

# Physician Employment, Corporate Practice Issues and PPACA Cases

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# Origins of “Corporate Practice”

- State “police power” to protect the public is used to justify licensing statutes.
- Licensing medical practitioners was an attempt to address untrained, deceptive practitioners and to elevate standards of practice.
- Moral fitness and medical training are now required to obtain a license to practice medicine.

# Medical Practice

- Non-licensed physician controlled entities wished to employ (profit/control) physicians.
- These entities were not licensed to practice medicine.
- Yet, they were to have control over employees who were licensed (employer's right to control).
- Hoxsey Cancer Clinic (1957)
  - Not a licensed physician owner
  - Employed Donald Watt, MD on a salary; clinic kept fee

# HMO Case: Garcia v TSBME (1974)

- HMO attempted to obtain a certificate of authority from the Secretary of State. Charter was refused, because none of the incorporators were licensed to practice medicine.
- HMO sought to enjoin provisions in Texas law limiting the hiring of physicians by non-physician controlled entities.
- Argument: First Amendment freedom of association and due process and equal protection (Fourteenth Amendment).

# HMO

- Federal court found that state has the right to regulate the practice of medicine. This right does not violate the federal constitution.
- Court discussing issue: medical licensure requirement is designed to address “stream of public abuse at the hands of the entrepreneur medicine man purveying his snake oil elixir.”
- “Without licensed, professional doctors on the Boards of directors, who and what criteria govern the selection of medical ... staff members?”

# HMO

- “To whom does the doctor owe his first duty—the patient or the corporation?”
- “Who is to preserve the confidential nature of the doctor–patient relationship?”
- “What is to prevent or who is to control a private corporation from engaging in mass media advertising in the exaggerated fashion so familiar to every American?”

# HMO

- “Who is to dictate the medical and administrative procedures to be followed?”
- “Where do budget considerations end and patient care begin?”
- “Plaintiffs seek to do indirectly that which they cannot do directly,” the federal court said.
- State Police Power validly exercised in assuring public safety through licensing requirements

# Flynn Brothers v. First Medical Associates

- Flynn Brothers were not licensed to practice medicine.
- Brothers contract with hospital to provide medical care in the ER.
- Brothers then contract with doctors to provide care, keeping 66.67% of the fees received for “management.”
- A dispute arose.
- Court refused to enforce contract saying:

# Flynn Brothers

- Arrangement to split fees violated the Texas Medical Practice Act, which prohibits aiding the practice of medicine by any person, partnership, or corporation not duly licensed.
- Flynn brothers were not licensed to practice medicine, so court will not enforce illegal arrangement

# NPHC Carve Out

- Nonprofit Health Corporations (passed in 1971) (Section 162.001(b), Texas Occupations Code – formerly V.T.C.S., Article 4495b, Section 5.01(a)); See TMB rules at Chapter 177.
- The statute allows a Texas licensed physician to set up a NPHC to practice medicine that can be owned by a lay entity if it meets certain requirements.
- The owner is the “member/owner or parent” of the NPHC.
- The Board must be all licensed and actively-practicing Texas physicians.
- Abuses were encountered.

# NPHCs

- TMB regs.: Non-physician members/owners, such as hospitals, must meet additional requirements (See TMB Rule 177.5)
- All credentialing, quality assurance, utilization review and peer review policies shall be made by the physician board of directors.
- New directors may not be appointed without the approval of a majority of the physician directors.
- Bylaws may not be amended without physician board approval.

# 501c3 NPHCs

- In cases in which the owner/member is a IRC 501c3 hospital or health system, the NPHC may also qualify as a 501c3 entity if it meets all requirements.
- Exceptions to allow for physician appointments by the member (rather than the physician board) are permitted if the law requires.
- The IRS's interpretation of the rules condition 501c3 tax- exempt status by requiring all financial control in the member, including the right to appoint board members.

# 501c3 NPHCs

- Structural and financial control must be with the 501c3 member: articles of incorporation, bylaws, employment agreements and management agreements.
- Member (parent or owner) must make a written representation that it will exercise all of its rights in law and equity to prevent diversion or wasting of the NPHC 501c3 assets.
- NPHC must perform the essential function of the parent.

# SB 1661 (2011)

- Places many of the TMB regulations into law to assure:
  - Independent medical judgment.
  - That policies be drafted and interpreted to assure sole authority to engage in the practice of medicine is with the licensed employed or contracted physicians.
  - No discipline allowed for “reasonably advocating for patient care.”
  - Some restrictions allowed if ethical and religious directives are adopted.

# SB 1661

- Requirements may not be waived by contract.
- Administrative penalties may be applied by TMB for violations, as well as the removal of certification and the refusal to re-certify.

# SB 1705 (2009)

- Authorizes board of hospital managers of Dallas County Hospital District to:
  - Appoint, contract for, or employ physicians, dentists, and other health care providers
- Prohibits the board from supervising or controlling the practice of medicine.
- Limited to necessary employment to care for the indigent and needy residents of the district.
- Requires a committee of five physicians to approve existing policies and/or adopt new ones to assure independent medical judgment in providing care for patients.

