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Update: Corporate Practice of Medicine in Michigan

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Kathleen A. Reed

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Development of the CPM Doctrine in Michigan

- ❖ **The Corporate Practice of Medicine (“CPM”) Doctrine = The practice of a learned profession should not be undertaken in corporate form**
- ❖ The CPM doctrine is a well-established legal doctrine adopted in Michigan and many other states
- ❖ Also known as the **“Learned Professions Doctrine”**
- ❖ CPM doctrine was developed to protect the professions, individual professionals and the clients of professionals

Development of the CPM Doctrine in Michigan

❖ Rationale for the CPM Doctrine

- ❖ Laymen should not be permitted to practice medicine, directly or indirectly, by virtue of corporate form
- ❖ Necessary and confidential professional relationships between patient and physician could be destroyed by shareholders with a profit motive
- ❖ The limited liability available in corporate form is not appropriate when patient must place high trust in physician
- ❖ A corporation cannot fulfill the licensing and ethical requirements of medical practice

Development of the CPM Doctrine in Michigan

- ❖ In Michigan, the CPM doctrine has evolved over 90 years through the interplay of multiple sources of legal authority
 - ❖ Opinions of the Attorney General
 - ❖ Case law
 - ❖ Legislation
 - ❖ Regulatory agency interpretations

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1938** – AG Opinion; Doctors of medicine may not incorporate for the practice of medicine. *Op. Atty. Gen. Mich. August 3, 1938*
- ❖ **1956** – AG Opinion; Not a lawful purpose for a corporation to supply medical services through its licensed officers, agents and employees. *Op. Atty Gen. Mich. No. 2451, March 7, 1956*
- ❖ No Michigan statutory or case law on point
- ❖ AG looks to other states for guidance

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1962** – Michigan enacts the Professional Services Corporation Act, 1962 PA 192 (“PC Act”), permitting professionals to practice their profession in corporate form
 - ❖ Addresses the rationale for the CPM, listed above:
 - ❖ All shareholders of a PC must be licensed to perform the profession for which the PC was formed
 - ❖ PC may provide professional services only through its licensed shareholders, employees or agents
 - ❖ The PC and its licensed professionals remain liable for professional acts

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1977** –AG Opinion; A professional who owns shares of stock in a PC may transfer shares to himself as trustee of a revocable living trust of which he/she is the sole beneficiary. *Op. Atty Gen. Mich. No. 5190, May 17, 1977*
- ❖ **1978** –AG Opinion; Where all participants and trustees of an employee stock ownership trust (“ESOT”) are licensed professional employees of the PC employer, the ESOT may hold the PC’s stock. *Op. Atty Gen. Mich. No. 5285, March 30, 1978*

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1980** – AG Opinion; Business corporation may not be formed to engage in the practice of medicine. *Op. Atty Gen. Mich. No. 5676, April 8, 1980*
- ❖ Recites 4-point rationale for CPM doctrine and how PC Act addresses these concerns
- ❖ Cites 1956 AG Opinion that it is not a lawful purpose of a business corporation to practice medicine through the corporation's licensed employees, agents or officers

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1989** – AG Opinion: Only a PC may be used to practice:
 - ❖ a learned profession (law, medicine and divinity); or
 - ❖ other professions which are prohibited by statute from incorporating other than under the PC Act
 - ❖ Dentistry (MCL 333.16601)
 - ❖ Certified Public Accountancy (MCL 339.705)
 - ❖ Psychologists (per advice to LARA from AG)

All other professions may incorporate under either the PC Act or the Business Corporation Act. *Op. Atty Gen. Mich. No. 6592, July 10, 1989*

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1990** – MI Corporation and Securities Bureau notifies entities organized under the Business Corporation Act and the Nonprofit Corporation Act who should have been formed under the PC Act of the August 30, 1990 deadline for taking corrective action to comply with AG Opinion 6592

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1992** – MI Corporations and Securities Bureau Release No. 92-3-C:
 - ❖ AG opinions establish “as a matter of law” that the Bureau may not accept profit and nonprofit corporate documents showing the entity will engage in the practice of medicine
 - ❖ Concerns raised about nonprofit (hospital) corporations
 - ❖ Bureau will accept articles with “clear and unequivocal” language in the corporate purposes provisions that the corporation will not engage in the practice of medicine. Examples of compliant language provided.

