

Will Corporate Practice of Medicine Kill Your Healthcare Venture?

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Many lawyers say that corporate practice of medicine is dead – that this is a new age of healthcare and we no longer need to worry about these old 20th century, or maybe 19th century healthcare rules.

And the prohibition against corporate practice often isn't written into statutes; the statutes prohibit unlicensed practice of *medicine*—referencing to individuals. Then there is often a second set of statutes that talk about the fact that corporations cannot engage in *professional* practices. Then usually a third set of statutes that deal with who can *organize and own a professional corporation*.

To get to the prohibition against the corporate practice of medicine (or Corporate Practice of Medicine), you have to put these three sources together. Sometimes the medical board website spells it out and pulls it all together.

For example, the **California Medical Board** says this in its page on [Corporate Practice of Medicine](#):

The Medical Practice Act, Business and Professions Code section 2052, provides:

“Any person who practices or attempts to practice, or who holds himself or herself out as practicing...[medicine] without having at the time of so doing a valid, unrevoked, or unsuspended certificate...is guilty of a public offense.”

Business and Professions Code section 2400, within the Medical Practice Act, provides in pertinent part:

“Corporations and other artificial entities shall have no professional rights, privileges, or powers.”

The policy expressed in Business and Professions Code section 2400 against the corporate practice of medicine is intended to prevent unlicensed persons from interfering with or influencing the physician's professional judgment. The decisions described below are examples of some of the types of behaviors and subtle controls that the corporate practice doctrine is intended to prevent.

In this way, the Medical Board of California pulls together the various pieces of legislation.

If you keep reading, California takes the corporate practice of medicine very seriously. So if you ask, if enforcement *possible*, the answer is, YES.

If you ask, if enforcement *likely*, that's another story. It's very much dependent on your exact model. And our **healthcare lawyers** have seen a thousand variations. The answer is invariably nuanced. This is why the Medical Board of California advises:

This area of law can be complicated, therefore physicians are encouraged to discuss their medical practices and business enterprises with appropriately knowledgeable legal experts. The Medical Board of California continues to receive complaints and inquiries about the law, and some repeating issues are presented here.

Well, we appreciate the medical board promoting legal services. It really isn't something you can figure out from a chart or grid or some poster you can get off the Internet. More below.

“Strong” v. “Weak” Corporate Practice of Medicine States

State law prohibitions against corporate practice of medicine come in to flavors:

- Strong form corporate practice of medicine doctrine
- Weak form corporate practice of medicine

The distinction between the “strong” and “weak” versions can be particularly important when designing an MSO (management services organization) structure. The MSO structure can work very well in navigating the twin of corporate practice of medicine enforcement: the prohibition against **kickbacks** and **fee-splitting**.

QUICK SUMMARY OF FEDERAL “STARK” SELF-REFERRAL & ANTI-KICKBACK LAW AND CALIFORNIA SELF-REFERRAL AND FEE-SPLITTING PROHIBITIONS

Here is a quick summary of federal self-referral (“Stark law”) and anti-kickback law, and California self-referral and anti-kickback / fee-splitting rules. Each state has its own laws, of course.

The MSO model allows non-MD (non-physician) entrepreneurs to create a robust business model for the healthcare venture in which they do not “partner” or share professional fees with the medical doctors, but rather take an MSO or management fee in exchange for their management and marketing efforts.

The management fee must be at fair market value. In some states (for example, California), it can be a percentage of gross revenues, whereas in other states (for example, **New York**), the management fee, at least historically, has had to be a flat fee.

States that have a “strong” Corporate Practice of Medicine (CPM) prohibition will likely regard it as a *per se* violation of Corporate Practice of Medicine for a company *other than* a professional medical corporation (“PMC”) to hire physicians.

In the strong form of Corporate Practice of Medicine, there is a typically a violation, whether the physicians are hired as employees or independent contractors, to provide medical services.

This is the case in California.

In some states, you have to read the various rules and figure out what the state’s position is on corporate practice of medicine. For example, in Georgia:

- Georgia law provides a fairly typical definition of the “practice of medicine” (O.C.G.A., Section 43-34-21) as well as a prohibition against unlicensed practice of medicine (Section 43-34-22(a)).
- Section 43-34-42 provides the penalty for unlicensed practice of medicine or any related violation. The crime is designated a felony, punished by a fine of \$1,000 per violation or by imprisonment for two to five years, or both.
- Section 43-34-39 provides that the state medical board, “in addition to any other remedy or criminal prosecution” (emphasis added), may file a complaint to the superior court and seeking a restraining order and an injunction against “any person, firm, company, partnership, association, or corporation or the agent, officer, or director of such firm, company, partnership, association, or corporation” who “is or has been violating any” state law relating to the practice of medicine.
- Section 33-18-17, a statute that deals with nonprofit “medical service corporations,” states that this statute shall not “be construed as authorizing the corporate practice of medicine.”
- In Minutes of June 7-8, 2012, the Georgia Composite Medical Board cryptically stated, “The corporate practice of medicine has not been defined by the statute legislature.” But this was after stating, “the Medical Board can only license physicians to practice in Georgia, not corporations.”

All this suggests that Georgia has a strong prohibition against Corporate Practice of Medicine—at least for the moment, as these legal rules can be in flux.

Corporate Practice of Medicine Exceptions

There are usually exceptions to the corporate practice of medicine prohibition—notably, for example, the case of hospitals. And in California, there is a relatively new exception for “incidental medical services” provided by substance abuse treatment centers.

