Time to Rethink the Illinois Corporate Practice of Medicine Doctrine in the PPACA Healthcare Market Era

James Flannery*

I. INTRODUCTION

Although the Patient Protection and Affordable Care Act (PPACA) brings the United States closer to the admirable goal of universal access to health care, health care policy must go beyond increased access and also focus on lowering costs and increasing the quality of care. In order to address these issues, policymakers and healthcare professionals turn to clinical integration. Clinical integration refers to the greater coordination of patient care across people, functions, activities, and sites over time in order to enhance the quality and efficiency of patient care. The corporate practice of medicine doctrine impedes efforts to promote efficient delivery and financing of health care by physicians through clinical integration.

The corporate practice of medicine doctrine prohibits persons or entities not licensed by the state in which they reside from providing medical services or from excessively influencing the delivery of said services. The doctrine

---

* Juris Doctor Candidate, May 2016, Loyola University Chicago School of Law. Mr. Flannery is a staff member of Annals of Health Law.

2. Id. at 28.
3. See Nicole Huberfeld, Be Not Afraid of Change: Time to Eliminate the Corporate Practice of Medicine Doctrine, 14 Health Matrix 243, 244-45 (2004) (“In increasingly integrated health care delivery systems, the corporate practice of medicine doctrine does nothing to improve quality, efficiency, or accountability.”).
4. Id. at 243.
is structured in three prongs. The first prong, and the main focus of this article, prohibits a non-licensed person or corporation from employing a physician or healthcare professional to practice medicine. Second, entities that provide health care services, including partnerships, professional corporations, nonprofit corporations, and various other entities, are generally prohibited from control or ownership by non-licensed persons or corporations. Third, licensed professionals cannot divide or share professional fees with a non-licensed person or entity. This would essentially amount to assisting an unlicensed person to practice medicine, which could lead to an improper influence on the medical professional’s conduct.

Although not found in a specific statute, the corporate practice of medicine doctrine is enforced in Illinois. In an era of greater need for clinical integration, the corporate practice of medicine doctrine in Illinois should be relaxed. Specifically, the corporate practice of medicine doctrine in Illinois should be codified to avoid potential confusion. Additionally, the doctrine should include limited exceptions for organizations to hire their own physicians to treat employees with their permission, and must be free from any influence on the physician’s independent medical judgment. Furthermore, the doctrine should be relaxed to allow independent practitioners to join with self-insured companies, to in turn lead to additional clinical integration.

This article will delve into how this approach to the corporate practice of medicine doctrine in Illinois will promote clinical integration. Part II of this article will examine the history of the corporate practice of medicine doctrine

---

5. *Id.* at 244.
6. *Id.*
7. *Id.*
8. *See id.*
in Illinois. Part III will focus on the doctrine as applied by other states. Part IV will promote the idea of relaxing the corporate practice of medicine doctrine in Illinois to allow independent physicians to join with self-insured employers to in turn help promote clinical integration, followed by a conclusion in Part V.

II. HISTORY OF THE CORPORATE PRACTICE OF MEDICINE DOCTRINE IN ILLINOIS

Under the Illinois Hospital Licensing Act, only licensed hospitals and hospital affiliates may employ licensed physicians if they meet certain requirements. The requirements are extensive and include that, (1) the employed physician is a member of the medical staff of the hospital or affiliate; (2) independent physicians not employed by the employing entity periodically review the quality of the medical services provided by the employed physician to improve patient care; (3) the employing entity and the employed physician sign a statement that acknowledges the employer shall not unreasonably exercise control, direct, or interfere with the employed physician’s exercise of his or her professional judgment; and (4) the physician and employed entity establish a mutually agreed upon independent review process.