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1993** – MI Corporations and Securities Bureau Rescinds Release No. 92-3-C by letter dated January 4, 1993:
 - ❖ Release 92-3-C caused considerable confusion and legal uncertainty for nonprofit hospital corporations
 - ❖ Bureau invited comments and met with stakeholders
 - ❖ Bureau ultimately determined that the issue is “not a settled matter of law”
 - ❖ Rescission not intended as Bureau’s determination that CPM does not apply to nonprofit corporations
 - ❖ Bureau won’t reject nonprofit filings suggesting CPM

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1993** – AG Opinion: The CPM doctrine does not apply to nonprofit corporations. *Op. Atty Gen. Mich. No. 6770, September 17, 1993*
 - ❖ Nonprofit entities do not present commercialization or profit motive issues presented by business corporations
 - ❖ Nonprofit entities remain liable for the acts of their employees and agents
 - ❖ Outcome: A nonprofit entity may directly employ learned professionals to practice their professions

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1993** – Michigan enacts Limited Liability Company Act, with provisions for Professional Limited Liability Companies (PLC or PLLC) *MCL 450.4901 et seq.*
 - ❖ Includes same protections as PC Act:
 - ❖ Only licensed professionals may be members or managers
 - ❖ Licensed members and managers retain personal liability for professional acts
 - ❖ PLLC may provide professional services only through licensed individuals

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1994** – Corporation and Securities Bureau Release 94-1a-C
 - ❖ Interprets Section 2(c) of the PC Act to require that PC shareholders be “licensed to practice the same professional service,” as distinguished from requiring that all shareholders all hold the same type of professional license
 - ❖ Will apply same interpretation to PLLCs
 - ❖ Distinction permits MDs, DOs and DPMs to practice in the same PLLC or PC

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **1997** – PC Act amended by 1997 PA 139.
 - ❖ Permits persons licensed to practice medicine (MD), osteopathic medicine and surgery (DO) and podiatric medicine and surgery (DPM) to form a PC with each other

- ❖ **1999** – Policy Statement C-10 Rev. (1) of the MI Corporation, Securities and Land Development Bureau (09/15/1999)
 - ❖ State will accept articles of incorporation for a for-profit hospital, provided the articles “clearly state that the corporation will not engage in the practice of medicine”

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **2000** – Policy Statement C-65 of the MI Corporation and Land Development Bureau
 - ❖ Bureau will permit a name of a corporation or LLC that implies the entity is formed to provide a learned profession so long as the articles clearly state that the entity will not engage in activities of a learned profession

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **2004** - AG Opinion: A chiropractor is not considered a “physician and surgeon” under the PC Act, and is not, therefore, permitted to form a PC with MDs, DOs or DPMs.
Op. Atty Gen. Mich. No. 7151, March 9, 2004
- ❖ **2004** – LARA issues reminder notice to all PLLCs/LLCs that a limited liability entity providing any “services in a learned profession” (dentist, physician, surgeon, clergy or attorney) must be formed as a PLLC with all members and managers properly licensed

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **2008** – *Miller v. Allstate*, 481 Mich. 601, 751 NW 2d 463 (2008)
 - ❖ Allstate seeks to avoid paying PT Works, Inc. for PT services on the grounds that the PT services were not “lawfully” provided because PT Works was improperly incorporated as a business corporation
 - ❖ MI Supreme Court ultimately decided that Allstate lacked standing to challenge PT Work’s incorporation, but upheld the Appeal Court’s decision that the PT services should be reimbursed because lawfully provided by licensed PTs
 - ❖ Confusion and uncertainty ensued

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **2011** – AG Bill Schuette files suit that results in permanent closure of two abortion clinics based on CPM violations
 - ❖ Clinics were for-profit entities owned and operated by non-physicians that contracted with physicians for medical services
 - ❖ AG Schuette files similar suit in **2016** to close abortion clinic organized as a PC in which non-physician was sole owner, officer and director

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **2013** – 2012 PA 569 – Repeals and recodifies the Professional Service Corporation Act as Chapter 2A of the Business Corporation Act.
 - ❖ Designed to address issues raised by *Miller v. Allstate*
 - ❖ Requires a corporation that provides professional services in a learned profession to incorporate under Chapter 2A as a professional corporation
 - ❖ Effective January 2, 2013

