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OPINION
OF
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Opinion No. 87-39

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TO: Dr. Gerald P. Rodriguez
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QUESTION:

May a corporation, organized and controlled by non-physicians, provide medical services to the general public through employed physicians?

CONCLUSION:

Yes, unless prohibited by statute or it exercises lay control of medical judgment or engages in lay exploitation of the medical profession in a manner prohibited by public policy.

ANALYSIS:

The medicine and surgery statutes pertaining to licensure of physicians, sections 61-6-1 to 61-6-32 NMSA 1978, do not address this question. Other professional licensure statutes do, however. See, e.g., section 61-5-17 NMSA 1978 of the Dental Act; section 61-8-14 (A) NMSA 1978 of the Podiatry Act; section 61-9-16 (B) NMSA 1978 of the Professional Psychologist Act; section 61-23-22(C) NMSA 1978 of the Engineering and Land Surveying Practice Act.

The Business Corporation Act, sections 53-11-1 through 53-18-12 NMSA 1978, which pertains to for-profit corporations, provides at section 53-11-3 NMSA 1978; "Corporations may be organized under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] for any lawful purpose or purposes, except banking, insurance, credit unions, savings and loan associations, railroads and waterworks organized under the Laws of 1887, Chapter 12." The Professional Corporation Act, sections 53-6-1 to 53-6-14 NMSA 1978, provides at section 53-6-1 NMSA 1978: "The purpose of this Act is to provide for the incorporation of an individual, or group of individuals, to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization." Section 53-6-3(A) NMSA 1978 defines "professional service" to include the services of medical doctors, which services "prior to the passage of the Professional Corporation Act and by reason of law, could not be performed by a corporation." The Professional Corporation Act restricts the ability of the corporation to engage in more than one professional service; requires that only licensed officers and employees render professional services; preserves the legal relationships between persons providing professional services and their clients or patients; and restricts the ability of the professional corporation to issue and transfer its shares. Sections 53-6-5, 53-6-7, 53-6-8, and 53-6-9 NMSA 1978. The thrust of the Professional Corporation Act is to permit, with restrictions, the formation of for-profit corporations to provide professional services to the public that, before the Act, could not lawfully be incorporated. Because the legislature chose to expressly prohibit the corporate practice, apart from professional corporations, in the case of dentists and podiatrists, and chose to expressly permit, with limitation, other forms of corporate practice in the case of psychologists and engineers, it may be inferred from the legislature's silence in the case of medical doctors that a corporation may be formed to provide medical services subject to the limitions discussed below. Further, the legislature has sanctioned forms of health care delivery other than by a sole practitioner or professional corporation. The legislature expressly has authorized health maintenance organizations (H.M.O.'s), which may be corporations, to provide health care services through employed providers. See section 59-46-5 NMSA 1978. Pursuant to section 59A-46-24(C) NMSA 1978 HMO's "shall not be deemed to be practicing medicine and shall be exempt from the provisions of laws relating to the practice of medicine." Non-profit health care plans may, on behalf of subscribers, pay a physician directly for services provided to a subscriber. Sections 59A-47-1 to 59A-47-35 NMSA 1978.

In any event, any categorical denunciation of the corporate practice of medicine is not warranted. Hospitals, which may be non-profit or for-profit corporations, regularly employ physicians

on a salaried basis. The negligence of those physicians may be imputed to the hospital under respondeat superior principles applicable to employer-employee relationships. See Reynolds v. Swigert, 102 N.M. 504, 697 P.2d 504 (Ct. App. 1984); Cooper v. Curry, 92 N.M. 417, 589 P.2d 201 (Ct. App. 1978). In holding that a hospital may be liable for the tortious acts of its employed physicians, New Mexico courts implicitly sanction the relationship, notwithstanding that "a hospital as an entity cannot practice medicine, diagnose an illness or prescribe a course of treatment." Reynolds v. Swigert, 102 N.M. at 508, 697 P.2d at 508. See, also, Bing v. Thunig, 2 N.Y.2d 656, 666, 143 N.E.2d 3, 8 (1957), recognizing that hospitals," regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action." See, also, Rush v. City of St. Petersburg, 205 So.2d 11 (D.Ct. App. Fla. 1985) (holding that a hospital does not engage in the unauthorized practice of medicine merely because it contracts with a physician to provide radiology services provided the proper doctor-patient relationship is preserved). As noted by Mr. Alanson W. Willcox, general counsel of the American Hospital Association, in Hospitals And The Corporate Practice Of Medicine, 45 Cornell L.Q. 432, 461 (1960), there are hospitals in which the entire staff is salaried such as the Henry Ford Hospital in Detroit, the Imogene Bassett Memorial Hospital in Cooperstown, New York, and the Mayo Clinic.

