMPLOYMENT OF PHYSICIANS DO NOT APPEAR TO PRESENT A MAJOR OVERALL PROBLEM FOR HOSPITALS .**

***Thirty-three percent of hospital administrators responding to the survey from the five States that prohibit hospital employment of physicians report that they are not even aware that these prohibitions apply in their State .***

It is possible that for administrators who are unaware of the prohibitions on employing physicians, these prohibitions have become a part of day-to-day operations and do not merit separate consideration. Perhaps they have not dealt recently with the prohibitions on hospital employment of physicians, or they may consider these issues to fall within the domain of some other department of the hospital, such as legal affairs or medical staffing services.

We found no recent cases in which hospitals had been prosecuted or had faced disciplinary actions for employing physicians in these States. Nevertheless, these institutions run a risk if they do not consider or are not aware of the prohibitions on hospital employment of physicians when they undertake such efforts as restructuring operations or recruiting physicians.

***Hospital administrators in these five States cite a number of factors other than prohibitions on hospital employment of physicians as more important limitations on their ability to assure specialty coverage in their emergency departments. These factors include a shortage of specialty physicians, low reimbursement rates, fear of increased malpractice liability, and disruption of their private practice .***

Only 20 percent of hospital administrators responding in these five States cite State prohibitions on hospital employment as a factor limiting their ability to assure specialty coverage. Sixty-three percent of the administrators indicate that a general shortage of specialty physicians causes problems in assuring specialty coverage in the emergency department, and sixty percent respond that low reimbursement rates are an obstacle to getting physicians to serve on specialty on-call panels. Other factors that administrators cite more frequently than prohibitions on

hospital employment of physicians are physicians fears that their exposure to malpractice liability will increase, physician concerns about disrupting their private practice, and fear of sanctions under the Federal patient transfer law (COBRA).

[View Graphic](#)

Our interviews supported the survey findings that the prohibition on hospital employment of physicians is a relatively unimportant factor in providing emergency coverage. As one administrator said, “If all of a sudden we were allowed to hire doctors, it wouldn't make a difference. It's not an emergency room issue.” Another indicated that even if laws prohibiting employment of physicians were repealed, any impact would be “evolutionary, not revolutionary.”

Hospitals in all States confront a number of problems related to emergency department coverage, in addition to those identified here. Forty eight percent of administrators responding to our survey from the five States report that their ability to assure specialty coverage in the emergency department has become more difficult over the past two years. Other recent studies have cited financial problems associated with trauma center<sup>[27]</sup>, use of emergency rooms for primary care services<sup>[28]</sup>, and overcrowding<sup>[29]</sup> as importantly problems confronting emergency care. A forthcoming OEI report will examine problems associated with the availability of specialty coverage in hospital emergency departments in more detail.

***When asked about the impact of the Federal patient transfer law on their hospital, none of the administrators responding to the survey from these five States identified prohibitions on physician employment as an obstacle to compliance.***

In the five States that prohibit hospital employment of physicians, 49 of the 115 survey respondents reported actions their hospital had taken in response to the patient transfer law, and 62 administrators commented on the impact of the law on their hospital. We analyzed these responses, and found that none of the comments related to a hospital's inability to employ physicians as a problem in their ability to comply with the patient transfer requirements.

Attorney we interviewed corroborated these findings. One attorney noted that prohibitions on hospital employment of physicians have never been raised as a defense in any patient transfer case. Other individuals we spoke with raised a number of issues related to the patient transfer law, yet no one was able to relate these concerns to State laws that prohibit hospitals from employing physicians.

## **SUMMARY AND CONCLUSION**

Our study has found that State prohibitions on hospital employment of physicians are not a major national problem. Only five States continue to prohibit hospitals from employing physicians, and even in those States numerous exceptions apply, based on hospital auspices, physician specialty, or organizational arrangement. Only a minority of hospital administrators responding to our survey from the five States believe that

these prohibitions present a problem; one-third of administrators in those States are not aware that these provisions apply.

Even among the administrators citing difficulties caused by the prohibitions, its relative importance is minor. With respect to emergency services, for example, those we surveyed cite factors such as a shortage of specialty physicians, low reimbursement rates, malpractice liability, and disruption of practice as more important limitations on their ability to provide specialty coverage than are State prohibitions on hospital employment of physicians.

Other administrators consider State prohibitions on hospital employment of physicians to be only one factor influencing hospital-medical staff relations. One California hospital administrator's comment summarizes the remark of others, "Most of us are able to accommodate through other mechanisms what repeal would accomplish."

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## **A P P E N D I X A**

### **METHODOLOGY**

#### **Legal Analysis**

We reviewed statutory language and court decisions from the States that prohibit hospitals from employing physicians. The prohibitions are based on the following statutes:

California Business and Professions Code, Section 2400; Colorado Revised Statutes, Section 12-36-129; Iowa Code Annotated, Sections 147.2 and 148.13; Ohio Revised Code, Sections 4731.22, 4731.41, and 1701.03; Texas Revised Civil Statutes, Article 4495b.