HOW SUBSTANCE ABUSE TREATMENT CENTERS NAVIGATE ANTI-KICKBACK RULES

Substance abuse treatment centers must steer carefully when sending patients for labs. Self-referral, anti-kickback, and fee-splitting rules can create legal enforcement issues and must be [...]

Weak Corporate Practice of Medicine States & A National Strategy

States with a “weak” Corporate Practice of Medicine prohibition potentially might allow such companies to hire physicians to provide medical services, so long as the contract clarifies that the company cannot interfere with clinical decision-making.

For example, in Virginia there is at least one Attorney General opinion that is permissive with respect to Corporate Practice of Medicine:

The Virginia Attorney General concluded that Virginia statutes and court decisions allow a hospital to employ a physician as long as the employment agreement authorizes the physician to exercise 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. 1992 Op. Atty. Gen. Va. 147.

While there often is a Corporate Practice of Medicine exception for hospitals that hire physicians, the AG’s rationale in the 1995 opinion, cited above, provides a good statement of the logic behind the “weak” version of the prohibition against Corporate Practice of Medicine.

This is good news if you are planning a multi-state or national model of health and wellness services, whether through **physical healthcare clinic sites** or **digital health** or **mobile health** (telemedicine, etc.). Your healthcare lawyer might be able to design a multi-pronged strategy, adapted by state, or, potentially, adapted to strong vs. weak corporate practice of medicine states.

Limitations to the Weak Corporate of Medicine Allowance

Even in a “weak” Corporate Practice of Medicine state, there is some ambiguity in the legal rules.

As we said, the prohibition is not necessarily embodied in a statute, but rather, may be expressed in cases, or, perhaps a policy statement by the state medical board.

The problem with the case is that they are typically very old. Cases can be interpreted as limited to its facts, or otherwise legally ambiguous; so much depends on the overall situation and what harms the State perceives in the arrangement and immediate facts, and, there is always enforcement discretion.

Whatever the medical board says on its website is a good indication of the medical board’s enforcement position. But it is not the law, simply a restatement of what the medical board interprets the law. And sometimes, the medical board may be more aggressive in its interpretation, signaling a strong enforcement posture to the Attorney General or District Attorney who will actually be the one prosecuting the case.

And “so long as the MSO does not overly interfere with the clinical duties of the medical doctors” leaves a lot of room for interpretation. If the MSO is an employer, then the MSO has the right to control its employees—by definition.

There are also a lot of subtle layers of influence, as California indicates on its [Corporate Practice of Medicine web page](#), including:

- *Determining what diagnostic tests are appropriate for a particular condition.*
- *Determining the need for referrals to, or consultation with, another physician/specialist.*
- *Responsibility for the ultimate overall care of the patient, including treatment options available to the patient.*
- *Determining how many patients a physician must see in a given period of time or how many hours a physician must work.*

These are criteria that California—a strong corporate practice of medicine state—uses to assess whether there has been a corporate practice of medicine violation. These criteria also show the slippery slope and how enforcement in other states can potentially look to find intrusion by the MSO or healthcare venture into the medical doctor's domain.

For example, what if the telemedicine or digital health venture or mobile app guides the user (aka patient) to a specific pathway of diagnostic tests and/or treatments? Let's say, for example, compounded skin care creams to treat acne? Is the MSO going too far into medical practice, *in the eyes of the regulators* who enforce the corporate practice of medicine prohibition?

What if every substance abuse patient is supposed to get a session with a behavioral healthcare professional, followed by a visit to the psych nurse for medication ... is the substance abuse “center,” which is owned by non-MDs, intruding into clinical practice by, in effect, setting the clinical pathway?

Again, these situations are very fact-specific. A good healthcare lawyer will work with your healthcare venture to help structure the business model so as to help mitigate regulatory risk.

Because of the limitations of the weak Corporate Practice of Medicine model, for some healthcare ventures, it makes sense to use one model—based on the strong version of Corporate Practice of Medicine—across states.

Again, regulatory authorities have a lot of enforcement discretion. Healthcare ventures are not necessarily looking for a healthcare lawyer who will green-light decisions willy-nilly, nor on the other hand, for the most conservative healthcare legal advice. A nuanced approach is best, and that is how our healthcare lawyers roll.

If it's not Corporate Practice of Medicine, Watch Out for Anti-Kickback Enforcement

As we noted, whenever you find Corporate Practice of Medicine concerns, you're likely to also find state law prohibitions against fee-splitting, kickbacks, conflict of interest, patient exploitation, and so on. Enforcement has many tools at its disposal.

In terms of risk mitigation, here some key legal strategies the healthcare venture can bake into its operational plan:

- The MSO should take care to leave anything that could be regarded as clinical decision-making or a clinical pathway to the healthcare provider. This includes evaluating or assessing the patient, treating, and obviously, prescribing.
- The MSO fee should reflect fair market value for the MSO's services. While California law does allow a percentage of gross revenues under certain conditions, generally, percentages raise enforcement issues.

Your healthcare lawyer can provide nuanced advice as what is good for business, often is fodder for enforcement; and conversely, what is most compliant, is often neither efficient nor profitable. One of the benefits of getting advice from an astute healthcare lawyer is finding the right “Goldilocks” strategy—neither too hot on the enforcement side, nor too cool on the profit side. Crafting the right plan takes legal experience as well as knowledge of the corporate practice of medicine, anti-kickback

and fee-splitting, and other legal pitfalls that can ensnare the healthcare venture.