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The Corporate Practice of Medicine Doctrine: Still Alive and Kicking

MICHAEL F. SCHAFF AND GLENN P. PRIVES

Introduction

Some health care providers may not be aware of the corporate practice of medicine doctrine (CPOM doctrine) and whether it is applicable in the state in which they want to structure a health care arrangement with a nonlicensee or nonmedical professional entity. At its core, the CPOM doctrine prohibits a nonphysician from interfering with the professional judgment of a physician by prohibiting nonphysician owned and controlled corporations from employing physicians to practice medicine and then charging fees for those professional services. The rationale for prohibiting employment of physicians by corporations is derived from the concept that individual physicians, not entities, should be licensed to practice medicine.[1] In practice, many states with CPOM laws permit permit professional service entities to practice medicine, but only if owned by physicians licensed in that state.[2] Authority for state CPOM laws ranges from statutes and rules to case law and state attorney general opinions.

Health care providers must be careful to comply with local laws because violations of these laws could result in a provider's loss of license and repayment of all revenue for billed services to insurance companies and the government. It is also important for parties that enter into ventures with physicians to understand the CPOM doctrine, since it can affect the structures of such ventures.

Michael F. Schaff is chair of the Corporate and Healthcare Departments and shareholder of Wilentz, Goldman & Spitzer PA, Woodbridge, N.J. . Schaff has been a member of the board of directors of the American Health Lawyers Association since 2006 and is on its Executive Committee. He is a past chair of the AHLA Physicians Organization Committee and was the editor of its newsletter. Schaff is a member of the editorial advisory board for BNA's Health Law Reporter. Glenn P. Prives is an associate with Wilentz, Goldman & Spitzer, Woodbridge, N.J..

Background

The origins of the CPOM doctrine can be traced back to the American Medical Association's issuance of its Principles of Medical Ethics[3] and its efforts to distinguish physicians in the public eye from nonphysicians who offered their services or products as cures and remedies for various ailments and afflictions. Further fueling the AMA's argument was the employment of physicians by corporations for the care of their employees.[4] States followed the AMA's warning and promulgated statutes to restrict the practice of medicine to licensed physicians and to empower physicians as the sole legitimate professionals to provide medical care.[5]

The CPOM doctrine is based on the policy that the patient's need for treatment and care, and the physician's related judgment, conflicts with the interest of the corporation in maximizing its profits and reducing its costs. Consistent with these ideals, the Illinois Supreme Court held that:

[1] *See* Painless Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d 67 (1932).

[2] *See* U.S. Dep't of Health & Human Svcs., Office of Inspector General, State Prohibitions on Hospital Employment of Physicians, Document No. OEI-01-91-00770 (November 1991), *available at* http://oig.hhs.gov/oei/reports/oei-01-91-00770.pdf.

[3] Nicole Huberfeld, *Be Not Afraid of Change: Time to Eliminate the Corporate Practice of Medicine Doctrine*, 14 Health Matrix 243, 245 (2004) (citing Am. Med. Ass'n, Principles Of Medical Ethics, ch. 3, art. 6, sec. 2, *reprinted in* Am. Med. Ass'n, American Medical Dictionary 15 (15th ed. 1938)).

[4] *Id.* at 247-248.

[5] See Jeffrey F. Chase-Lubitz, The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry, 40 VAND. L. REV. 445, 447 (March 1987).

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> 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. These requirements are spoken of generically as that good moral character which is a pre-requisite to the licensing of any professional man. No corporation can qualify.[6]

Over the years, while some states have held steadfast to this policy, others have determined that the liability system and the state's regulatory oversight provide sufficient safeguards to allow the practice of medicine to adapt to new business realities, and these states have either repealed their CPOM prohibition or provided a growing number of exceptions to the CPOM prohibition.

Determining whether a state actually has a CPOM prohibition is not always easy. Although it is straightforward if the state's CPOM prohibition is statutorily created, in many states the CPOM doctrine is established through common law. Additionally, the CPOM prohibition in some states may derive from the state's medical practice regulations.