We also reviewed case law on decisions interpreting the corporate practice of medicine, as well as legal and policy literature. Relevant decisions and articles are identified in appendix B.

#### ***Samples Selection and National Survey***

This study uses data from a survey of a random national sample of hospital administrators on issues related to emergency room care. The sample universe consisted of all acute short-term hospitals that had an emergency department from the Health Care Financing Administration Provider of Service file. The sample was selected by using stratified simple random sampling with six strata:

Small rural hospitals (fewer than 100 beds) Small urban hospitals Medium rural hospitals (100 – 299 beds) Medium urban hospitals Large rural hospitals (300 or more beds) Large urban hospitals

Due to prior knowledge that California prohibits hospital employment of physicians, hospitals in that state were sample at a higher rate than the remaining States. Six strata were defined for California and also for the remaining States, for a total of 12 strata. Originally 637 hospitals were

selected for the survey, but due to mergers and closures, the sample size was decreased to 598.

Surveys were distributed on May 10, 1991, to these 598 hospitals, with a follow-up mailing to nonrespondents on May 31. Responses were received from 447 hospitals, a response rate of 74.7 percent. Of these 447 hospitals, 115 (25.7 percent) responded from the five States that prohibit hospital employment of physicians, forming the data base for the analysis in this study. A sample size of 115 hospitals provides estimates within  $\pm$  ten percent of the true value at the 95 percent confidence level. Except where identified specifically as coming from the full national sample, all percentages in the text refer to the 115 hospitals in the five States.

The survey contained questions to determine whether hospital administrators believe that their State prohibits hospitals from employing physicians. In some States, some administrators indicated that their States did have such a prohibition. Follow-up telephone calls to State hospital associations to verify the applicability of the prohibition, however, revealed that the State had either repealed the prohibition, or that the provisions were substantially ignored. Based on the survey results and these discussions, California, Colorado, Iowa, Ohio, and Texas were identified as having and enforcing State prohibitions on hospital employment of physicians. Table A-1 displays the sample and response size for each of these States.

**TABLE A-1**

**Distribution of Surveyed Hospitals and Respondents by State**

| STATE        | NUMBER OF HOSPITALS SURVEYED (% of Total) | NUMBER OF HOSPITALS (% of Total) |
|--------------|---|----------------------------------|
| California   | 81 (51.9%)                                | 54 (47.0%)                       |
| Colorado     | 8 (5.2%)                                  | 8 (7.0%)                         |
| Iowa         | 12 (7.7%)                                 | 11 (9.6%)                        |
| Ohio         | 16 (10.3%)                                | 15 (13.0%)                       |
| Texas        | 39 (25.0%)                                | 27 (23.5%)                       |
| <b>TOTAL</b> | 156 (100.0%)                              | 115 (100.0%)                     |

***Interviews***

Our interviews included telephone and in-person discussions with ten hospital administrators from California and three administrators from Massachusetts. We focused our interviews on California, because that State had been identified previously as prohibiting hospital employment of physicians.

We also interviewed by telephone or in person, officials with state hospital associations in Arizona, California, Colorado, Georgia, Illinois, Iowa, Kansas, Massachusetts, Mississippi, Montana, Ohio, Texas, and Washington, and representatives of regional hospital associations in California. We interviewed State medical society officials in California, Iowa Massachusetts, and Texas. (In some cases, interviews were conducted with more than one member of these groups.)

Our interviews also included representatives of the American Medical Association, American Hospital Association, and American College of Emergency Physicians. We also interviewed seven attorneys identified to

us as familiar with issues related to the corporate practice of medicine.<sup>[22]</sup>

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- [1] The author would like to thank Astrid G. Meghrigian, Esq. Susan S. Ballard, Esq. and Robert S. Siltanen, Esq. for their substantial contributions.
- [1] P.L. 101-508, Section 4008(c).
- [1] The author would like to thank Astrid G. Meghrigian, Esq. Susan S. Ballard, Esq. and Robert S. Siltanen, Esq. for their substantial contributions.
- [2] John Wiorek, “The Corporate Practice of Medicine Doctrine: An Outmoded Theory in Need of Modification,” *Journal of Legal Medicine* , 8, no. 3 (1987), pp. 465–492.
- [3] Jeffrey F. Chase-Lubitz, “The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry,” *Vanderbilt Law Review* , 44 (1987), pp. 445–488.
- [4] Stanley Wohl, “Is Corporate Medicine Healthy for America? The Growth of the Medical-Industrial Complex May Be Hazardous to Your Health,” *Business and Society Review* , (Fall 1984), pp. 16–20.
- [5] Donald P. “Rocky” Wilcox, “Medicine and the Law: Pressure to Serve Two Masters,” *Texas Medicine* , 82 (June, 1986), pp. 67–69.
- [6] *Painless Parker v. Board of Dental Examiners* , 216 Cal. 285, 14 P.2d 67 (1932).
- [7] *State Board of Medical Examiners v. Pacific Health Corp.* , 12 Cal. 2d 156 82 P.2d 429 (1938).
- [8] *Dr. Allison, Dentist, Inc. v. Allison* , 360 Ill. 638, 196 NE 799 (1935).
- [9] *Ibid.*
- [10] *Garcia v. Texas State Board of Medical Examiners* , 284 F. Suppl. 434, W.D. Texas (1974).
- [11] Arnold J. Rosoff, “The Business of Medicine: Problems with the Corporate Practice Doctrine,” *Cumberland Law Review* , 17 (1987), pp. 485–503.
- [12] *Ibid.*
- [13] *Ibid.*
- [14] Alanson W. Wilcox, “Hospitals and the Corporate Practice of Medicine,” *Cornell Law Review* , 45 (1960), pp. 432–487.

