

## CORPORATE PRACTICE OF MEDICINE IN MICHIGAN

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### I. What is the Corporate Practice of Medicine?

Due to a rapidly changing health care environment, hospital-physician consolidation and joint ventures are quickly becoming commonplace. However, physicians and hospitals must ensure that their new organizational structures comply with Michigan corporate law and do not constitute the corporate practice of medicine. The corporate practice of medicine ("CPOM") prohibits a for-profit entity, either a corporation or a limited liability company, from practicing medicine or employing a physician to provide professional medical services. The rationale for creating the CPOM is largely rooted in public policy. Many believe that if corporations are involved in the practice of medicine and in a position to control physicians' compensation, the corporation may negatively influence patient care. After all, achieving and increasing profits is the main focus of a for-profit corporation, a focus that is contradictory to patient care as the highest concern. Therefore, the CPOM doctrine prevents business judgment from influencing medical or health care judgment.

This article provides the options under which certain "learned professions" may incorporate, including professional services corporations and professional limited liability companies. Although learned professions are generally prohibited from working for corporations, certain exceptions exist such as employment by nonprofit corporations. In addition, this article will discuss the "grey area" of CPOM currently facing non-learned professions in Michigan and offer guidance to those professions falling under the ambiguous area of the doctrine.

This article is intended to serve as a preliminary research tool for attorneys in this area. It is not intended to be a treatise nor should it be used as the sole basis for making critical business or legal decisions. This article does not constitute legal advice.

### II. Professional Service Corporation/Professional Limited Liability Company

In Michigan, those desiring to practice and perform a professional service may do so as a professional service corporation ("PC") under the Michigan Business Corporation Act (the "MBCA"),<sup>1</sup> or a professional limited liability company ("PLLC") pursuant to the Michigan Limited Liability Company Act (the "LLCA").<sup>2</sup> Both of these entity types define "professional services" as including public accountants, chiropractors, dentists, optometrists, veterinarians, osteopathic physicians, physicians, surgeons, podiatrists, chiropodists, physician's assistants, architects, professional engineers, land surveyors, or attorneys-at-law.<sup>3</sup> A subset of this group of "professional services" is known as the "learned professions" which are required to organize as a PC or PLLC, only. This subgroup consists of dentists, osteopathic physicians, physicians,

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surgeons, doctors of divinity or other clergy, and attorneys-at-law.<sup>4</sup> This requirement is known as the "learned profession" doctrine.

Several Michigan Attorney General opinions have addressed the "learned profession" doctrine and have consistently applied a four-point rationale to explain the reasons that learned professions are prohibited from organizing as an entity other than a PC or PLLC, as follows:

- Laypersons should not be permitted by virtue of the corporate form to practice medicine;
- Necessary confidential and professional relationships between physicians and patients could be destroyed by lay shareholders interested only in profit;
- The limited liability of the corporate form is not appropriate where the client must place a high degree of trust and confidence in the physician; and
- It is impossible for a corporation to fulfill the licensing and ethical requirements demanded by the practice of medicine.<sup>5</sup>

It was this rationale that led the Michigan Attorney General to conclude that neither the practice of medicine or osteopathic medical services were a lawful corporate purpose permitting formation of a corporation.<sup>6</sup> This eventually led to the enactment of the Professional Service Corporations Act, which has since been superseded by the MBCA. Nevertheless, this rationale is still relevant to any exception to the CPOM, as an exception must not have the same inherent risks.

#### A. *Professional Service Corporation*

As previously discussed, learned professions must incorporate as a PC or a PLLC. A PC is formed by filing Articles of Incorporation for use by Domestic Profit Professional Service Corporations with the State of Michigan.<sup>7</sup> The articles of incorporation of a PC must state as its purpose that the company is formed to render the professional service for which it is being formed (i.e. to practice medicine by licensed physicians). The PC must practice medicine in Michigan through its officers, employees, and agents who are licensed to practice medicine in Michigan or otherwise legally authorized to provide the services.<sup>8</sup> Every shareholder of a PC must be licensed by the State of Michigan to perform the professional service for which it was formed. Employees of the PC do not include those individuals such as a bookkeeper, secretary, or technician that provide assistance but are not ordinarily licensed individuals providing a professional service. Shares of the PC's stock must only be sold or transferred to a shareholder of the PC, a personal representative of the estate of a deceased or legally incompetent shareholder (which personal representative is not allowed to make decisions concerning the professional service of the PC), or to a trust or split interest trust in which the trustee and the current income beneficiary are each eligible to be a shareholder of the PC. A PC's failure to

comply with the requirements of the MBCA could result in the forfeiture or dissolution of the PC.

