The Future of the Corporate Practice of Medicine Doctrine Following Berlin v. Sarah Bush Lincoln Health Center

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INTRODUCTION

The corporate practice of medicine doctrine requires that all medical decisions be made by licensed medical professionals.¹ Currently, modern attempts to follow this proscription have produced confusion in health care institutions about the unauthorized practice of medicine.

Courts have interpreted the corporate practice doctrine to prohibit the employment of persons acting as physicians by any entity, other than a professional corporation² or health maintenance organization, even if the entity performs strictly business functions.³ However, the current health care environment has developed in ways that differ greatly from the one in which the corporate practice of medicine prohibition originated.⁴

In recent years, the health care industry has developed into a cost-conscious environment.⁵ Corporations have introduced alternative

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¹Staff Writer, DePaul J. of Health Care L.B.A., Binghamton University, SUNY, 1996; J.D. (Cand.), DePaul University, 1999.
³A distinction must be drawn between professional corporations and lay corporations. Professional corporations are those owned and controlled by licensed physicians. Lay corporations are owned and controlled by people who are not licensed to practice medicine. For the purposes of this Comment, “corporation” will refer to lay corporation unless otherwise stated.
⁴Lisa Rediger Hayward, Note and Comment, Revising Washington’s Corporate Practice of Medicine Doctrine, 71 WASH. L. REV. 403, 403 (1996).
⁶Id. at 478.
systems of health care delivery with cost containment measures that often conflict with traditional notions of professional autonomy. In other words, the corporate practice of medicine doctrine has failed to keep up with changes in the way health care services are organized, delivered, and financed.

"Preserving the facade that the corporate practice of medicine prohibition requires a complete bar to corporations employing licensed physicians causes confusion by distorting the realities of modern medical practices." Physicians threatened by a loss of autonomy, and states attempting to regulate competition in the health care field, are the most common parties in corporate practice litigation. One such suit, Berlin v. Sarah Bush Lincoln Health Center, has far-reaching policy implications regarding the doctrine.

Part I of this Article will cover the background of the doctrine, including its origin, rationale, and development. Part II will consist of a brief state survey of current legal trends surrounding the corporate practice of medicine. Part III will analyze the impact of the Illinois Supreme Court's decision in Berlin. Finally, Part IV will suggest changes in state and federal legislation in light of the Berlin decision.

BACKGROUND

Origin of the Corporate Practice of Medicine Doctrine
Physicians of the nineteenth century competed for patients not only among themselves, but also with others who had not obtained a traditional medical education. Independent physicians were also forced to compete

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6Id.
7Hayward, supra note 3, at 417.
9Chase-Lubitz, supra note 4, at 447.
11See infra Part I.
12See infra Part II.
13See infra Part III.
14See infra Part IV.
15Chase-Lubitz, supra note 4, at 448.
with contract practices. In these arrangements, corporations employed physicians to treat employees working in isolated industries.

The corporate practice of medicine doctrine developed to protect consumers from receiving substandard care at the hands of medical professionals hired by non-physicians. The prohibition cannot be traced to one direct source of law; it has emerged through a combination of state medical practice acts and public policy arguments developed by state courts.

Policy Justifications for the Corporate Practice of Medicine Doctrine
Three main justifications are given in support of the corporate practice prohibition. First, physician employment by lay corporations may reduce physician autonomy over medical judgments. Courts have traditionally been concerned with protecting physician-patient relationships from being undermined by the intrusion of a lay corporation not bound by medical ethics. Second, employed physicians may experience a sense of divided loyalty between their profit-seeking employer and their treatment-seeking patients. The disjointed interests of physicians in patient well-being, and corporations in shareholder satisfaction, may jeopardize the quality and delivery of health care. Third, public policy arguments have been raised to attack the commercialization of health care and the possible exploitation of patients. Many critics worry that investors will pressure physicians to sell their services to obtain large profits, thereby emphasizing profitability over patient care.