# SB 1705 (2009)

- Requires policies on credentialing, quality assurance, utilization review, peer review, medical decision-making and due process.
- Committee member must report to TMB if a committee member reasonably and in good faith believes an action “...constitutes a compromise of the independent medical judgment of a physician in caring for a patient.”
- Requires disclosure of financial conflicts of interest.
- All doctors to report to the chief medical officer.

# HB 1568 (2011)

- Harris County Hospital District may contract for or employ physicians.
  - May not supervise or control the practice of medicine, mandates independent medical judgment
  - Can employ to the extent to fulfill the statutory mandate of the district; to provide medical care for the indigent and needy of the district.

# HB 1568

- Policies to be adopted:
  - Governance of the medical executive board
  - Credentialing
  - Quality assurance
  - Utilization review
  - Peer review
  - Medical decision-making
  - Due process
  - Conflicts of interest

# HB 1568

- A conflict management process must be developed to address any conflict between management and policies adopted by the medical executive committee.
- Verification statement must be signed by the chair of the medical executive committee.
- A report to the TMB that physicians are being employed is required of the chief medical officer.
- If a compromise of patient care is made due to not allowing the physicians independent judgment, a report to TMB required.

# HB 1568

- Includes a provision for employment by the commissioners of Harris County to employ physicians to care for jailed inmates.

# SB 894 (2011)

- Critical access hospitals, sole community hospitals and those hospitals located in a county of 50,000 or less may employ physicians. The hospital must:
  - Appoint a chief medical officer who has been recommended by the medical staff.
  - Promote independent medical judgment through policies adopted and enforced.
  - Adopt policies that include:

# SB 894

- Credentialing and privileges
- Quality assurance
- Utilization review
- Peer review and due process
- Medical decision-making
- Complaint mechanism regarding interference or attempt to interfere with a physician's independent medical judgment

# SB 894

- Policies adopted must be approved by the medical staff of the hospital.
- Employed physician must report to chief medical officer of the hospital.
- Conflict management process must be adopted and implemented.
- Chief medical officer must report to the TMB that the hospital is employing physicians and when a compromise of independent medical judgment occurs.

# SB 894

- Equal consideration must be given to employed and other physicians regarding medical staff membership and privileges.
- No discipline allowed for the employed physicians reasonably advocating for patients.
- The employed physician may participate in the selection of professional liability coverage, may choose to have independent defense, and has the right to consent to any proposed settlement of an action brought against the physician.

# HB 2351 (2011)

- Special bill for Bexar County Hospital District
  - Allows BCHD to employ physicians through a NPHC certified by the TMB and created by the Bexar County Hospital District.
  - BCHD is not allowed to supervise or control the practice of medicine.

# PPACA Court Challenges

- Thirty law suits have been filed challenging PPACA on constitutional grounds.
- Almost all the suits argue that the “Commerce Clause” does not support the individual mandate.
- Two cases have been decided by a federal court of appeals and are on their way to the United States Supreme Court

# Federal Court Of Appeals Cases

- 11th Circuit ruled that requirement on individuals to carry health insurance or pay penalty is unconstitutional (2 to 1).
- Sixth Circuit rules insurance requirement on individuals is constitutional (2-1).
- Fourth Circuit dismissed two challenges to the law, other challenges are pending.
- D.C Circuit heard arguments on Sept 23.
- US Supreme Court expected to take up issue in the spring or 2012.

# Court Challenges

- A case challenging the PPACA restrictions on physician ownership of hospitals is on appeal to Fifth Circuit court of Appeals.
  - TMA and The Physicians Foundation filed amicus curiae briefs at the trial and appellate in support of challengers to legal restrictions.
  - Arguments against physician ownership are flawed and unreasonable.
  - PPACA creates financial incentives for physicians to take financial risk (ACOs) but restricts hospital ownership, removes competition and inhibits innovation.

# IPAB suit

- District Court case in Arizona filed in 2010 challenging the IPAB.
  - IPAB: fifteen persons is to be appointed to identify Medicare cuts
  - Secretary of HHS is mandated to implement cuts unless Congress overrides recommendations.
  - Cuts cannot be “rationing” of care per statute.
  - Cuts can include decisions not to cover certain medical services.

# IPAB Suit

- Goldwater Institute and others filed suit arguing that the IPAB provisions are an unconstitutional delegation of authority to the executive branch.
- Congress's ability to alter or reject IPAB recommendation is severely limited.
- A three-fifths vote is required to stop recommendation, among other restrictions.

# IPAB suit

- Congress has 14 business days in 2017 to propose a “Joint Resolution” repealing IPABS’ statutory authority or it is precluded from ever doing so in the future.
- Sever legislative timelines for consideration and debate of IPAB recommendations or of altering or repealing delegation to IPAD are included in the enabling legislation and applicable to future sessions of Congress.

# Medicare

- Second largest social “insurance” program is the United States
- 47.5 million beneficiaries
- Benefits paid in 2010 = \$516 billion
- Medicare Trust fund will be “exhausted “ in 2024 per CMS 2011 Trustees Report

# Don't bite the hand that feeds you



# Happy Trails

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