B. *Professional Limited Liability Company*

Alternatively, learned professions could choose to incorporate as a PLLC under the LLCA. A PLLC is formed by filing Articles of Organization for use by Domestic Professional Limited Liability Companies with the State of Michigan.<sup>9</sup> An entity formed as a PLLC involves one or more licensed persons who organize and become members of the PLLC. As required to form a PC, the articles of organization of a PLLC must state as its purpose that the company is formed to render the professional service for which it is being formed. Each member and/or manager must be licensed by the State of Michigan. There are some caveats to PLLC formation in Michigan, however, for example a physician's assistant cannot organize a PLLC if the only members are physician's assistants. Moreover, a person licensed in a foreign jurisdiction may become a member, manager, employee, or agent of a PLLC, but that person cannot render any professional services in Michigan until licensed to do so. In addition, a PLLC can only render the professional service for which it was specifically organized.

Both PCs and PLLCs have certain requirements that must be met by the parties forming them. A PLLC and a PC may, however, invest its funds/profits in real estate, stocks, and mortgages, own real estate or personal property used for rendering the professional service, or join a partnership, PLLC, or PC formed under Michigan law if the entity performs the same professional service as the PLLC or PC. The implications of practicing medicine in Michigan through an entity that is not a PC or a PLLC may include loss of license and repayment of all revenue for billed services to insurance companies and the state and federal government.

III. **Nonprofit Exception**

Although the CPOM doctrine limits corporate formation for learned professions, Michigan has carved out an exception that allows nonprofit corporations to employ learned professions. The most common example of this exception is a nonprofit hospital employing physicians. Pursuant to Michigan Attorney General Opinion No. 6770, Hospitals, and other nonprofit corporations, when organized under the Nonprofit Corporation Act 162 of 1982, may provide medical services through employed physicians.<sup>10</sup> The Michigan Attorney General responded to the question of whether the "learned profession" doctrine and its accompanying four-point rationale, discussed above, applied to nonprofit corporations providing medical services through employed physicians. The Michigan Attorney General found that the purpose of the "learned profession" doctrine was to prevent laypersons from commercializing the practice of medicine, which is most likely to occur when a physician is supervised by a profit-seeking shareholder.<sup>11</sup> Additionally, the Michigan Supreme Court in *Parker v. Port Huron Hospital* held that charitable, nonprofit hospitals are not immune from liability for injuries to patients caused by negligent hospital employees.<sup>12</sup> As a result of these opinions, the nonprofit exception exists because nonprofit corporations are believed to not be subject to the same risks of commercialization and limited liability inherent in the corporate form. However, physicians employed by nonprofit

corporations are still subject to all of the licensing requirements, ethical codes, and standards of practice requirements imposed by the State of Michigan.

#### IV. Problems with CPOM

The CPOM in Michigan presented a significant constraint to physician business ventures. Specifically, if physicians or other clinical personnel work for entities other than a PC or PLLC, they may be subject to disciplinary action, as well as forfeiture of revenues from payors for services rendered. For non-physician business partners, violating the CPOM may also bring both civil and, in extreme cases, potential criminal liability for engaging in the practice of medicine without a license. The CPOM also influences how physicians can be hired, the terms under which contracts are entered into, and the means by which professional services can be legally provided.

Recent decisions in Michigan highlight some of the issues practitioners face in the grey area of CPOM. Currently, the most important case on the matter is *Miller v. Allstate Ins. Co.*<sup>13</sup> In *Miller*, Miller suffered injuries and was referred by his doctor to receive physical therapy at P T Works, Inc. ("P T Works"), a Michigan domestic profit corporation.<sup>14</sup> Miller's insurance provider, Allstate, argued unsuccessfully that P T Works was unlawfully incorporated under the MBCA and should have incorporated as a professional services corporation because it offered physical therapy services. If Allstate's argument was successful, then the insurer would not have been responsible for the physical therapy services because the services would not have been lawfully rendered under Michigan's No-Fault Act. However, the Michigan Supreme Court held that only the Michigan Attorney General had standing to challenge an entity's corporate status, and that the MBCA creates an irrebuttable presumption of proper incorporation once the articles of incorporation are properly filed.<sup>15</sup> Although the *Miller* court avoided the issue of whether physical therapists must incorporate as a PC instead of a corporation, the issue could resurface as to whether now even non-learned professions providing health care services must incorporate as professional entities.<sup>16</sup>

In an effort to clarify the grey area of CPOM, the Michigan House of Representatives recently proposed legislation to narrow the definition of "services in a learned profession" in the MBCA and LLCA as applied to health professionals. If passed, the new bills would exempt services provided to nursing home residents by physicians or surgeons who are employees or independent contractors of the nursing home.<sup>17</sup> As a result, nursing homes could have employees engaged in the practice of medicine, but not be required to incorporate as a PC or PLLC. This legislation could open the door for further exceptions from the definition of learned profession, but more exceptions could also lead to further ambiguity. After the issues in *Miller*, nursing homes under this proposed legislation should consider organizing as a PC or PLLC by default to avoid the CPOM.

