Resolution 23-305

Corporate Practice of Medicine Prohibition

South Florida Caucus, Florida Chapter Division of the American Academy of Emergency Medicine and the Florida College of Emergency Physicians

Whereas, A majority of Florida's physicians are employed with no ownership in their practice (54.8% as of 2021[1]); and

Whereas, This lack of physician ownership, especially in the setting of private equity ownership, leads to a prioritization of profits over quality patient care due to understaffing, replacement of physicians with non-physician practitioners and an inflation of costs to the patients as seen with increases in out of network charges and "surprise billing"[2]; and

Whereas, The Corporate Practice of Medicine (CPOM) doctrine is a legal prohibition that exists in many states to keep the business interest out of the physician-patient relationship, specifically prohibits the ownership and operation of medical groups or practices by laypersons; and

Whereas, Florida already has statutes prohibiting the corporate practice of dentistry and optometry as well as statutes prohibiting the fee splitting of physician professional fees; and

Whereas, The CPOM prohibition has as its main purpose the protection of patients and the avoidance of the commercialization of the practice of medicine; and

Whereas, Private equity ownership and corporate practice of medicine constitutes a financial conflict of interest that harms the physician-patient relationship and the quality of healthcare;

Whereas, A bill to prohibit the Corporate Practice of Medicine was already introduced in both the Florida House and Senate during the 2023 legislative session; therefore be it

RESOLVED, That FMA will support legislation to limit ownership of physician practices to physicians only; and be it further

RESOLVED, that this can be accomplished by amending Florida Statutes Title XXXII Chapter 458 Medical Practice with a new section "Proprietorship by Non-physicians" (for any physician practice formed or sold after the effective date of the amended legislation) prohibiting any person (or entity) other than a physician (or group of physicians), hospital or university/medical school, licensed pursuant to Florida law from:

1. Employing a physician.
2. Directing, controlling, or interfering with a physician's clinical judgment.
3. Having any relationship with a physician which would allow the unlicensed to exercise control over:
    a. The selection of a course of treatment for a patient; the procedures or materials to be used as part of such course of treatment; and the way such course of treatment is carried out by the licensee.
    b. The patient records of a physician.
    c. Policies and decisions relating to billing, credit, refunds, and advertising; and

d. Decisions relating to the physician or non-physician staffing, office personnel and hours of practice; and be it further

RESOLVED, That the Florida Medical Association bring a resolution to the American Medical Association at the next meeting to seek similar legislation or regulation, prohibiting the corporate practice of medicine at a federal level.

Fiscal Note:

Description	Amount	Budget Narrative
110 staff hours	$17,700	Can be accomplished with current staff
Total	$17,700	$0 added to the operating budget

Fiscal notes are an estimate of the cost to implement a given Resolution. All Resolutions that are adopted by the House of Delegates will be referred to the FMA Committee on Finance and Appropriations for fiscal consideration.

Reference Committee: III – Legislation & Miscellaneous

References:

1) https://www.floridahealth.gov/provider-and-partner-resources/community-health-workers/HealthResourcesandAccess/physician-workforce-development-and-recruitment/2021DOHPhysicianWorkforceAnnualReport-FINALREPORT-10-25-2021.pdf

2) https://www.nytimes.com/2017/07/24/upshot/the-company-behind-many-surprise-emergency-room-bills.html

Florida's Prohibition on the Corporate Practice of Dentistry

Florida law prohibits the corporate practice of dentistry.[14] This law states that its purpose is to: " . . . [P]revent a non-dentist from influencing or otherwise interfering with the exercise of a dentist's independent professional judgment."

This Florida statute[15] prohibits any person (or entity) other than a dentist licensed pursuant to Florida law from:

4. Employing a dentist or dental hygienist;

5. Controlling the use of dental equipment or material in the provision of dental services; or

6. Directing, controlling, or interfering with a dentist's clinical judgment[16];

7. Having any relationship with a dentist which would allow the unlicensed to exercises control over:

    a. The selection of a course of treatment for a patient, the procedures or materials to be used as part of such course of treatment, and the manner in which such course of treatment is carried out by the licensee;

    b. The patient records of a dentist;

    c. Policies and decisions relating to pricing, credit, refunds, warranties, and advertising; and

    d. Decisions relating to office personnel and hours of practice.[17]

The statute specifies that "Directing, controlling or interfering with a dentist's clinical judgment" is defined as not including dental services contractually excluded, the application of alternative benefits that may be appropriate given the dentist's prescribed course of treatment, or the application of contractual provisions and scope of coverage determinations in comparison with a dentist's prescribed treatment on behalf of a covered person by an insurer, health maintenance organization, or a prepaid limited health service organization.[18]

The statutes does indicate that dentists may contract, lease or rent dental equipment or materials without violating the law. But, any lease agreement, rental agreement, or other arrangement between a non-dentist and a dentist whereby the non-dentist provides the dentist with dental equipment or dental materials shall contain a provision whereby the dentist expressly maintains complete care, custody, and control of the equipment or practice."[19]

This Florida law provides several different remedies. First, violation by anyone is a crime, which may be prosecuted by the State's Attorney as a felony of the third degree.[20]Additionally, the statute itself states that any contract or arrangement that violates this act is void as a matter of public policy.[21]

Florida's Dental Practice Act, in Section 456.028(1)(h), specifically allows disciplinary action to be taken against a licensed dentist for: "Being employed by any corporation, organization, group, or person other than a dentist or a professional corporation or limited liability company composed of dentists to practice dentistry."[22]

The Florida Board of Dentistry has implemented administrative rules, which add additional restrictions and clarifications to enforce this statute.[23] The Florida Board of Dentistry is very active in policing and prosecuting violations of it.

