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September 29, 2010

Honorable Pedro Nava
Room 2148, State Capitol

PHYSICAL THERAPISTS: MEDICAL CORPORATIONS - #1021592

Dear Mr. Nava:

You have asked us whether a physical therapist may be subject to discipline by the Physical Therapy Board of California for providing physical therapy services as an employee of a medical corporation. In analyzing this question, you have asked us to consider whether subdivision (h) of Section 2660 of the Business and Professions Code may be implicated.

Generally, the formation, powers, and duties of corporations are expressed in various statutory provisions of the Corporations Code (see generally, Div. 1 (commencing with Sec. 100), Title 1, Corp. C.). A corporation is a "creature of statute;" therefore, it has only those powers as expressed in a statute (see *Kaysser v. McNaughton* (1936) 6 Cal.2d 248, 253). As a general rule, corporations are prohibited from practicing learned professions, such as medicine (*People v. Cole* (2006) 38 Cal.4th 964, 970-971; *California Assn. of Dispensing Opticians v. Pearle Vision Center, Inc.* (1983) 143 Cal.App.3d 419, 427 (finding that the ban on corporate practice of medicine applies to optometrists); *Benjamin Franklin Life Assur. Co. v. Mitchell* (1936) 14 Cal.App.2d 654, 656-657; *Pacific Employers Ins. Co. v. Carpenter* (1935) 10 Cal.App.2d 592, 594-595; 11 Ops.Cal.Atty.Gen. 236 (1948)). Among the reasons for this prohibition is to avoid the control of the practice of medicine by laypersons (*California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790, 810) and to protect the public from possible abuses stemming from commercial exploitation of the practice of medicine (*Los Angeles County v. Ford* (1953) 121 Cal.App.2d 407, 413).

The rule prohibiting the corporate practice of medicine is codified in the Medical Practice Act (Ch. 5 (commencing with Sec. 2000), Div. 2, B.& P.C.) in Sections 2052 and 2400 of the Business and Professions Code¹ (*California Physicians' Service v. Aoki Diabetes*

¹ All further section references are to the Business and Professions Code unless otherwise indicated.

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Research Institute (2008) 163 Cal.App.4th 1506, 1514). Subdivision (a) of Section 2052 prohibits a person from practicing or holding himself or herself out as practicing any system or mode of treating the sick or afflicted in this state, or diagnosing or treating any physical or mental condition of a person, without having a certificate under the Medical Practice Act or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law (see *SteinSmith v. Medical Board* (2000) 85 Cal.App.4th 458, 460). However, a certificate under the Medical Practice Act is only available for natural persons (see Secs. 2082, 2089, and 2096). Furthermore, Section 2400 makes clear that a corporation does not have the ability to obtain a license or engage in the practice of medicine, as follows:

"2400. Corporations and other artificial legal entities shall have no professional rights, privileges, or powers. However, the Division of Licensing may in its discretion, after such investigation and review of such documentary evidence as it may require, and under regulations adopted by it, grant approval of the employment of licensees on a salary basis by licensed charitable institutions, foundations, or clinics, if no charge for professional services rendered patients is made by any such institution, foundation, or clinic."

Exceptions to the rule banning the corporate practice of medicine have been made in various circumstances.² Specifically, medical and podiatry corporations are exempt from the rule if they are practicing pursuant to, and in compliance with the Moscone-Knox Professional Corporation Act (Pt. 4 (commencing with Sec. 13400), Div. 3, Title 1, Corp. C.; hereafter the Professional Corporation Act), which authorizes the formation and operation of professional corporations (Sec. 2402). The Professional Corporation Act defines a professional corporation as "a corporation organized under the General Corporation Law or pursuant to subdivision (b) of Section 13406 [of the Corporations Code] that is engaged in rendering professional services in a single profession, except as otherwise authorized in Section 13401.5 [of the Corporations Code], pursuant to a certificate of registration issued by the governmental agency regulating the profession as herein provided and that in its practice or business designates itself as a professional or other corporation as may be required by

² Health care service plans are specifically authorized to employ physicians (subd. (b), Sec. 1395, H.& S.C.; see also Sec. 2411). The courts have also found authorization for contracting for physician's services, even where the statutory language was not compelling, where there were limitations on improper motives (*Los Angeles County v. Ford*, *supra*, at pp. 413-414). In addition, arrangements not amounting to employment relationships may be entered into by hospitals and physicians for the provision of medical services (see *Blank v. Palo Alto-Stanford Hospital Center* (1965) 234 Cal.App.2d 377). For purposes of this opinion, we will assume that none of these exceptions apply to the corporation in question here.