Courts have consistently rejected challenges to faculty medical practice where the medical college shares in the fees generated by physicians who are faculty members. Albany Medical College v. McShane, 66 N.Y.2d 982, 489 N.E.2d 982, 499 N.Y.S.2d 376 (1985). In addition, the employment of physicians by industrial and commercial corporations to provide necessary medical care to employees is, according to Alanson Willcox, "widely if not universally accepted as legitimate and proper."

Courts also have sustained consistently the legality of the operations of non-profit health care corporations. In People ex rel. State Board of Medical Examiners v. Pacific Health Corp., 12 Cal. 2d 156, 160, 82 P.2d 429, 430, cert. denied, 306 U.S. 633 (1938), the Supreme Court of California distinguished between for-profit corporations and various benevolent organizations furnishing medical services to its members. In discussing benevolent organizations, the Court stated:

> In nearly all of them, the medical service is rendered to a limited and particular group...; and the doctors are not employed or used to make profits for stockholders. In almost

> every case the institution is organized as a non-profit corporation or association. Such activities are not comparable to those of private corporations operated for profit and, since the principle evils attendant upon the corporate practice of medicine spring from the conflict between the professional standards and obligations of doctors and the profit motive of the corporation employer, it may well be concluded that the objections of policy do not apply to non-profit institutions.

In Complete Services Bureau v. San Diego County Medical Society, 43 Cal.2d 201, 272 P.2d 497 (1954), the Supreme Court of California held that a non-profit corporation providing medical services to subscribers was not engaged in the unlawful practice of medicine. The Court concluded that the public policy prohibiting middlemen from profiting in establishing professional relationships between doctors and members of the public was not contravened by permitting a group to form a non-profit corporation to secure for themselves medical services at low cost.

In United State v. American Medical Association, 110 F.2d 703, 714 (D.C. Cir.), cert. denied, 308 U.S. 599 (1939) an antitrust prosecution of the American Medical Association ("A.M.A.") for its interference with Group Health, a non-profit association, A.M.A. alleged that Group Health was engaged in the unlawful practice of medicine by reason of employing physicians for a salary to provide medical services to subscribers, who were members of an employee group. The court disagreed and distinguished the numerous cases involving illegal activities of for-profit corporations, stating that it was the "profit object" which condemned the other medical practice corporations. In American Medical Ass'n v. F.T.C., 638 F.2d 443, 453 (2d Cir.), affd, 455 U.S. 676 (1981), the appellate court ordered the A.M.A. to cease and desist from, among other conduct: "Restricting...or interfering with the consideration offered or provided to any physician in any contract with any entity that offers physicians' services to the public..." (emphasis supplied in original.)

Courts have on occassion condemned for-profit corporations providing medical services to the public through employed physicians in order to protect the public against possible abuses stemming from commercial exploitation by laymen of the practice of medicine and from control by laymen of the professional activities and judgments of physicians. Los Angles County v. Ford, 121 C.A. 2d 407, 263 P.2d 638 (1953); Willcox, supra, at 442, 443, 446, 447 (1960). In the context of a clinic operated for profit providing medical services to the county's indigent, where services were

performed by employed, salaried doctors, the court held that public policy was violated, because such corporate practice tends to allow commercialization and debasement of the profession. Bartron v. Codington County, 68 S.D. 309, 2 N.W.2d 337 (1947). See, also, Worlton v. Davis, 73 Ida. 217, 249 P.2d 810 (1952) (concluding that a physician's contract of employment with a co-partnership involving a lay partner was void as contravening public policy where the doctor agreed to practice medicine under the direction of co-partners); People by Kerner v. United Medical Services, Inc., 362 Ill. 442, 200 N.E. 157 (1936) (concluding that the Business Corporation Act of Illinois did not permit formation of for-profit corporations to provide medical services through physicians); United Calendar Mfg. Corp. v. Huang, 94 A.D.2d 161, 463 N.Y.S. 2d 497 (1983) (refusing to enforce a contract between a corporation and previously employed doctors where the corporation, which received 30% of patient fees, contended that the patients "belonged" to the corporation and not to the doctors.)