Because the statute does not expressly implement the corporate practice of medicine doctrine, the doctrine developed through Illinois case law. The first instance in which the Illinois Supreme Court encountered the doctrine occurred in Dr. Allison, Dentist, Inc. v. Allison. In Allison, the plaintiff corporation owned and operated a dental practice and entered into a contract

11. Id.
12. See Michal et al., supra note 9 at 5 (Stating, “case law appears to prohibit unlicensed corporations from employing physicians to provide medical services; however, case law allows licensed hospitals to employ physicians because licensed hospitals possess legislative authority to provide medical services.”).
with the defendant dentist.\textsuperscript{14} The defendant later breached the agreement with the plaintiff after he opened a dental office and began to practice directly across the street from the corporate dental parlors.\textsuperscript{15} The court dismissed the case on grounds that the plaintiff was practicing dentistry in violation of the Dental Practice Act of 1933, which prohibited corporations from practicing dentistry.\textsuperscript{16}

The Illinois Supreme Court addressed the corporate practice of medicine doctrine as it pertained to medicine a year after the \textit{Allison} decision in \textit{Kerner v. United Med. Serv., Inc.} In \textit{Kerner}, a corporation operated a low-cost health clinic in which duly licensed physicians rendered all medical services.\textsuperscript{17} The State brought suit against the corporation alleging that it illegally engaged in the practice of medicine in violation of the Medical Practice Act.\textsuperscript{18} The Court stated that only individuals may obtain a license to practice medicine, and no corporation could meet the requirements of the statute essential to the issuance of a license.\textsuperscript{19} Additionally, the Court invoked the Business Corporation Act and held that the practice of medicine is not included in the Act’s authorization of the formation of corporations for “any lawful purpose.”\textsuperscript{20}

Illinois courts did not apply the corporate practice of medicine rule set out in \textit{Kerner} until \textit{Berlin v. Sarah Bush Lincoln Health Ctr.}\textsuperscript{21} In \textit{Berlin}, the Illinois Supreme Court faced the issue of whether the doctrine prohibits corporations that are licensed hospitals from employing physicians to provide

\begin{itemize}
\item \textsuperscript{14} Dr. Allison, Dentist, Inc. v. Allison, 196 N.E. 799, 799 (Ill. 1935).
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textit{Id.} at 800-01.
\item \textsuperscript{17} People ex rel. Kerner v. United Med. Serv., Inc., 200 N.E. 157, 158 (Ill. 1936).
\item \textsuperscript{18} \textit{See id.} The Attorney General of Illinois filed a petition for leave to file an information to require the defendant United Medical Services, Inc., a domestic corporation, to show by what warrant it holds a franchise to practice medicine.
\item \textsuperscript{19} \textit{Id.} at 163.
\item \textsuperscript{20} \textit{Id.} at 164.
\item \textsuperscript{21} \textit{Berlin}, 688 N.E.2d at 111.
\end{itemize}
medical services. The plaintiff doctor sought to have a restrictive covenant contained in an employment agreement with defendant health center declared unenforceable. The defendant, a nonprofit corporation, was duly licensed under the Hospital Licensing Act to operate a hospital. The circuit court, relying primarily on *Kerner*, determined that the health center, through hiring the doctor to practice medicine as its employee, violated the prohibition against corporations practicing medicine. The divided appellate court affirmed the circuit court ruling.

The Illinois Supreme Court reversed the lower court’s ruling and instead distinguished *Berlin* from both *Kerner* and *Allison*. The Court noted that neither *Kerner* nor *Allison* involved employment of physicians by a hospital or involved a corporation licensed to provide health care services to the general public. The Court thus declined to apply the corporate practice of medicine doctrine to licensed hospitals. The Court reasoned that the corporate practice of medicine doctrine is appropriate to a general corporation that does not possess a licensed authority to offer medical services to the public, but when a corporation is allowed by state law to operate a hospital, such a prohibition is inapplicable. The Court further noted the public policy concerns that support the doctrine are inapplicable to licensed hospitals where the concern for control over a physician’s professional judgment is alleviated by a

22. *Id.* at 107.
23. *Id.*
24. *Id.*
25. *Id.* at 108.
26. *Id.*
27. *Id.* at 112.
28. *Id.*
29. *Id.*
30. *Id.* at 113.
separate medical staff responsible for the quality of the medical services provided. The Court then emphasized that any concerns over the commercialization of health care are relieved when a licensed hospital is the physician’s employer because hospitals have an independent duty to provide for the patient’s health and welfare.

III. THE CORPORATE PRACTICE OF MEDICINE DOCTRINE IN OTHER STATES

Although Illinois adopted the corporate practice of medicine doctrine via case law, many states have not ruled on the matter, or instead expressed exceptions in case law or attorney general opinions. Illinois should take a similar approach to states that relaxed the doctrine, in order for employers to play a role in clinical integration.