- [15] 42 U.S.C. sections 1395cc and 1395dd.
- [16] North Dakota House Bill No. 1426, approved March 21, 1991, provides that: It is permissible for a hospital incorporated as a nonprofit corporation to employ a physician provided that the employment relationship between the physician and hospital is evidenced by a written contract containing language to the effect that the hospital's employment relationship with the physician may not affect the exercise of the physician's independent judgment in the practice of medicine, and the physician's independent judgment of medicine is in fact unaffected by the physician's employment relationship with the hospital. Under this section a hospital may not be deemed to be engaged in the practice of medicine.
- [17] Montana Senate Bill No. 146, effective October 1, 1991, permits: practicing medicine as the partner, agent, or employee of or in joint venture with a hospital, medical assistance facility, or other licensed health care provider. However:
- (I) The partnership, agency, employment, or joint venture must be evidenced by a written agreement containing language to the effect that the relationship created by the agreement may not affect the exercise of the physician's independent judgment in the practice of medicine;
  - (II) The physician's independent judgment in the practice of medicine must in fact be unaffected by the relationship; and
  - (III) The physician may not be required to refer any patient to a particular provider or supplier or take any other action the physician determines not to be in the patient's best interest.
- [18] The Resource Information Center at the American Hospital Association informed us that in 1989 there were 6,720 hospitals in the United States. The number of hospitals in each of the five States examined here were: California -- 560 (8.3%) Colorado -- 88 (1.3%) Iowa -- 135 (2.0%) Ohio -- 226 (3.4%) Texas -- 538 (8.0%) Subtotal, five States -- 1,547 (23.0%)
- [19] Morgan J. Ordman, "The Corporate Practice of Medicine," *Illinois Bar Journal*, April 1988, pp. 464-465; John Wiorek, "The Corporate Practice of Medicine Doctrine: An Outmoded Theory in Need of Modification," *Journal of Legal Medicine*, 8, no. 3 (1987), pp. 465-492; Alanson W. Willcox, "Hospitals and the Corporate Practice of Medicine," *Cornell Law Quarterly*, 45 (1960), pp. 432-487.
- [20] *Early Detection Center, Inc. v. Wilson et al*, Kansas Supreme Court, No. 65,328 (May 1991).
- [22] The clinic must conduct medical research and health education, and must provide health care through a group of 40 or more physicians; the physicians and surgeons must be independent contracts representing at least 10 board-certified

specialties; and no less than two-thirds of the physicians must practice on a full-time basis at the clinic.

- [23] One example provided was that a hospital enters into a trust agreement, with the hospital (which provides the capital to fund the venture) as beneficiary and a physician serving as trustee at the pleasure of the hospital. The physician trustee also serve as majority shareholder in a professional corporation, with shares purchased by the hospital-physician trust. The professional corporation owns and operates the practice and distributes net revenues back to the trust as dividends. The trust then can distribute this trust income back to the hospital as beneficiary.
- [24] According to one source, employment would ensure that physician referrals to the employing hospital are not subject to fraud and abuse laws. Contracts that require repayment of some value, in order to avoid IRS proscriptions on inurement to a physician from a tax-exempt hospital, run the risk of violating Medicare-Medicaid kickback provisions. See “Finally, Positive Thinking on Physician Recruitment,” *Action Kit for Hospital Law* , July, 1990.
- [25] See “Definition of Emergency Medicine and the Emergency Physician,” *Annals of Emergency Medicine* , 15, no. 10, (October 1986), for a full discussion of the emergency medicine specialty.
- [26] The totals exceed 100 percent because some administrators indicated that they use more than one approach to staffing basic emergency services.
- [27] U.S. General Accounting Office, *Trauma Care: Lifesaving System Threatened by Unreimbursed Costs and Other Factors* , May 1991, Report No. GAO/HRD-91-57.
- [28] *Use of Emergency Rooms by Medicaid Recipients* , OEI-06-00180.
- [29] Andrew S. Bindman, Kevin Grumbach, Dennis Keane, Loren Rauch, and John Luce, “Consequences of Queuing for Care at a Public Hospital Emergency Department,” *JAMA* , 266, no. 8 (August 28, 1991), pp. 1091–1096.
- [22] *Morrelli v. Ehsan* , 10 Wn. 2d 555, 756 P.2d 129 (June 1988).
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