In Flynn Bros. Inc. v. The First Medical Associates, 715 S.W. 2d 782 (Tex. Civ. App. 1986), the court considered the legality of a management agreement between a lay person and a doctor under which the lay person received 66.67% of the net profits of the doctor's medical practice derived from contracts that the lay person secured from hospitals desiring contractual medical services. The lay person was the doctor's "exclusive management agent." The court stated:

> In effect, Dr. Adcock allowed FBI to use his license to get contracts to provide emergency medical care and staff for hospital employers in exchange for which FBI received the majority of the profits made through Dr. Adcock's practice of medicine, thereby indirectly allowing FBI to practice medicine without a license.... The design, effect, and purposes of the management agreement contravene the Medical Practices Act...

Id. at 785. The medicine and surgery statutes of New Mexico at section 61-6-14 NMSA 1978 prohibit aiding or abetting the practice of medicine by an unlicensed person and allowing a person to use a medical doctor's license. An entity, such as a clinic, hospital or other similar corporate entity employing physicians, therefore may not engage in conduct amounting to the practice of medicine by exerting lay control of professional medical judgments. Prohibited "fee splitting", however, is expressly defined and is limited to conduct in the nature of referral fees. Section 61-6-14(C) NMSA 1978.

Apart from "exploitation" by lay persons of the medical practice, courts have rejected certain forms of corporate medicine because of the dangers of lay control. In Garcia v. Texas State Board of Medical Examiners, 384 F.Supp. 434 (W.D. Tex.), aff'd, 421 U.S. 995 (1975), the district court held that a health maintenance association could not practice medicine by providing services through employed physicians where it was not organized as permitted by Texas statutes, which required that the directors of non-profit corporations organized to deliver health care be physicians. The court found that the statutes had a rational basis in that the legislature sought to preserve the doctor-patient relationship and to prevent possible abuses resulting from lay control of a corporation employing licensed doctors on a salaried basis. See, also, Virginia Beach S.P.C.A., Inc. v. South Hampton Roads Veterinary Association, 229 Va. 349, 329 S.E. 2d 10 (1985) (holding that a contract between a non-profit corporation and its employed veterinarian was illegal because the veterinarian was subject to the corporation's direction and substantial control, and the clinic received all fees in accordance with an established fee schedule).

Many of the earlier decisions in this area may not be germane to the health care environment today. A market demand for intergrated health care delivery has emerged in recent years. Such systems have been termed "brokered" arrangements and include H.M.O.'s or preferred provider organizations ("P.P.O.'s"), which "are fueled both by demand, from businesses and governments as major purchasers of health care services seeking to control and/or reduce their health care expenses...and by supply, from health care providers seeking to protect and/or increase their market share of patients...". Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 635 F.Supp. 1287, 1299 (D. Kan. 1986). These market forces may redound to the benefit of consumers of health care, and restraints on the commercial practice of physicians that inhibit their "affiliating with non-physicians or engaging in other novel arrangements which may provide more convenient or accessible health care service to the public" may invite the scrutiny of the Federal Trade Commission. See, Remarks of Acting F.T.C. Chairman, Terry Calvani, 5 Trade Reg. Rep. (CCH) ¶50,479, at 56,279 (Feb. 20, 1986).

In the absence of an express statutory answer to the question posed, we conclude that, unless prohibited by statute or by public policy considerations against lay control of medical judgment and

lay exploitation of the practice of medicine, corporations organized and controlled by non-physicians, may provide medical services to the public through employed physicians.

Respectfully submitted,

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