Current Incarnations of the CPOM Doctrine

Today's incarnations of the CPOM doctrine vary from state to state, but some generalizations can be made from examining the laws of various states. In many states, physicians remain prohibited from entering into relationships with lesser-licensed professionals or nonphysicians where the physician's practice of medicine is in any way controlled or directed by, or fees shared with, a nonphysician. For instance, in California:

> . . . any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law is guilty of a public offense, punishable by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the state prison, by imprisonment in a county jail not exceeding one year, or by both the fine and either imprisonment.[7]

Certain states, such as Texas, permit arrangements whereby a nonphysician can enter into an independent contractor relationship with a physician and avoid application of the CPOM doctrine.[8] The question of whether an independent contractor situation exists is a question of law and attendant facts. The mere designation of a physician as an ''independent contractor'' is not dispositive. It is important to review the Internal Revenue Service's guidance for determining whether an individual is an employee or an independent contractor, but such classification remains very fact-specific.[9]

The CPOM doctrine, in certain states, such as Illinois, is not as extensive and allows hospitals to employ physicians since hospitals are formed for the specific purpose of treating patients and providing health care services and are themselves licensed entities.[10]

Most states that have a form of the CPOM doctrine, such as New York, allow physicians to provide medical services through a professional corporation or limited liability company, but generally each shareholder or member of the corporation or LLC must be a licensed physician.[11]

Supplementing the CPOM doctrine, some states prohibit fee-splitting, a form of corporate practice whereby one physician shares fees earned from professional services rendered by that physician with another physician or where one entity whose licensees render professional services shares fees with a physician who is not an owner or employee of that entity. This fee-splitting prohibition also bars physicians from sharing their reimbursement for services with any nonlicensed person or entity. For instance, in Washington:

> It shall be unlawful for any person, firm, corporation or association, whether organized as a cooperative, or for profit or nonprofit, to pay, or offer to pay or allow, directly or indirectly, to any person licensed by the state of Washington to engage in the practice of medicine and surgery, drugless treatment in any form, dentistry, or pharmacy and it shall be unlawful for such person to request, receive or allow, directly or indirectly, a rebate, refund, commission, unearned discount or profit by means of a credit or other valuable consideration in connection with the referral of patients to any person, firm, corporation or association, or in connection with the furnishings of medical, surgical or dental care, diagnosis, treatment or service, on the sale, rental, furnishing or supplying of clinical laboratory supplies or services of any kind, drugs, medication, or medical supplies, or any other goods, services or supplies prescribed for medical diagnosis, care or treatment.[12]

Since the CPOM doctrine exists in various forms throughout the country, there are certain general considerations that need to be addressed when structuring a health care arrangement in a state where the CPOM doctrine is in effect.

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[6] Dr. Allison, Dentist, Inc. v. Allison, 360 Ill. 638, 641-642 (1935).

[7] Cal. Bus. & Prof. Code § 2052.

[8] *See* Texas Med. Board, *Corporate Practice of Medicine*, *available at* http://www.tmb.state.tx.us/professionals/physicians/licensed/cpq.php.

[9] *See* Internal Revenue Service, *Independent Contractor or Employee . . .*, *available at* http://www.irs.treas.gov/pub/irs-pdf/p1779.pdf.

[10] *See* Berlin v. Sarah Bush Lincoln Health Center, 179 Ill. 2d. 1, 17 (1997).

[11] *See* McKinney's Limited Liability Company Law § 1204. *See also* McKinney's Business Corporation Law § 1504.

[12] Chapter 19.68 RCW.

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General Considerations

The 2009 decision in *In re Andrew Carothers, M.D., P.C., 888 N.Y.S. 2d 372 (N.Y. Civ. Ct. 2009)*, provides insight into the minefield that is the CPOM doctrine when structuring health care arrangements that involve licensees and nonlicensees to avoid a possible violation of the CPOM doctrine. While *Carothers* is a New York case, the lessons learned from the case are instructive across all jurisdictions and can be summarized in the seven points listed below, which is certainly not exhaustive.