All of these justifications embrace the image of the solo family practitioner, completely independent from outside control, who is kept from exploiting his dependent patients by professional ethics. This

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16Mars, supra note 8, at 247.
17Id.
18Id. at 249.
19Id.
20Chase-Lubitz, supra note 4, at 469 (arguing that "by allowing lay-controlled corporations to provide medical services, lay people not subject to the physicians' ethical code would be free to solicit patients and advertise competitively").
21Id., supra note 8, at 243.
22Id.
23Id. at 249.
24Id. at 249.
25Id.
characterization has been deemed anachronistic given the state of modern health care because this traditional type of provider is rapidly disappearing due to the integration of the health care industry.\textsuperscript{26}

Development of the Corporate Practice of Medicine Doctrine

The doctrine prohibiting the unauthorized corporate practice of medicine is a mix of common law, statutory law, and ethical rules established by the medical profession.\textsuperscript{27} Each state has a statute governing the licensing of physicians.\textsuperscript{28} These statutes, or "medical practice acts," usually make it a criminal offense for anyone not possessing a valid license to practice medicine.\textsuperscript{29}

Courts that derive a rule against corporate practice, therefore, deduce that corporations employing physicians are engaging in the practice of medicine without themselves being licensed.\textsuperscript{30} Because corporations are not natural persons, they cannot meet the requirements of state licensure acts such as obtaining a medical degree, being of a certain age, and being of good moral character.\textsuperscript{31}

Exceptions to the Corporate Practice of Medicine Doctrine

State court decisions and legislative acts have created exceptions to the general rule against the corporate practice of medicine.\textsuperscript{32} Certain types of corporations may legally hire physicians or share in physician-employee incomes.\textsuperscript{33} The problem with these exceptions is that although the qualified entities do not violate the doctrine \textit{per se}, the policy concerns are

\begin{itemize}
\item \textsuperscript{26}Interview with Jeff Atkinson, Adjunct Professor, DePaul University College of Law; sole practitioner, Wilmette, Illinois. B.A., Northwestern University, 1974; J.D., DePaul University, 1997, in Chicago, Ill. (Oct. 8, 1997).
\item \textsuperscript{27}Indest & Egolf, \textit{supra} note 1, at 34.
\item \textsuperscript{28}Id.
\item \textsuperscript{29}Id.
\item \textsuperscript{30}Id.
\item \textsuperscript{31}Id. at 33; \textit{see also} Chase-Lubitz, \textit{supra} note 4, at 464-65 (stating most medical practice acts are simple licensure statutes listing qualifications needed to obtain a license and requiring no person practice without one).
\item \textsuperscript{32}Hayward, \textit{supra} note 3, at 410.
\item \textsuperscript{33}Indest & Egolf, \textit{supra} note 1, at 34.
\end{itemize}
just as prevalent in these arrangements as with non-exempt corporate entities.\textsuperscript{34}

A general exception exists for professional corporations.\textsuperscript{35} All states have adopted statutes, which authorize licensed professionals to form corporations to engage in the practice of medicine.\textsuperscript{36} These statutes usually require that all shareholders and officers of the corporation be licensed in the same profession.\textsuperscript{37}

Certain states recognize an exception for medical schools and teaching hospitals.\textsuperscript{38} These states allow approved medical schools to employ physicians in furtherance of medical science and instruction.\textsuperscript{39}

The difference between not-for-profit and for-profit corporations can affect application of the doctrine.\textsuperscript{40} States may choose to distinguish between not-for-profit and for-profit corporations and refuse to apply the doctrine to the former.\textsuperscript{41} The rationale courts generally give for excluding non-profit organizations is that the policy concerns underlying the corporate prohibition (commercial exploitation, divided loyalty, and lay control of physicians) disappear when the profit motive is removed.\textsuperscript{42}

A large, federally mandated exception covers health maintenance organizations.\textsuperscript{43} HMO development became a priority in the 1970s as a mechanism to curb rising health care costs.\textsuperscript{44} However, state laws prohibiting the corporate practice of medicine posed a significant obstacle to HMO growth. In response to this problem, numerous states voluntarily adopted legislation that expressly exempted application of the corporate practice doctrine to HMOs.\textsuperscript{45}

Fundamental differences between independent contractors and physician-employees have an impact on the corporate practice of medicine.