For example, state regulations in Indiana allow certain entities or professionals to employ physicians to provide medical services so long as they refrain from control or influence over the licensed physician’s professional medical judgment. Specifically, Indiana law provides a list of contractual relationships that do not constitute an unlawful practice of medicine. Indiana holds that a contractual relationship between licensed physicians and a hospital, physician, psychiatric hospital, health maintenance organization, and many others does not constitute an unlawful practice of medicine.

In Iowa, on the other hand, state statutes and regulations do not address

31. Id. at 113-14.
32. Id. at 114.
33. See generally, Michal, supra note 9. This source lists thirty-six states in which statutes do not address the corporate practice of medicine doctrine.
34. Id. at 6.
35. Id.
36. 25 IND. ADMIN. CODE § 25-22.5-1-2(c) (2013). In addition to a contractual relationship between licensed physicians and a hospital, physician, psychiatric hospital, and health maintenance organization, the exceptions also include a health facility, dentist, registered nurse or licensed practical nurse, midwife, optometrist, podiatrist, chiropractor, physical therapist, or psychologist as a lawful practice of medicine.
the corporate practice of medicine doctrine. Instead, the Iowa Attorney General noted in an opinion that Iowa courts employ an in-depth factual analysis to determine whether there is a violation of the corporate practice of medicine doctrine. Iowa courts look at the dominion and control over both the physician’s treatment and decisions to determine whether a prohibited employment relationship exists, and not the designation provided in the contractual arrangement between the employing entity and the physician.

Unlike Indiana and Iowa, South Dakota takes a different approach to the doctrine via statute. South Dakota law prohibits an employer-employee physician relationship in which the agreement or relationship either directly or indirectly influences the physician’s independent judgment concerning the practice of medicine, treatment, or diagnosis of a patient. Additionally, South Dakota does not allow a corporation to profit from the practice of medicine, such as by the corporation charging higher fees for services than that which he would otherwise reasonably charge if he or she worked independently.

IV. LOOSENING THE CORPORATE PRACTICE OF MEDICINE DOCTRINE IN ILLINOIS

The corporate practice of medicine doctrine certainly serves an important purpose by prohibiting employers from exerting inappropriate influence over

37. Michal, supra note 9, at 6.
39. Id. at 5.
40. S.D. CODIFIED LAWS § 36-4-8.1 (Current through the 2014 Regular Session). Although the statute has not been directly challenged in court, the statute lays out specifically that when an agreement either directly influences the physician’s independent judgment concerning the practice of medicine, treatment, or diagnosis of a patient, it constitutes a violation. The statute also prohibits allowing a corporation to profit from the practice of medicine. Illinois should follow suit with South Dakota and clearly lay out what constitutes a violation of the doctrine.
41. Id.
42. Id.
a physician’s professional medical judgment in regards to diagnosis and treatment of patients. However, Illinois should take a similar approach to South Dakota in terms of reforming its corporate practice of medicine doctrine. Specifically, due to the absence of a statute, Illinois should, like South Dakota, codify the doctrine and identify exceptions that would allow for an employer-employee relationship. Specifically, the statutory exceptions should include relationships in which the employer does not influence, either directly or indirectly, the physician’s independent professional medical judgment in terms of diagnosis and treatment. This approach would help identify the doctrine and provide examples as to when a relationship does not violate the doctrine.

The theoretical rationale for the doctrine is that because only a person can undergo the training needed for a professional license, a corporation or artificial person cannot be licensed and thus cannot practice medicine. From a practical and policy standpoint, rules against the corporate practice of medicine carry the intent to prevent commercial exploitation of health care by organizations motivated by profit rather than commitment to patient wellbeing and quality of care. If the approach to the corporate practice of medicine doctrine changed via the proposal in this article, problems of control, divided loyalty, and commercialism would have little effect on the physician’s relationship with the patient. More likely than not, such a relationship would involve a physician employed by a corporation to treat employees and promote wellness. The physician, however, would not be able to treat the general

---

43. See Jessica A. Axelrod, Article: The Future of the Corporate Practice of Medicine Doctrine Following Berlin v. Sarah Bush Lincoln Health Ctr., 2 DePaul J. Health Care L. 103, 105 (1997) (citing three justifications for the corporate practice of medicine doctrine including that the prohibition 1) increases physician autonomy over medical judgments, 2) limits a sense of divided loyalty between the physicians and their profit-seeking employer, and 3) reduces the commercialization of health care and the possible exploitation of patients).


