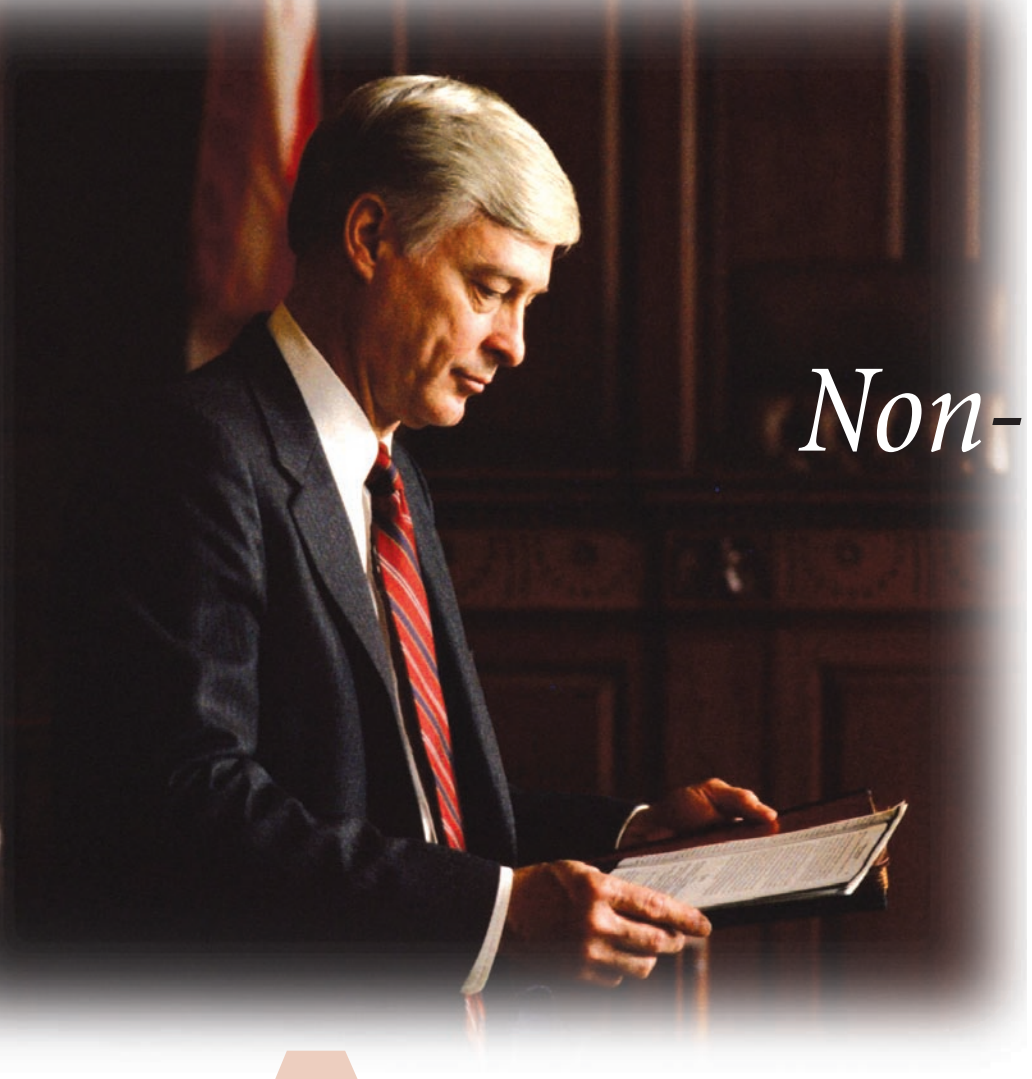

The Non-Corporate Practice of Medicine

By Padraic B. Deighan, M.B.A., J.D.

A little known but powerful legal concept has all but been ignored in recent trends in cosmetic and aesthetic medicine. Forty-five out of fifty states have enacted legislation that prohibits the corporate practice of medicine. There is also federal legislation on the issue. Most of these laws have been in existence for many years.

Generally, the concept of these laws is that physicians should be free to practice medicine without taking into account financial considerations. The theory is that physicians should not allow financial considerations to affect their medical judgment. These regulations exist so that appropriate medical providers are making medical decision as opposed to business managers making medical decisions.

MEDICAL SPA OWNERSHIP

Non-physicians are specifically prohibited from owning most medical practices. There are few exceptions to this rule. The exceptions are extremely limited. For example, in 1973 President Nixon set up a commission to establish and implement Health Maintenance Organizations (HMOs). HMOs were granted a limited exemption from the prohibitions of the non-corporate practice of medicine.

In the mid to late 1990's, another business entity, the Physician Practice Management Company (PPMC) wave began to constructively own medical practices. However, the PPMCs did not actually "own" the

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practices, but rather they established management agreements between the medical practice and the management company.

In my opinion, the emergence of PPMCs gave rise to the perception that non-physicians could in fact own medical practices or otherwise practice medicine. As stated above, however, the PPMCs did not own the medical practice and theoretically did not violate the non-corporate practice of medicine regulations. By the year 2002, many of the PPMCs had vanished. However, it was significant to note that properly structured PPMCs had approximately 500 pages of legal agreements between the management company and the physician or medical practice. The high number of pages was the result of the necessity to avoid the appearance that the PPMC itself was practicing medicine. Virtually all of these documents ensured that the medical decisions were being made by the physicians or their proper designee.