\textsuperscript{34}Mars, supra note 8, at 252.
\textsuperscript{35}Hayward, supra note 3, at 410-11.
\textsuperscript{36}Id.
\textsuperscript{37}Id.
\textsuperscript{38}Indest & Egolf, supra note 1, at 34.
\textsuperscript{39}Id.
\textsuperscript{40}See, e.g., Mars, supra note 8, at 256 ("Some state legislatures and courts have recognized not-for-profit hospitals as an exception to the corporate practice of medicine doctrine").
\textsuperscript{41}Hayward, supra note 3, at 410.
\textsuperscript{42}Id.
\textsuperscript{43}Mars, supra note 8, at 259.
\textsuperscript{44}Hayward, supra note 3, at 411.
\textsuperscript{45}Id.; see also Mars, supra note 8, at 259.
By definition, independent contractors cannot engage in the corporate practice of medicine, because they are not employed by the hospital and retain individual licenses to practice. Therefore, independent contracting physicians do not create the same threat of lay control and divided loyalties as do other arrangements.

Another exception that is sometimes recognized allows corporations to hire physicians in a consulting capacity. In this situation, corporations can hire physicians directly, because the physician may have no direct patient-care responsibilities and, therefore, is removed from the direct practice of medicine. This arrangement eliminates the concern that the corporation is engaging in the practice of medicine.

Certain states allow for the employment of physicians by employer-sponsored health plans and school health programs to provide treatment for employees or students. This exception is justified by the fact these programs are not held out to the general public and do not typically charge the patient a fee.

ANALYSIS

Different Approaches Taken to Apply the Corporate Practice of Medicine Doctrine

Since treating patients affects public health and safety, state legislatures can exert their police power to regulate the practice of medicine. Licensure and medical practice act requirements serve an important function given the trust and reliance patients place in their physicians to render adequate health care. However, a problem arises with respect to state licensure laws and medical practice acts due to the courts' wide interpretation and application of these regulations.

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46 Mars, supra note 8, at 263.
47 Id.
48 Id.
49 Indest & Egolf, supra note 1, at 35.
50 Id.
51 Id.
52 Id.
53 Id.
54 Mars, supra note 8, at 248.
55 Id.
56 Id.
States vary on the extent to which they recognize and/or enforce a corporate practice of medicine prohibition.\(^5\) Generally, states can be divided into three groups.\(^6\) Most states recognizing the prohibition enforce it subject to certain exceptions.\(^7\) Other states have either an outright statutory or common law ban on certain entities employing physicians.\(^8\) The remaining states either do not have a corporate practice prohibition, or if one exists, simply refuse to enforce it.\(^9\)

In states recognizing the corporate practice of medicine doctrine subject to certain exceptions, a greatly disputed issue is the proper scope of those exceptions. Exceptions which permit hospitals to practice medicine by employing physicians vary widely in their approach.\(^10\) Certain states explicitly authorize physician employment by hospitals, while other states only recognize an exception for not-for-profit

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\(^5\) For a comprehensive survey of all fifty states and their respective stances on the corporate practice of medicine doctrine, see D. Cameron Dobbins, Survey of State Laws Relating to the Corporate Practice of Medicine, 9 Health Lawyer, May 1997 at 18 (covering each state’s position on the doctrine, as interpreted by both statutory and common law).

\(^6\) The states do not fall into three precise categories. These generalizations have been made to aid the analysis of this Article.

\(^7\) See, e.g., Colorado Medical Practice Act, COLO. REV. STAT. § 12-36-117(m) (West 1998) (defining unprofessional conduct as “practicing medicine as an employee of ... any corporation other than a professional service corporation for the practice of medicine”); see also COLO. REV. STAT. § 25-3-103.2 (West 1998) (providing that licensed hospitals may employ health care professionals only if located in counties with a population less than 100,000).

\(^8\) Texas, for example, has a strong and strictly enforced prohibition against the corporate practice of medicine. See TEX. REV. CIV. STAT. ANN. art. 4495b, §§ 3.07(f), 3.08(12), and 3.08(15) (Vernon Supp. 1996) (providing that it is unlawful for a physician to allow another to use his license or to aid or abet the practice of medicine by any unlicensed person, partnership, association, or corporation); see also Garcia v. Texas Bd. of Medical Examiners, 384 F. Supp. 434 (W.D. Tex. 1974), aff’d, 421 U.S. 995.