§466.0285, Fla. Stat. (2002), entitled "Proprietorship by Nondentists."

§466.0285, Fla. Stat. (2002).

§466.0285(1), Fla. Stat. (2002).

§466.0285(2), Fla. Stat. (2002).

§466.0285(1) (c), Fla. Stat. (2002).

§466.0285(1)(c), Fla. Stat. (2002).

§466.0285(3), Fla. Stat. (2002).

§466.0285(4), Fla. Stat. (2002).

§466.028(l) (h), Fla. Stat. (2002).

Florida Board of Dentistry rules F.A.C. 64B5-17.013.

§463.014, Fla. Stat. (2002).

§463.014(l)(b), Fla. Stat. (2002).

See Cole Vision Corporation and Vision Works, Inc. v. Department of Business and Professional Regulation, Board of Optometry, 688 So,2d 404, 408 (Fla. 1st DCA 1997) (holding that §§463.014(1)(a) and (b) and §484.006(2) Fla. Stat., when read together, mean that, while optometrists cannot form partnerships or professional associations with or be employed by opticians, opticians can be employed by an optometrist).

F.A.C. 64B13-3.008(5) (prohibiting any control which includes type, extent, availability or quality of optometric services, types of material available, access to or control of records, prescriptions, scheduling and availability of services, time limitations on patient exams, volume of patients, fee schedules and information disseminated to the public).
F.A.C.64B13-3.008(15)(f).

Fee Splitting/Kickbacks

Court Upholds Phymatrix Ruling

BYLINE: Palm Beach Post Staff and Wire Reports
DATE: July 2, 1999
PUBLICATION: The Palm Beach Post
EDITION: FINAL
SECTION: BUSINESS
PAGE: 7D
MEMO: In brief
A state appellate court has upheld a ruling that doctors can't pay a percentage of their profits to physician management companies that run their offices and handle their business affairs.
The ruling by the 1st District Court of Appeal in Tallahassee upheld a November 1997 order by the Florida Board of Medicine. The June 25 ruling went against PhyMatrix Corp., a company formerly based in West Palm Beach
that bought and managed doctors' practices. At issue was a 30 percent annual fee PhyMatrix charged doctors based on a practice's net income.
The Board of Medicine had said fees based on a percentage violate state law that prohibits paying or receiving payment in exchange for patient referrals. The board said a flat fee would have been acceptable under the
law.
The case, involving a 15-doctor practice in the Tampa area, was brought by Magan Bakarania, a cardiologist who was considering joining the practice.
PhyMatrix is now getting out of the physician practice management business. This year the company moved to Providence, R.I., and changed its name to Innovative Clinical Solutions.

Contract Issues

Percentage of Fees Taken Makes Florida PPM Contract Illegal

According to a report in the *Tampa Bay Business Journal*, a Florida Court of Appeals has affirmed an 18-month old Florida Board of Medicine decision involving a group of Tampa doctors who contracted with a West Palm Beach-based physician practice management company, PhyMatrix Corporation.
The Board found that the PhyMatrix contract with Access Medical Care, the primary care practice employing the physicians in question, was illegal. The contract called for Access, in exchange for various services, to pay PhyMatrix a percentage of the revenues doctors get from PPM-generated referrals. The Board said that such percentage payments amount to fee-splitting to pay for referrals, which is illegal under Florida law. The appeals court agreed. As a result, hundreds of Florida doctor-PPM contracts will likely have to be revamped.

The story quotes Alan Gassman, the attorney who represented Access in the case, as saying that doctors may have another concern as well-making sure they are not violating criminal statutes under Florida's Patient Brokering Act. Gassman said since the appeals court was the highest court to date to review a decision involving practice management contracts, doctors seeking to escape such pacts are now well-armed to do so in local courtrooms. Further, he said, the Florida decision could have influence in other states, most of which have similar laws against fee splitting.

Note: This ruling has important implications for EM in Florida and may serve as a guidepost in other states. Importantly, the actions of the Florida Board of Medicine point out a largely untapped resource to fight abusive contracts in EM. Under the fee-splitting prohibitions in Florida and other states, one should not be forced to split their fee in order to receive referrals. With the typical EM contract where the pit doctor gives up 30-50% of their fees in order to work in an ED and thereby receive referrals, these statutes are implicated. Emergency physicians in such arrangements should strongly consider reporting the physicians who front for the big groups or the "dictators" who are the sole owners of one or two lucrative contracts to their state Board of Medicine for investigation of fee-splitting. The various Boards of Medicine are primarily composed of physicians responsible for upholding the moral and ethical aspects of the profession and represent an important resource for EPs.