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statute" (Sec. 13401, Corp. C.). Thus, a professional corporation may only render services in a single profession except as authorized under Section 13401.5 of the Corporations Code.

Section 13401.5 of the Corporations Code provides that certain licensed persons "may be shareholders, officers, directors, or professional employees of the professional corporations designated in this section so long as the sum of all shares owned by those licensed persons does not exceed 49 percent of the total number of shares of the professional corporation so designated herein, and so long as the number of those licensed persons owning shares in the professional corporation so designated herein does not exceed the number of persons licensed by the governmental agency regulating the designated professional corporation." (Emphasis added.) With respect to medical corporations, subdivision (a) of Section 13401.5 provides that the following licensed persons may be shareholders, officers, directors, or professional employees of the corporation:

- "(a) Medical corporation.
- "(1) Licensed doctors of podiatric medicine.
- "(2) Licensed psychologists.
- "(3) Registered nurses.
- "(4) Licensed optometrists.
- "(5) Licensed marriage and family therapists.
- "(6) Licensed clinical social workers.
- "(7) Licensed physician assistants.
- "(8) Licensed chiropractors.
- "(9) Licensed acupuncturists.
- "(10) Naturopathic doctors."

Section 13401.5 of the Corporations Code thereby liberalizes the language of Section 13401 of the Corporations Code by allowing more than the members of a single profession to participate in the ownership and operation of certain professional corporations.

Pursuant to the doctrine of "expressio unius est exclusio alterius," the enumeration of acts, things, or persons as coming within the operation or exception of a statute will preclude the inclusion by implication in the class covered or excepted of other acts, things, or persons (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403). Courts may not read into a statute an exception not incorporated therein by the Legislature, unless such an exception must reasonably and necessarily be implied (*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1265). As a result, we think that only the licensees listed in paragraphs (1) to (10), inclusive, of subdivision (a) of Section 13401.5 of the Corporations Code may be professional employees of a medical corporation. Because this list does not include physical

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therapists, we think that a physical therapist is prohibited from providing physical therapy services as an employee of a medical corporation.³

We next turn to whether a physical therapist may be subject to discipline by the Physical Therapy Board of California (hereafter the board) for providing physical therapy services as an employee of a medical corporation. The Physical Therapy Practice Act (Ch. 5.7 (commencing with Sec. 2600), Div. 2) provides for the licensure and regulation of physical therapists by the board. Section 2660 authorizes the board to revoke or impose probationary conditions upon any license, certificate, or approval issued under the Physical Therapy Practice Act for unprofessional conduct, as follows:

"2660. The board may, after the conduct of appropriate proceedings under the Administrative Procedure Act, suspend for not more than 12 months, or revoke, or impose probationary conditions upon any license, certificate, or approval issued under this chapter for unprofessional conduct that includes, but is not limited to, one or any combination of the following causes:

"(a) Advertising in violation of Section 17500.

"(b) Fraud in the procurement of any license under this chapter.

"(c) Procuring or aiding or offering to procure or aid in criminal abortion.

"(d) Conviction of a crime that substantially relates to the qualifications, functions, or duties of a physical therapist or physical therapist assistant. The record of conviction or a certified copy thereof shall be conclusive evidence of that conviction.

"(e) Habitual intemperance.

"(f) Addiction to the excessive use of any habit-forming drug.

"(g) Gross negligence in his or her practice as a physical therapist or physical therapist assistant.

"(h) Conviction of a violation of any of the provisions of this chapter or of the Medical Practice Act, or violating, or attempting to violate, directly or indirectly, or assisting in or abetting the violating of, or conspiring to violate any provision or term of this chapter or of the Medical Practice Act.

³ Furthermore, in 2003, Section 13401.5 of the Corporations Code was amended to authorize naturopathic doctor corporations to employ various licensed professionals, including licensed physical therapists (Ch. 485, Stats. 2003). The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other aspects are made is indicative of an intent to leave the law as it stands in the aspects not amended (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 596).

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"(i) The aiding or abetting of any person to violate this chapter or any regulations duly adopted under this chapter.

"(j) The aiding or abetting of any person to engage in the unlawful practice of physical therapy.

"(k) The commission of any fraudulent, dishonest, or corrupt act that is substantially related to the qualifications, functions, or duties of a physical therapist or physical therapist assistant.