45. Id.

46. Axelrod, supra note 43, at 120.
public as a physician employed by a non-hospital corporation. The loosening of the doctrine in Illinois would provide more options for the independent practitioner, improve overall patient wellness, and promote clinical integration.

Over the past decade, independent practitioners have increasingly closed their practices and integrated into larger health care systems and hospitals. In 2012, the number of physicians in the United States who practiced outside of a hospital, clinic, or large group fell to thirty-nine percent, down from fifty-seven percent in 2000. Eighty-seven percent of those who closed their independent practices blamed the cost of doing business, sixty-one percent cited managed care, and more than fifty percent noted the burden of converting to electronic health records. Additionally, in regards to newly hired physicians, more than seventy-five percent will be hospital employees within two years as compared to eleven percent eight years ago.

Needless to say, this data coupled with an increasing number of recent large hospital system mergers illustrates that independent physicians might need to look elsewhere for employment opportunities in order to compete.  

47. See Steve Jacob, Texas a Last Bastion for Independent Physicians, DALLAS/FORT WORTH HEALTHCARE DAILY (Apr. 9, 2014), http://healthcare.dmagazine.com/2014/04/09/texas-a-last-bastion-for-independent-physicians/. (Citing various polls in which physicians practicing outside a hospital fell over the past decade, due to increased costs, managed care, and electronic health records).
48. Id.
49. Id.
50. Id.
Such mergers also put pressure on a dwindling number of independent hospitals to consider partnering with larger hospital systems. While these large systems merge and promote clinical integration throughout their institutional structure, independent physicians may be forced to continue to close their doors due to a lack of any sort of competitive advantage. A different approach to the corporate practice of medicine doctrine in Illinois to allow for employer-employee relationships in which the employer cannot exercise influence over the physician’s professional medical judgment would provide a more flexible alternative for the independent physician. With the creation of the accountable care organization under the PPACA which allows for fully integrated physician groups, coupled with a drive towards more value based payment models, more independent physicians will need to turn elsewhere to keep their doors open. The ability of corporations to hire their own physicians as an option for their employees to receive treatment effectively incorporates the employer

52. Wang, supra note 51.

53. According to a 2011 survey of healthcare organization executives, “two out of three said they were receiving more employment requests from physicians and they planned to increase their physician hiring over the next three years.” Jacob, supra note 47. Additionally, third-year medical residents are increasingly bypassing independent physician practices to work as salaried employees in hospitals and larger medical organizations. Id. “About half said they were ill-prepared to handle the business side of medicine because they receive no formal instruction in medical school on how to negotiate contracts or manage reimbursement.” Id. The article also notes that more physician revenue means seeing more patients, which is subsidized by hospitals. Id. Finally, the article notes that “the biggest difference in having such a high percentage of independent affiliated physicians is the lack of an ability to create compensation incentives to reward performance goals …[and that] it is easier to control the patient volume with employed physicians.” Id.

into the role of promoting clinical integration. Many employers want to remove themselves from the role of paying for their employees’ health care, but it is plausible that in the coming years many companies will increasingly integrate into a role that includes an increase in the management of their employees’ health care.\textsuperscript{55} Healthy and productive employees help lead to profits, and many employers spend thousands of dollars each year in an attempt to attract, train, improve, and retain their employees.\textsuperscript{56} As a result, employers can play a role as health care integrators if the corporate practice of medicine doctrine is relaxed.

