

## Legislative Update: Texas' Corporate Practice of Medicine Doctrine

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A recent American Medical Association article<sup>1</sup> addressed the need to tackle physician shortages in many states' rural areas. Some state legislators in California and Texas introduced legislation this year that would have allowed hospitals to directly hire doctors against long-standing state laws aimed at preventing corporate interference with the practice of medicine. California and Texas are among only a handful of states that have vibrant Corporate Practice of Medicine (CPOM) statutory schemes in place. Such a statutory scheme generally holds that only physicians, as opposed to corporate entities, are licensed to provide medical services. The fundamental purpose of this law is to ensure physicians' independent medical judgment. Opponents of the legislative measures to allow hospitals to directly hire physicians do not dispute the need to address shortages, but note that there are other ways to recruit physicians without thwarting medical independence, such as reducing medical student debt and increasing residency slots.<sup>2</sup> Recent Texas legislative sessions have had bills introduced addressing the CPOM doctrine in some form or carving out exceptions to the law. However, it remains unclear whether Texas' CPOM law currently achieves its original purpose or whether the numerous exceptions in place negate the public policy of the doctrine.

### Background

In the mid-1800s, the American Medical Association created the doctrine of corporate practice of medicine to protect the public as well as the profession of medical doctors.<sup>3</sup> At that time, medical doctors struggled to separate themselves from faith healers and others claiming to have medical knowledge to cure human ailments.<sup>4</sup> As part of a larger plan to ensure the public that physicians possessed a substantial ethical structure and true skills, the AMA issued pronouncements that contained warnings against the practice of medicine by a corporation, regardless of its intent, structure, or form.<sup>5</sup>

The guidelines and lobbying by the AMA greatly affected state legislation in subsequent years. States were encouraged to license medical doctors and to establish physicians as

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<sup>1</sup> Amy Lynn Sorrel, *Some States Still Prohibit Hospitals From Hiring Doctors; Physicians Want to Keep It That Way*, AM. MED. ASS'N NEWS, Aug. 3, 2009, <http://www.ama-assn.org/amednews/2009/08/03/prl20803.htm>.

<sup>2</sup> *Id.*

<sup>3</sup> Nicole Huberfeld, *Be Not Afraid of Change: Time to Eliminate the Corporate Practice of Medicine Doctrine*, 14 HEALTH MATRIX 243, 245-46 (2004).

<sup>4</sup> *Id.* at 246.

<sup>5</sup> *Id.* citing Am. Med. Ass'n, 1922 Report of the Judicial Council (interpreting Section 6 of the Principles of Medical Ethics), abstracted in PRINCIPLES OF MEDICAL ETHICS 40 (1960) (The AMA Council noted: [i]t was decided long ago that the practice of law by a corporation was against public policy and the same has been prohibited by law in many states. The relations between patient and physician are more intimate than are those between client and attorney. It is impossible for that intimacy of relationship to exist between an individual and a corporation and if it is against public policy for a corporation to practice law, how much more so must it be for a corporation to practice medicine.).

the sole legitimate professionals to provide medical care.<sup>6</sup> The result was an abundance of state laws and regulations protecting physicians from outside influence, including corporations. Additionally, states were encouraged to prohibit fee-splitting, a form of corporate practice that prevented payments for referrals, whether from a physician or corporation.<sup>7</sup> The fee-splitting prohibition also prevented physicians from sharing their reimbursement for services with any non-licensed person or entity.

In interpreting states' CPOM laws, courts relied not only on the plain language of the statutes in place, but also on public policy rationales based on the physician-patient relationship. First, courts were often concerned that sensitive patient information could be transmitted through a non-medical group such as a corporation. Second, courts feared that corporations practicing medicine would attempt to exploit the profession and exert influence or control over medical professionals. Finally, courts believed, to some degree, that corporations might deceive the public via false advertisements or unreasonable enticements of medical claims in an effort to generate revenue to the detriment of a would-be patient.<sup>8</sup>

In recent years, most states have repealed CPOM laws in favor of other means to protect the integrity of the medical profession. For example, many states' laws simply require that an individual must be licensed to practice medicine. In Texas, however, a healthy CPOM statutory scheme remains in place, though numerous exceptions to the law arguably have diluted its original intent.