MEDICAL FACILITY FRANCHISING

Today there are many medical facilities that appear to be franchises or businesses practicing medicine. Many if not most of these are violating state and federal statutes. With very few exceptions, a business enterprise cannot directly employ physicians or other healthcare providers to practice medicine. This includes cosmetic or aesthetic medicine. Many of the agreements by and between the business entity and the medical provider are merely a few pages in length. They cannot adequately address the issues in so few pages.

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It would be safe to conclude that all medical laser centers (including laser hair removal) are subject to the non-corporate practice of medicine regulations. You would never fathom this by the widespread proliferation of this type of facility. The reason is that such facilities are either actually practicing medicine, utilizing medical devices, or advertising in such a manner that it would be implied that they are practicing medicine. Some are also practicing medicine since they are in some manner dispensing prescription medication (such as Botox® Cosmetic).

REGULATIONS

Enforcement of these regulations is likely to increase for the simple reason that many members of the public are being harmed in these business-owned centers. As the injury to the public increases, the government is responding with higher

enforcement. The other reason that enforcement is likely to increase is that people (including physicians) are filing complaints with respective state and federal agencies (including Boards of Medicine). Such complaints, which may be little more than a letter, are the largest source of new compliance actions. Most Boards of Medicine, by law, are required to investigate any complaint regardless of merit on its face.

In fact, it is the cosmetic and aesthetic rise in non-physician owned centers that is causing the government to increase enforcement. At a recent conference for health care attorneys, it was estimated that the number of attorney generals or staff who were present had tripled over previous years. The reason for the increase was the expected increase in compliance actions. The attorney generals were being educated on fraud, compliance, and corporate practice of medicine issues. This is important to note since there are substantial criminal and civil penalties for violations of these regulations. The civil penalties alone could be substantial.

Medicine in the United States (as well as most developed nations) is a heavily regulated industry. Medicine represents approximately 15-17% of our Gross Domestic Product (GDP). Accordingly, healthcare is a major industry in the United States, but the fact remains that it is a heavily regulated industry.

SUPERVISION AND THE HEALTHCARE PROVIDER

Another problematic development is that many of the business-owned medical facilities are improperly staffed with healthcare providers who are not properly supervised by an appropriate physician. However, we will not discuss that in this issue but will address that in future columns.

These prohibitions do not preclude physicians from having an entrepreneurial spirit. Physicians are free to develop and implement medical business plans that are legally and medically supportable. Many have embarked on strategies such as medical spas.

The prohibitions do apply to business people or business entities from owning and in most instances, operating a medical facility. They would also apply to business persons and entities from directly employing physicians. Again, the theory of these laws and the reason for their existence is that the public and its health should not be subject to decisions being made because of business considerations. The concept is that our health care system may suffer if decisions are based upon business criteria.

There seems to be speculation on what the actual practice of medicine entails. It is not as difficult to determine as it may appear. If your business is diagnosing or treating medical conditions, you are practicing medicine. Additionally, if you are utilizing certain federally classified medical devices (such as virtually all efficacious lasers and many ultrasound devices), you are practicing medicine. You are also practicing medicine if your business is utilizing certain strength chemicals (such as exfoliants) and prescription materials.

As mentioned above, non-

physician owned business entities have tremendous difficulty employing physicians and an even harder time employing non-physician health care providers. It is the perception of many (due to widespread use) that it is acceptable for a business entity to employ nurses to provide medical services to the public. Many nurses are putting forth this proposition as well. With limited exceptions, this is not the case. In fact, it is even more legally problematic to employ non-physician health care providers by a business entity because such health care providers require (again, with limited exception) physician supervision or delegation.

CHANGE OF THE TIMES

Admittedly, these statutes have been in effect for many years. It is also true that enforcement has been scant. However, this is about to change because of abuses and because the states have recognized the need to enforce due to the abuses. Most of these state and federal laws are very clear and very broad to include a wide variety of situations.

None of this is to suggest that the "merger" of business and medicine is not possible. However, extreme care must be taken to ensure compliance with state and federal laws. There also are never any guarantees that you are in compliance because such statutes are necessarily vague and subject to interpretation. Enforcement actions are truly based on a "case-by-case" determination. Just because the facility down the road has been operating longer than you does not mean to imply that it is acceptable for you to also be doing certain procedures.

Similarly, if a facility has been the subject of a regulatory intervention and their business plan was found in compliance (unlikely since even the most carefully constructed plans are typically violative of some aspect of health law), this does not mean that your facility will be found in compliance as well.

Since the rise in enforcement actions is directly related to the number of complaints filed by the public and medical professionals, it is particularly important to pay close attention to the non-corporate practice of medicine statutes. One letter sent to the government could result in the closure of your business (sometimes immediately). Accordingly, seek proper counsel and do not embark on questionable practices since the fines and penalties are severe, and the more blatant the violation, the heavier the fine or penalty. Many of the business models that I have reviewed would be subject to enormous fines and penalties because the abuses are significant.

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