Application of the corporate practice of medicine doctrine extends beyond the scope of its purpose and instead impedes improvement in the efficiency of health care delivery.\textsuperscript{57} Relaxing the corporate practice of medicine doctrine in Illinois to allow for these employers to both improve employee wellness and essentially incorporate them into a clinical integration role will promote efficiency.\textsuperscript{58} The role that the employer will play with a relaxation of the corporate practice of medicine doctrine involves six aspects.\textsuperscript{59} First, the employer would be self-insured, which would include a deductible and health savings accounts to help cover the employee’s health cost.\textsuperscript{60} Second, primary care physicians and nurse practitioners would be on the company or contractor firm payroll, and would serve as the primary care physicians to employees and their families.\textsuperscript{61} These providers would oversee medical care decisions,

\textsuperscript{56} Id.
\textsuperscript{57} Adam M. Freiman, Comment: The Abandonment of the Antiquated Corporate Practice of Medicine Doctrine: Injecting a Dose of Efficiency Into the Modern Health Care Environment, 47 EMOY L.J. 697, 746 (1998).
\textsuperscript{58} CHRISTENSEN ET AL., supra note 55, at 204.
\textsuperscript{59} See generally, id. at 207-08.
\textsuperscript{60} Id. at 207.
\textsuperscript{61} Id.
and their performance would be measured and compensated by the improvement in an employee’s health.\textsuperscript{62}

Third, employers could contract directly with hospitals, outpatient and retail clinics, and whenever possible, would direct care for disorders still in the realm of intuitive medicine to these outside facilities.\textsuperscript{63} The employer would promote self-care if appropriate, encourage the use of retail clinics, and direct employees to low-cost medical tourism hospitals abroad when expensive procedures may be required for treatment.\textsuperscript{64} Fourth, employers would provide employee-access to personally controlled electronic health records in a format compatible with the systems of hospitals and other health care facilities.\textsuperscript{65} Fifth, in an effort to reduce and treat behavior-dependent chronic diseases like obesity and diabetes, employers would contract with disease management network operators to manage the patient’s adherence to treatment programs.\textsuperscript{66} Sixth, employers would implement financial rewards for good behaviors such as weight loss, increased exercise, cessation of smoking, and compliance with treatment plans.\textsuperscript{67} Some companies, like Quad/Graphics in Wisconsin, successfully implemented innovative programs like this, which resulted in improved employee health and integration across the board.\textsuperscript{68}

\begin{itemize}
  \item \textsuperscript{62} Id. at 208.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Id.; See also Steven J. Thompson, Medical Tourism and Travel: What it Means for Your Hospital, BECKER’S HOSPITAL REV., (June 08, 2012) http://www.beckershospitalreview.com/hospital-management-administration/medical-tourism-and-travel-what-it-means-for-your-hospital.html (Defining medical tourism as patients taking an overseas trip to seek medical treatment. Typically the treatment sought is expensive in the United States, whereas it is substantially cheaper in many instances at the overseas destination. The motivation is typically price, and many overseas institutions have gained a reputation for quality medical services at a lower cost).
  \item \textsuperscript{65} CHRISTENSEN ET AL., supra note 55, at 208
  \item \textsuperscript{66} Id.
  \item \textsuperscript{67} Id.
  \item \textsuperscript{68} See, id. at 209-11. Quad/Graphics is a company headquartered in Milwaukee, Wisconsin, which set up its first primary care clinic in 1990 as a way to bypass the middlemen in medicine and to control costs. By 2009, the company
V. Conclusion

In an era of increasing demand for higher quality of care at the lowest cost possible and increased regulatory requirements under the PPACA, a different approach to the corporate practice of medicine doctrine in Illinois could help ease the transition into additional clinical integration. Codifying and relaxing the doctrine to identify and permit employer-employee relationships where the employer does not exercise influence or control over the physician’s independent medical judgment as to diagnosis and treatment would allow for an alternative employment method for independent physicians. This is particularly important in a time where more and more health care systems are consolidating, thus providing the independent physician with less leverage and increasing the competition. Additionally, relaxing the doctrine in Illinois to allow for physicians to seek employment with self-insured employers would promote both clinical integration and employee wellness because both the physician and employer would have a more direct role in the coordination of employee health care.

operated four medical centers. The medical centers offer family practice, internal medicine, pediatrics, obstetrics, gynecology, minor surgical procedures, lab work, injury rehabilitation, and physical examinations. The services are free to both employees and their families. The services emphasize wellness rather than treating illness, through programs that focus on combating chronic diseases such as obesity and diabetes. Quad/Graphics is self-insured and contracts directly with local hospitals and specialists for situations that require advanced care. The system cut the company’s health-care costs, reduced morbidity and employee absenteeism, and increased employee wellness. Quad/Graphics spends more on primary care than other companies, but the investment helps keep employees and their families from requiring care in hospitals and from high-cost specialists.