"(l) Except for good cause, the knowing failure to protect patients by failing to follow infection control guidelines of the board, thereby risking transmission of blood-borne infectious diseases from licensee to patient, from patient to patient, and from patient to licensee. In administering this subdivision, the board shall consider referencing the standards, regulations, and guidelines of the State Department of Public Health developed pursuant to Section 1250.11 of the Health and Safety Code and the standards, regulations, and guidelines pursuant to the California Occupational Safety and Health Act of 1973 (Part 1 (commencing with Section 6300) of Division 5 of the Labor Code) for preventing the transmission of HIV, hepatitis B, and other blood-borne pathogens in health care settings. As necessary, the board shall consult with the Medical Board of California, the California Board of Podiatric Medicine, the Dental Board of California, the Board of Registered Nursing, and the Board of Vocational Nursing and Psychiatric Technicians of the State of California, to encourage appropriate consistency in the implementation of this subdivision.

"The board shall seek to ensure that licensees are informed of the responsibility of licensees and others to follow infection control guidelines, and of the most recent scientifically recognized safeguards for minimizing the risk of transmission of blood-borne infectious diseases.

"(m) The commission of verbal abuse or sexual harassment."
(Emphasis added.)

Section 2691 provides that it constitutes unprofessional conduct and a violation of the Physical Therapy Practice Act "for any person licensed under [the act] to violate, attempt to violate, directly or indirectly, or assist in or abet the violation of, or conspire to violate any provision or term of this article, the Moscone-Knox Professional Corporation Act, or any regulations duly adopted under those laws." Thus, because the Professional Corporation Act does not permit a physical therapist to provide professional services as an employee of a medical corporation, we think a physical therapist who provides those services could be charged with violating, attempting to violate, or assisting in or abetting the violation of the

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Professional Corporation Act, and, as a result, could be subject to discipline by the board under Sections 2691 and 2660. However, it is important to note that “the words ‘aiding or abetting’ in provisions of this kind require scienter or guilty knowledge on the part of one charged with unprofessional conduct” (see 36 Cal.Jur.3d (2010) Healing Arts and Institutions, Sec. 306 (citing *James v. Board of Dental Examiners* (1985) 172 Cal.App.3d 1096, 1109; *Barrett v. Board of Osteopathic Examiners of California* (1935) 4 Cal.App.2d 135, 139)).

In addition, Section 2630 makes it unlawful for a person to practice physical therapy without holding a valid, unexpired, unrevoked license under the Physical Therapy Practice Act. As discussed above, except as provided by statute, neither a corporation nor any unlicensed person or entity may engage, directly or indirectly, in the practice of certain professions, including the legal and medical professions (*People ex rel. State Bd. of Medical Examiners v. Pacific Health Corp.* (1938) 12 Cal.2d 156, 158). Because a medical corporation is not authorized to employ a physical therapist to provide physical therapy services, we think a medical corporation that does so would be unlawfully engaging in the practice of physical therapy. The medical corporation would thereby violate Section 2630 and the physical therapist providing those services could be subject to discipline for aiding or abetting that violation under subdivision (i) or (j) of Section 2660.⁴

Lastly, subdivision (h) of Section 2660 provides that it is unprofessional conduct and grounds for discipline for a physical therapist to aid or abet a violation of the Medical Practice Act. The Medical Practice Act provides for the licensure and regulation of physicians and surgeons by the Medical Board of California. As discussed above, the rule prohibiting corporations from engaging in the practice of medicine is codified in the Medical Practice Act in Sections 2052 and 2400. Section 2402 and the Professional Corporation Act provide an exception to this rule but do not give a medical corporation the authority to employ physical therapists to provide professional services. As a result, we think a medical corporation that employs a physical therapist to provide those services would fall outside the exception provided by Section 2402 and the Professional Corporation Act and would thereby violate Sections 2052 and 2400. Consequently, the physical therapist may be subject to discipline under subdivision (h) of Section 2660 if he or she is found to have aided or abetted in that violation.⁵

⁴ But see the discussion supra regarding required knowledge for “aiding or abetting.”


⁵ But see the discussion supra regarding required knowledge for “aiding or abetting.” In addition, the Medical Practice Act specifies that it does not prohibit the practice of other persons licensed under other provisions of law when that person is engaged in his or her authorized and licensed practice (Sec. 2061). Thus, the physical therapist in question here, if licensed under the Physical Therapy Practice Act, would not, himself or herself, be in violation of subdivision (a) of Section 2052.

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In conclusion, it is our opinion that a physical therapist may be subject to discipline by the Physical Therapy Board of California for providing physical therapy services as an employee of a medical corporation.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

By 
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SLS:dkr