1. Licensees should be solely responsible for making all clinical decisions regarding patient care;

2. Agreements between the (a) licensee or the professional entity and (b) the nonlicensee and the nonprofessional entity should be the products of arms-length transactions and should be in writing (which writing shall be followed and not ignored);

3. Nonlicensees should not exercise control over the professional assets of the professional entity;

4. Any advances made by the nonlicensees to the professional entity should not be deemed capital investments;

5. Nonlicensees should not hold themselves out to third parties as owners of the professional entity;

6. Nonlicensees should not be able to hire, fire, and/or determine the salaries of the professional entity's licensed employees; and

7. The licensee(s) who are owners of the professional entity should not be absentee owners and should play a substantial role in the day-to-day and overall operation and management of the professional entity.[13]

Potential Penalties for Violations of the CPOM Doctrine

There are a number of penalties and other consequences that could be imposed as a result of a physician's involvement individually and/or with an entity that violates the CPOM doctrine. Such penalties vary from state to state, but generally involve fines, civil penalties, actions against licenses and could even include imprisonment. For example, in Pennsylvania:

> Any person, or the responsible officer or employee of any corporation or partnership, institution or association, who violates [the statutory CPOM prohibition] commits a misdemeanor of the third degree and shall, upon conviction, be sentenced to pay a fine of not more than $2,000 or to imprisonment for not more than six months, or both, for the first violation. On the second and each subsequent conviction, he or she shall be sentenced to pay a fine of not less than $5,000 nor more than $20,000 or to imprisonment for not less than six months nor more than one year, or both. In addition to any other civil remedy or criminal penalty provided for in this act, the [Pennsylvania State Medical Board] . . . may levy a civil penalty of up to $1,000 on any current licensee who violates [the statutory CPOM prohibition] or on any person who practices medicine and surgery or other areas of practice requiring a license, certificate or registration from the board without being properly licensed, certificated or registered to do so . . . .[14]

Although some states may have CPOM prohibitions that have not been enforced in recent years, the lack of enforcement should not be viewed by providers as tacit approval to ignore these laws. Consequently, providers must structure their practices accordingly.

In addition, insurance companies have used violations of the CPOM doctrine to avoid paying providers and to seek reimbursement of all monies previously paid to a violating provider.[15] Insurance companies have been one of the most prevalent plaintiffs in recent CPOM doctrine litigation. In *Allstate Insurance Co. v. Belt Parkway Imaging PC*, insurance companies sued several provider entities, along with the licensee who was the owner of the entities on paper and the nonlicensee whom the insurance companies alleged actually owned the entities.[16] The court found that the entities were ineligible to receive no-fault benefits because they had engaged in illegal fee-splitting with nonlicensees and were unlawfully controlled and/or beneficially owned by a nonlicensee. More specifically, the court concluded, as a matter of undisputed fact, that (1) the nonlicensee completely controlled the entities, (2) the licensee permitted the nonlicensee to control and dominate the entities to the exclusion of the licensee or any other licensed physician, (3) the licensee and the nonlicensee, as well as the entities, are liable for fraud, and (4) the insurers have no obligation to pay any pending, previously denied, or future no-fault claims submitted by any of the entities. The court allowed the insurance companies to recover all funds paid to the entities after April 4, 2002, and to personally seek relief from the licensee and the nonlicensee.[17]

Conclusion

Economic forces have changed the health care landscape in recent years. The recent influx of nonlicensed business people in the health care arena has brought the CPOM doctrine back to the forefront of discussion. When structuring business ventures with physicians and nonlicensees, the CPOM doctrine needs to be reviewed on a state-by-state basis to determine its possible impact on the venture.

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[13] This consideration is most important in New York as a result of *BCL § 1507*, which provides that a shareholder of a professional corporation actually must engage in the practice of the profession in that professional corporation that the corporation is authorized to practice.

[14] 63 PA. CONS. STAT. § 422.39.

[15] *See* Allstate Insurance Co. v. Northfield Medical Center PC, 2001 WL 34779104 (N.J. Super. L. 2001).

[16] *See* Cadwalader, Wickersham & Taft LLP, *Important Court Decision for No-Fault Insurers— New York Court Grants Summary Judgment To Insurers on Mallela Issue* (Feb. 2, 2011), available at http://www.cadwalader.com/assets/client_friend/020111ImportantDecisionforNoFaultInsurers.pdf.

[17] *Id*.