Other professional service providers, including chiropractors, optometrists and physical therapists, should also strongly consider organizing as a PC or PLLC to avoid complications with the CPOM. Specifically, those three professions are considered "professional services" arguably engaging in the practice of medicine, but are not currently required to organize as a PC or PLLC

like learned professions. After *Miller*, these particular professions should err on the side of assuming that organization as a PC or PLLC is no longer optional in order to ensure compliance with Michigan corporate law.

Finally, attorneys assisting in the formation of health care entities should determine whether any non-licensed shareholders will have control over services offered by the entity.<sup>18</sup> If yes, then the formed entity would likely be either improperly formed as a PC or PLLC by having non-practicing shareholders, or improperly formed as a corporation violating the CPOM. Health care entities that lack legitimate professional and non-professional relationships also risk scrutiny under Federal fraud and abuse statutes, including the Anti-Kickback Statute and the Stark Law.<sup>19</sup> It is imperative to gather as much information about the structure and leadership of any entity possibly engaging in the practice of medicine prior to filing for incorporation.

## V. Conclusion

Although the CPOM doctrine places significant limits upon the operation and formation of medical practices, a wide range of services and business relationships between physicians and non-physicians remain viable. One must keep the goal of the CPOM in perspective. The CPOM protects patient needs against a corporation's interests in maximizing its profits and reducing costs. In addition, a physician should be able to make medical decisions free from the control of non-physicians, and there exists a necessary confidential and professional relationship between a physician and his/her patient that could easily be destroyed by lay shareholders or members who are only interested in profit. The CPOM dictates that it is impossible for a corporate entity to fulfill the licensing and ethical requirements that a medical practice demands. When advising a client to form an entity in Michigan that intends to practice a learned profession, one should review and analyze the MBCA and LLCA to understand the many requirements and intricate details before filing formation documents.

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<sup>1</sup> See MCL 450.1101, et seq., specifically MCL 450.1281 to 450.1289, formerly known as the Professional Service Corporation Act, MCL 450.221 et seq., repealed in 2012 effective January 1, 2013.

<sup>2</sup> See MCL 450.4101 to 450.5200, specifically, MCL 450.4901 to 450.4910.

<sup>3</sup> See MCL 450.1282 under the MBCA, and MCL 450.4902(b) under the LLCA

<sup>4</sup> MCL 450.1109(1); MCL 450.4102(2)(t).

<sup>5</sup> See MI Op. Att'y Gen. No. 6770 (Sept. 17, 1993) (citing 47 J. Urban L. 674, 685-686 (1969)).

<sup>6</sup> See MI Op. Att'y Gen. No. 2451 (Mar. 7, 1956).

<sup>7</sup> Currently Form CSCL/CD-501 Rev. 01/14.

<sup>8</sup> A "licensed person" is an "individual who is licensed or otherwise legally authorized to practice a professional service by a court, department, board, commission, or an agency of this state or another jurisdiction, any corporation or professional services corporation all of whose shareholders are licensed persons, any partnership all of whose partners are licensed persons, or any limited liability company all of whose members and managers are licensed persons." MCL 450. 1282.

<sup>9</sup> Currently Form CSCL/CD-701 Rev. 01/14.

<sup>10</sup> MI Op. Att'y Gen. No. 6770 (Sept. 17, 1993); see MCL 450.2101 et seq.

<sup>11</sup> Id. at 3.

<sup>12</sup> See *Parker v. Port Huron Hospital*, 361 Mich. 1, 105 N.W.2d 1 (1960).

<sup>13</sup> *Miller v. Allstate Ins. Co.*, 481 Mich. 601, 751 N.W.2d 463 (2008).

<sup>14</sup> *Id.* at 604, 465-66.

<sup>15</sup> *Id.* at 605, 466.

<sup>16</sup> See Theresamarie Mantese & Gregory Nowakowski, *Survived Miller? Think Again*, Mich. B.J. 40, 41 (Mar. 2009).

<sup>17</sup> See H. B. 5377 97th Leg., Reg. Sess. (Mich. 2014); H.B. 5376 97th Leg., Reg. Sess. (Mich. 2014).

<sup>18</sup> Mantese & Nowakowski, *supra* note 21 at 42.

<sup>19</sup> *Id.* (noting that illegitimate relationships could result in improper billing services to third-party payers and federal health care programs and improper physician referrals).