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **2016** – PAs 157 & 158 of 2015 amended the LLC Act and the Business Corporation Act, respectively, effective 1-18-2016
 - ❖ Refined definition of “services of a learned professional” to *exclude* professional services provided to residents of a nursing home by physicians/dentists who are employees or independent contractors of the nursing home *MCL 450.1109(1) and 450.4102(2)(t)*
 - ❖ Nursing home organized as corporation or LLC may employ or contract with physicians or dentists to provide professional services to residents

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **2017** – *Michigan Radiological Society v. OMIC, LLC d/b/a Oakland MRI, and Susan Swider, LC No. 2016-153236-CZ*
- ❖ Michigan Radiological Society (“MRS”) sought to enjoin operation of Oakland MRI, arguing:
 - Oakland MRI is LLC that offers medical services, requiring it to be 100% physician owned and managed
 - Profit motive, not professional judgment, controls operations
 - Unfair competition with licensed radiologists

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **2017** – *Michigan Radiological Society v. OMIC, LLC*
- ❖ Oakland MRI argued:
 - MRS had no standing to bring suit
 - State of Michigan “approved” the CON, thereby approving Oakland MRI’s operation with knowledge of non-physician ownership
 - Operational for 10 years without incident
 - Not practicing medicine by owning MRI facility; contracts with radiologists for medical functions

Development of the CPM Doctrine in Michigan

Historical Timeline for the CPM doctrine

- ❖ **2017** – *Michigan Radiological Society v. OMIC, LLC*
- ❖ *Quo warranto* action
 - MRS appealed to AG Bill Schuette to intervene in the actions and file proceedings against Oakland MRI
 - AG Schuette declined, noting “we are not persuaded that the circumstances warrant participation by this office”
 - Compare this to AG’s CPM stance on abortion clinics
 - MRS filed motion to bring its own *quo warranto* action based on AG’s failure to act

Development of the CPM Doctrine in Michigan

Historical Timeline

- ❖ **2017** – *Michigan Radiological Society v. OMIC, LLC*
- ❖ MRS appealed, with parties making essentially the same arguments
- ❖ Court of Appeals Decision (Unpublished, March 27, 2018)
 - Based on holding in *Miller v. Allstate*, MRS lacks standing to challenge Oakland MRI's corporate status; only the AG has such authority
 - MRS' quo warranto claim does not satisfy legal requirements and necessarily fails as a matter of law

Current Parameters of Michigan's CPM Doctrine

- ❖ Learned Professionals who want to incorporate must do so as a PC or PLLC
- ❖ Professionals who are not learned professionals may incorporate as PC/PLLC or as business corporation/LLC
- ❖ Nonprofit corporations may employ or contract with professionals to provide professional services, including learned professionals

Current Parameters of Michigan's CPM Doctrine

- ❖ A licensed nursing home may employ or contract with a physician or dentist to provide professional services to its residents
- ❖ For profit corporations may not employ learned professionals, but may employ other professionals
- ❖ In current practice, for profit corporations enter into independent contractor arrangements with learned professionals, where the professional retains control over the professional practice
 - ❖ Basis for employee vs. independent contractor distinction

Potential Implications of CPM Doctrine Enforcement

- ❖ Professional discipline for physicians providing professional services through entities other than PCs, PLLCs, nursing homes and nonprofit corporations
- ❖ Unenforceability of agreements between physicians and for-profit entities (including compensation and indemnification provisions) as void and in violation of the law
- ❖ Loss/forfeiture of reimbursement to physicians and legal entities for professional services rendered
- ❖ Characterization of reimbursement for professional services as fraudulent payments to illegal entities

The PC and PLLC Acts and CPM in Michigan

- **PC Act** and the **PLLC Act** define how licensed professionals may provide professional services in a legal entity formed in Michigan
- The following **key provisions** of PC and PLLC Acts address the underlying **policy rationale** for the CPM Doctrine

The PC and PLLC Acts and CPM in Michigan

Summary of Key PC and PLLC Act Provisions

- **Choice of Entity**
 - An entity that will provide the professional services of a learned professional may incorporate under either the PC Act or the PLLC Act, but not as a business corporation.
MCL 450.1201, 450.1281(1), 450.4901(1)
 - An entity that will provide the professional services of a licensed person who is not a learned professional may incorporate as a PC, a PLLC or a business corporation.
MCL 450.1201, 450.1281(1), 450.4901(1)