The most direct effect of this ruling is for emergency physicians in Florida whose contracts spell out a percentage-based formula for compensation. Since this ruling invalidates the contract, the rank and file emergency physicians in such a situation are now presented with an opportunity to break away from a contract group or a dictator and take control of their professional future. For more information on fee splitting the reader should access www.aaem.org.

FLORIDA

Statutes

§456.327 (prohibiting the unlicensed practice of medicine)
§641.01 et seq. (Health Care Service Plans)
§641.17 et seq.(HMO Act) (providing for arrangements between physicians and HMOs.)

Cases

Dr. Allison, Dentist, Inc. v. Allison (1935) 360 Ill. 638, 196 N.E. 799, 800 (stating that doctors who were hired by corporations would "owe their first allegiance to their corporate employer and cannot give the patient anything better than a secondary or divided loyalty."); State Bd. of Optometry v. Gilmore (1941) 147 Fla. 776 3 So. 2d 708 (physician employed as salaried optometrist by jewelry store violated statute prohibiting employment of optometrist by corporation); Rush v. City of St. Petersburg (Fla. Dist. Ct. App. 1967) 205 So. 2d 11 (where physician argued that a contract to provide radiological service to the city hospital was void on the ground that performance of the contract would result in the illegal corporate practice of medicine by the hospital, the court held that the hospital was not engaged in the illegal practice of medicine because the doctor-patient relationship was maintained); Cohen v. Department of Professional Regulation Bd. of Optometry, (Fla. Dist. Ct. App. 1981) 407 So. 2d 621 (affirming a finding of practicing optometry under a corporate name).

Recent Decisions Clarify Legality of Percentage-based Physician Management Contracts

By *Mark Bancroft Langdon* and *Larri Short* of Arent Fox

Note: The alert is also available in Adobe PDF format here.

On June 25, 1999, in PhyMatrix Management Co., Inc. v. Bakarania, Fla. Dist. Ct. App., No. 97-4534, 6/25/99, the Florida First District Court of Appeal, in a per curium decision, affirmed a 1997 Board of Medicine ruling that a physician practice paying a percentage of net income to a physician practice management company ("PPMC") in return for "practice-expansion activities" is engaging in illegal fee-splitting in Florida. The PPMC's "practice-expansion activities" involved developing contracts with insurers, hospitals, and other medical providers designed to generate patient referrals to the practice. The court's decision cannot be appealed.

The Bakarania case came before the Board of Medicine in 1997 when Dr. Bakarania asked the Board for advice about the legality of a contract between PhyMatrix Management Co. and Access Medical Care, Inc., a group medical practice which he was considering joining. Noting that the management company received 30 percent of the physicians' net income in return for services which included practice enhancement activities, attorneys for Dr. Bakarania argued that the payment methodology violated the prohibition against fee splitting in the Florida Medical Practice Act. The Board of Medicine agreed. As written, the ruling could be interpreted to bar all percentage-fee contracts. While not binding outside of Florida, because the Florida statutory provision is similar to those in other states, the decision had a chilling effect upon the growth of PPMCs across the country.

Another recent decision from Florida, however, is not so restrictive. Two weeks before the Florida appellate court's affirmance of the Bakarania decision, the Florida Board of Medicine issued a declaratory statement, ruling that percentage fees paid to a management firm *are* permissible under the fee-split bar if the percentage fees are not tied to activities that are designed to bring more patients into the practice. The case involved a proposed contract between an anesthesiology practice and a management company, where the management company would be paid 50 percent of net collections up to $10,000 a month to be responsible for office space, staff, equipment, personnel, and billing and collection services but not for the types of "practice enhancement" activities with which the Board took issue in the Bakarania case. Although the specific rationale underlying the Board's decision will not be known until its final order is published sometime next month, the decision is significant for the PPMC industry since it appears to confirm that percentage-based arrangements involving only basic management services will not run afoul of the Florida fee-splitting law.

Reading the two decisions together, it appears the legality of percentage-based contracts between PPMCs and Florida physicians depends upon the types of services the PPMC is contractually required to provide. To the extent the management company provides traditional administrative services, such as billing and collections, the fee-split law should not be implicated. However, PPMCs wishing to furnish marketing services designed to generate referrals appear to be restricted to contracts which provide a flat fee for practice expansion activities.

It is ironic that these developments arise from Florida, one of a handful of states which does not prohibit the corporate practice of medicine. Thus, PPMCs operating in Florida can achieve the financial results

they seek by restructuring their relationships with physicians from independent contractors to employees. Should other states follow the lead of the Florida Board of Medicine, that option may not be available and PPMCs will be forced to consider alternative financial arrangements with its physicians.