\(^9\) A typical example can be found in Arkansas where the state legislature has enacted standard medical licensing and professional corporation acts, but no court has held there to be a prohibition against the corporate practice of medicine. See Arkansas Medical Practice Act, ARK. CODE ANN. § 17-95-101 et seq. (restricting the privilege of practicing medicine to individuals) (The State of Arkansas 1987-1947).

\(^10\) Edward Kornreich, Health Care M & A: Update on Major Regulatory, Legislative and Industry Initiatives, 984 P.L.I. Corp. 101, at 141 (1997). Thirty-seven states have either an outright statutory or common law ban on unlicensed entities employing physicians, or have authority implying such a prohibition, yet enforcement is sporadic regarding the employment of physicians by hospitals. “[A]ll but five states (California, Colorado, Iowa, Ohio, and Texas) appear to allow not-for-profit ... hospitals to directly employ their staff physicians. However, many of the remaining thirty-two states with ostensible bans have old precedent forbidding hospital employment of physicians which has yet to be formally repealed or overruled”).
hospitals. In contrast, some states recognize an unwritten exception, which permits all hospitals to employ staff physicians.

Background of Berlin v. Sarah Bush Lincoln Health Center

Sarah Bush Lincoln Health Center (Hospital) is a not-for-profit corporation that owns and operates a general hospital in Coles County, Illinois. The Hospital services a medically underserved and predominantly rural area of Illinois. In furthering its charitable purposes, the Hospital recruits and retains physicians in order to alleviate an existing and projected shortage of primary care physicians and specialists.

In 1992, the Hospital recruited Richard B. Berlin, Jr., M.D., a board-certified general surgeon with specialized training in surgical oncology. The Hospital entered an employment agreement whereby Dr. Berlin would receive an annual salary plus quarterly production bonuses. The employment agreement between Dr. Berlin and the Hospital provided that the Hospital would neither have nor exercise control over the professional aspects of Dr. Berlin's practice. However, the agreement emphasized that Dr. Berlin was required to render medical services and comply with the policies, standards, and regulations established by the Hospital. The agreement also included a restrictive covenant covering a fifty-mile radius and lasting for the duration of the agreement, plus two years thereafter.

In February 1994, Dr. Berlin resigned from the Hospital and became an employee of a clinic located approximately one mile from the Hospital. The Hospital filed a motion for injunctive relief against Dr. Berlin, and Dr. Berlin was subsequently enjoined from working for any competing health care provider within a fifty-mile radius of the Hospital.

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64 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
Dr. Berlin appealed the preliminary injunction, and the appellate court reversed and remanded the case, holding the trial court had improperly denied Dr. Berlin's motion for substitution of judge.\textsuperscript{74}

In January 1995, Dr. Berlin filed a complaint for declaratory judgment and a motion for summary judgment in which he sought to have the restrictive covenant declared unenforceable.\textsuperscript{75} The Hospital filed a cross-motion for summary judgment.\textsuperscript{76} The trial court granted Dr. Berlin's motion for summary judgment, finding the restrictive covenant was not enforceable because of the prohibition on the corporate practice of medicine.\textsuperscript{77} The Hospital appealed, and the appellate court affirmed.\textsuperscript{73}

Four main points summarize the appellate court's decision. Initially, the appellate court felt it was bound by \textit{stare decisis} to follow the decisions of the Illinois Supreme Court in \textit{Dr. Allison, Dentist v. Allison},\textsuperscript{79} and \textit{People ex rel Kerner v. United Medical Service}.\textsuperscript{80} Both of these decisions interpreted the Medical Practice Act of 1923 and found that corporations cannot be licensed to practice medicine.\textsuperscript{81}

Next, the court decided that since the state legislature had created statutory exceptions to the corporate practice of medicine doctrine, any decision to expand the scope of these exceptions must also come from the legislature.\textsuperscript{82} To date, the legislature had addressed hospitals as
employers, but it had never addressed hospitals as employers of physicians.\textsuperscript{83}

On the question of whether to depart from precedent in order to recognize an exception to the doctrine prohibiting the corporate practice of medicine, the court stated the primary expression of Illinois social policy should emanate from the legislature, especially regarding issues where there is disagreement over whether a new rule is warranted.\textsuperscript{84}