### Texas' Use of the CPOM Doctrine

The following provisions of the Texas Occupations Code create the basis for the prohibition against the corporate practice of medicine in Texas:

- Section 155.001 provides that a person may not practice medicine in the State of Texas unless that person holds a license;
- Section 155.003 describes the requirements for a license to practice medicine which only an individual can meet, but not a business entity or corporation;
- Section 157.001 allows physicians to delegate certain medical acts but prohibits such delegation to a person falsely representing to the public authorization to practice medicine;
- Section 164.052(8) prohibits a physician from using or selling the physician's medical degree or license to practice medicine; subsection (13) prohibits a physician from permitting another to use his/her license or certificate to practice medicine; and subsection (17) prohibits a physician from directly or indirectly

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<sup>6</sup> *Id.* at 249 (citing Adam M. Freiman, Comment, *The Abandonment of the Antiquated Corporate Practice of Medicine Doctrine: Injecting a Dose of Efficiency into the Modern Health Care Environment*, 47 EMORY L.J. 697, 700-01 (1998).

<sup>7</sup> *Id.*

<sup>8</sup> Jennifer B. Claymon, *Corporate Practice of Medicine and Non-Profit Health Organizations*, presented at the 21st Annual Health Law Conference in Houston, Texas (April 2009).

- aiding or abetting in the practice of medicine by a person, partnership, association or corporation that is not licensed to practice medicine;
- Section 165.156 specifically provides that a person, partnership, trust, association or corporation commits an offense if it in any manner indicates entitlement to practice medicine when it is not licensed to do so.<sup>9</sup>

In any arrangement between physicians and non-physicians, the CPOM doctrine in Texas applies and the physician must function as an independent contractor or fit another exception. However, even independent contractor agreements have come under fire in recent years. In *Flynn Brothers, Inc. v. First Medical Associates*,<sup>10</sup> a Texas appellate court found that the practical effect of an employment contract between a lay entity and medical professionals was that of employer-employee, not independent contractor. Of course, the parties also admitted that they drafted the contract with the intent to avoid CPOM violations.

Other exceptions to the Texas CPOM involve the formation of specific entities authorized to provide medical services. Such entities include: (1) a Texas Professional Association<sup>11</sup> (2) a certified Non-Profit Health Corporation<sup>12</sup> and (3) federally-qualified health centers. Such organizations may employ physicians without violating the CPOM doctrine.

Additionally, specific exceptions to the CPOM doctrine have been carved out by legislative action in recent years allowing certain types of entities such as private, nonprofit medical schools, federally qualified health care centers, and about 10 hospital districts to employ physicians.

### Recent Legislative Actions

During the 79th Legislative Session, House Bill 1924 was signed into law amending § 166.001 of the Occupations Code to require the state's Board of Medical Examiners to certify certain hospital districts to employ physicians.<sup>13</sup> Under the law, a hospital district must be organized and operating as a migrant, community, or homeless health center under federal law and be located in a county bordering Mexico with a population of at least 650,000 residents.<sup>14</sup> The bill essentially had limited impact to the El Paso area, and included a sunset date of September 1, 2007. The inclusion of a sunset date and a geographic limitation suggest that the underlying motivation behind the bill was to carve out an exception to the CPOM doctrine.

Also during the 79th regular session, Senate Bill 1027 was signed into law authorizing Maverick County Hospital District to employ physicians, dentists, and other health care

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<sup>9</sup> Jennifer B. Claymon, *Corporate Practice of Medicine and Non-Profit Health Organizations*, presented at the 21st Annual Health Law Conference in Houston, Texas (April 2009).

<sup>10</sup> 715 S.W.2d 782 (Tex.App.—Dallas 1986).

<sup>11</sup> TEX. REV. CIV. STAT. ANN. art. 1528f (Vernon 2009).

<sup>12</sup> TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.01 (Vernon 2009).

<sup>13</sup> H.B. 1924, 79th Reg. Sess. (Tex. 2005).

<sup>14</sup> *Id.*

providers as needed for efficient operation of the district.<sup>15</sup> The bill specified that the district was not authorized to supervise or control the practice of medicine.<sup>16</sup>

Rural hospitals have been seeking a broad exception to the CPOM doctrine for years in order to allow them to employ physicians and use other tools to recruit and retain physicians. Legislation addressing these issues during the 79<sup>th</sup> session failed to pass.<sup>17</sup>

In the 80th regular session, House Bill 4035 attempted to allow the Moore County Hospital District's Board of Directors to employ physicians.<sup>18</sup> The measure also failed to pass.

During the most recent legislative session, several bills were introduced seeking an exception to the state's CPOM in some form. Senate Bill 1500, introduced by Senator Duncan, would have allowed the Dallas County Hospital District and certain small, rural hospitals, to employ physicians.<sup>19</sup> The bill failed to pass. However, another bill, Senate Bill 1705,<sup>20</sup> also allowing the Dallas County Hospital District to "appoint, contract for, or employ physicians, dentists, and other health care providers," was signed into law by Governor Perry.