The PC and PLLC Acts and CPM in Michigan

Summary of Key PC and PLLC Act Provisions

- **Who May Hold Equity?**
 - Each PC shareholder must be licensed in Michigan to perform the professional service provided by the PC. *MCL 450.1283(2)*
 - Each PLLC member must be licensed in Michigan or in another jurisdiction to perform the professional service provided by the PLLC. *MCL 450.4902(a) and 450.4903(1)*
 - In PCs/PLLCs providing a professional service licensed under the Public Health Code, each shareholder/member must be licensed/legally authorized in Michigan to provide the same professional service. *MCL 450.1284(1), 450.4904(2)*

The PC and PLLC Acts and CPM in Michigan

Summary of Key PC and PLLC Act Provisions

- **Practice of Medicine and Surgery**
 - MDs, DOs and DPMs may organize with each other in the same PC or PLLC. *MCL 450.1284(2) and 450.4904(3)*

The PC and PLLC Acts and CPM in Michigan

Summary of Key PC and PLLC Act Provisions

- **Practice of Medicine and Surgery with a PA**
 - An MD, DO or DPM may organize in a PC/PLLC with a physician's assistant ("PA"). *MCL 450.1284(3) and 450.4904(4)*
 - PA organizing with MDs, Dos or DPMs ("physicians") must have a practice agreement with a physician who is a shareholder/member in the same PC/PLLC. *MCL 333.17048(3)*
 - PA must disclose upon license renewal: the PA's shareholder/member status, the physicians with whom PA has practice agreement and those physicians' shareholder/member status. *MCL 333.17048(4)*

The PC and PLLC Acts and CPM in Michigan

Summary of Key PC and PLLC Act Provisions

- **Holding Equity and Control in other Professional Entities**
 - A PC may become a shareholder, a member or manager, or a partner of another PC, a PLLC, or a partnership, respectively, provided the other entity provides the same professional service as the PC. *MCL 450.1287(2)*
 - A PLLC may become a member or manager of another PLLC, or become a partner in a partnership, provided the other PLLC or the partnership provides the same professional service as the PLLC. *MCL 450.4907(2)*

The PC and PLLC Acts and CPM in Michigan

Summary of Key PC and PLLC Act Provisions

- **Foreign Licensed Persons**
 - A licensed person from another jurisdiction may become an officer, agent, or employee of a PC, or a member or manager of a PLLC, but cannot provide professional services in Michigan unless licensed in Michigan. *MCL 450.1284(4) and MCL 450.4904(5)*
 - Note – Members and managers of PLLC that provides health care professional services must be licensed in Michigan. *MCL 450.4904(2)*

The PC and PLLC Acts and CPM in Michigan

Summary of Key PC and PLLC Act Provisions

- **Activities Limited to Rendering Professional Services**
 - A PC/PLLC shall not engage in any business other than rendering the professional services for which it was formed. *MCL 450.1287(1) and MCL 450.4907(1)*
 - Exceptions:
 - A PC/PLLC may invest its funds in funds, real estate, mortgages, stocks, or bonds.
 - A PC/PLLC may own real or personal property necessary for rendering professional services. *MCL 450.1287(2) and MCL 450.4907(2)*

The PC and PLLC Acts and CPM in Michigan

Summary of Key PC and PLLC Act Provisions

- **Only Michigan-Licensed Professionals may Provide Professional Services in Michigan through a PC/PLLC**
 - A PC or PLLC may provide professional services only through its officers, employees, agents, managers and members who are licensed or otherwise authorized to render professional services in Michigan. *MCL 450.1285(1) and 450.4905(1)*

The PC and PLLC Acts and CPM in Michigan

Summary of Key PC and PLLC Act Provisions

- **Full Assumption of Liability**
 - The individual who provides professional services remains personally and fully liable for negligent or wrongful conduct in rendering professional services. *MCL 450.1285(2) and 450.4905(2)*
 - The PC/PLLC through which services are provided remains liable up to the value of its property for negligent or wrongful acts committed by its agents who are providing professional services. *MCL 450.1285(3) and 450.4905(3)*

The PC and PLLC Acts and CPM in Michigan

Summary of Key PC and PLLC Act Provisions

- **Disqualified Persons**
 - An individual who becomes legally disqualified to provide professional services must sever all employment and financial interests in a PC/PLLC within a reasonable amount of time. *MCL 450.1286 and 450.4906*
 - A PC's/PLLC's failure to comply with this requirement may result in dissolution of the PC/PLLC.

THANK YOU

Kathleen A. Reed
Dykema Gossett PLLC
Phone: 231-348-8134
Fax: 231-348-8135
kreed@dykema.com