According to text explaining the rationale behind Senate Bill 1705, employment of physicians and other health care providers by the Parkland Health and Hospital System was desperately needed:

[i]n order to meet its statutory mandate and provide care for the needy and indigent population, Parkland needs to employ approximately 145 primary care physicians for its COPCs, [community-oriented primary care] the Dallas County Jail, family health centers, and Parkland Memorial Hospital. Since the early 1990s, however, the State of Texas has recognized a ban on the "corporate practice of medicine," which currently prevents corporate entities from employing physicians, dentists, and other health care providers.<sup>21</sup>

Authored by Senator West, Senate Bill 1705's passage officially authorized Parkland's 20-year-practice of employing physicians. Michael Silhol, general counsel for Parkland said:

[t]here was some confusion among folks about exactly what Parkland's legal authority was to hire doctors, and that is why we filed the legislation. Over the years there have been different interpretations of the corporate

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<sup>15</sup> S.B. 1027, 79th Reg. Sess. (Tex. 2005).

<sup>16</sup> *Id.*

<sup>17</sup> See Texas Medical Ass'n, *2005 Legislative Compendium: Corporate Practice of Medicine*, (Aug. 25, 2005), available at <http://www.texmed.org/Template.aspx?id=4232>.

<sup>18</sup> H.B. 4035, 80th Reg. Sess. (Tex. 2007).

<sup>19</sup> S.B. 1500, 81st Reg. Sess. (Tex. 2009).

<sup>20</sup> S.B. 1705, 81st Reg. Sess. (Tex. 2009).

<sup>21</sup> *Id.* See Analysis, available at <http://www.legis.state.tx.us/tlodocs/81R/analysis/html/SB01705H.htm>.

practice of medicine as it relates to public hospital systems such as Parkland.<sup>22</sup>

Rural hospital districts were not as lucky. Two other measures that failed to pass included Senate Bill 1502,<sup>23</sup> which would have allowed the Martin County Hospital District to employ physicians and other health care providers and Senate Bill 1503,<sup>24</sup> which would have allowed the Dallam-Hartley Counties Hospital District to employ physicians.

The piece of legislation that garnered the most public attention involving the state's CPOM was House Bill 3485, introduced by Representative Garnet Coleman.<sup>25</sup> Certain provisions of the bill sought to allow government-owned hospitals in any county with fewer than 50,000 residents to hire physicians directly. The bill was passed in the legislature but subsequently vetoed by Governor Perry. Representative Coleman said the bill would have given public hospitals and physicians who want to practice in rural Texas some flexibility.<sup>26</sup> However, the Texas Medical Association noted that other provisions of the bill added at the last minute diluted the state's liability reform law by changing the liability cap from a per-plaintiff standard to a per-defendant standard and exposing local governmental entities to significant tort liability risks.<sup>27</sup> Such additions were, according to the TMA, the impetus for Governor Perry's veto.<sup>28</sup>

### Conclusion

The main concern with legislative exceptions to the state's CPOM is that they generally are not based on an analysis of whether the entities should be exempted from CPOM but are ways to slowly erode the doctrine in the state. Further, some argue that there is no distinction between a hospital system, such as Parkland which is allowed to directly hire physicians, and those districts in more rural areas. The Texas Medical Association typically opposes any legislation that would undermine the intent of the CPOM doctrine. However, the association did not oppose the Parkland legislation because the hospital had been hiring physicians successfully for years, with no complaints that it interfered with physicians' independent decision-making.<sup>29</sup> Such approval of one hospital district's ability to employ physicians and opposing another's results in widespread confusion regarding the limits of the CPOM doctrine and generates questions regarding the true intent of the law.

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<sup>22</sup> Joyce Tsai, *Parkland Allowed to Directly Hire Its Physicians*, DALLAS BUS. J., July 10, 2009, available at <http://dallas.bizjournals.com/dallas/stories/2009/07/13/story1.html>.

<sup>23</sup> S.B. 1502, 81st Reg. Sess. (Tex. 2009).

<sup>24</sup> S.B. 1503, 81st Reg. Sess. (Tex. 2009).

<sup>25</sup> H.B. 3485, 81st Reg. Sess. (Tex. 2009), companion bill S.B. 2123, 81st Reg. Sess. (Tex. 2009) (West).

<sup>26</sup> Garnet Coleman Blog, *Governor's Veto of HB 3485*, June 21, 2009, <http://www.garnetcoleman.com/blog/2009/06/governors-veto-of-hb-3485.html>.

<sup>27</sup> Texas Medical Ass'n, *Governor Vetoes Bad Liability Bill*, June 19, 2009, <http://www.texmed.org/Actionv2.aspx?id=7836>.

<sup>28</sup> *Id.*

<sup>29</sup> See Joyce Tsai, *supra* note 21.

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