Finally, as an implied exception to the corporate practice doctrine, the Hospital argued it qualified under section four of the 1987 Medical Practice Act, which provides that the Act shall not apply to persons lawfully carrying on their particular profession or business under any valid existing regulatory Act of this State.\textsuperscript{85} The court found, however, that simply because hospitals must be licensed under the Illinois Hospital Licensing Act\textsuperscript{86} does not mean they qualify for an exception under the 1987 Medical Practice Act.\textsuperscript{87}

Based on the aforementioned conclusions, the appellate court determined the trial court was correct in granting Dr. Berlin's motion for summary judgment.\textsuperscript{88} The appellate court also agreed that the Hospital, through its general surgery agreement with Dr. Berlin, violated the statutory prohibition on the corporate practice of medicine.\textsuperscript{89} One justice of the appellate court dissented, stating that any prohibition on corporations engaging in health services did not prohibit the Hospital's employment of Dr. Berlin.\textsuperscript{90}

In the early part of 1997, the Illinois Supreme Court granted the Hospital's petition for leave to appeal.\textsuperscript{91}

\textbf{The Illinois Supreme Court's Decision in \textsc{Berlin}}

Because the facts were not in dispute, the supreme court adopted the statement of facts as set out in the appellate court's decision.\textsuperscript{92} On appeal,

\begin{itemize}
\item \textsuperscript{83}Id.
\item \textsuperscript{84}Id. at 344. (quoting Charles v. Seigfried, 651 N.E.2d 154, 160 (1995)).
\item \textsuperscript{85}Id. (quoting) 225 ILL. COMP. STAT. 60/4 (West 1994)).
\item \textsuperscript{86}210 ILL. COMP. STAT. 85/1 et seq. (West 1994).
\item \textsuperscript{88}Id.
\item \textsuperscript{89}Id.
\item \textsuperscript{90}Id. at 346 (McCullough, J., dissenting).
\item \textsuperscript{91}Sarah Bush Hosp. v. Berlin, 155 Ill.2d R. 315(a) (1997).
\item \textsuperscript{92}Berlin v. Sarah Bush Lincoln Health Ctr., 688 N.E. 2d 106, 107-08 (Ill. 1997).
\end{itemize}
the court was asked to consider two issues: (1) whether the expiration of
the two-year term of the restrictive covenant of the employment
agreement rendered the appeal moot; and (2) whether the corporate
practice doctrine, as set forth in People ex rel. Kerner v. United Medical
Service, prohibited licensed hospitals from employing physicians to
provide medical services.

The Illinois Supreme Court first determined the appeal was not moot. Applying the rule that an appeal has life if its decision could have a direct impact on the rights and duties of the parties, the court concluded that this appeal was not moot. This appeal was still relevant to the parties, because its outcome would affect their particular relationship, as well as public policy generally. A determination that hospitals are prohibited from employing physicians could force the Hospital to alter its working relationships with its medical staff. Also, such a finding could subject both parties to various penalties for violations of the Medical Practice Act of 1987. Conversely, a determination that hospitals may legally employ physicians may mean the Hospital has various causes of action for breach of contract.

The court next turned to an analysis of the corporate practice of medicine doctrine. After setting forth the definition and rationale behind the prohibition, the court considered its application in Illinois. Recognizing that prior to the instant action no Illinois court had applied the corporate practice of medicine rule or specifically addressed the issue of whether licensed hospitals are prohibited from employing physicians, the court looked to other jurisdictions with respect to the application of the corporate practice doctrine to hospitals.

After reviewing both common law and statutory authority, the court found there are primarily three approaches used to determine that the corporate practice doctrine is inapplicable to hospitals. First, some
states refused to adopt the corporate practice of medicine doctrine altogether. These states determined a hospital that employs physicians is not practicing medicine, but rather is merely making medical treatment available. Second, other jurisdictions determined the corporate practice doctrine does not apply to not-for-profit hospitals, because the public policy arguments supporting the doctrine do not apply to physicians employed by charitable institutions. Third, several states decided the doctrine does not apply to hospitals that employ physicians because hospitals are authorized by other laws to provide treatment to patients.

The court found the rationale of the latter two approaches persuasive, and combined them to reach a new result: refusing to apply the corporate practice of medicine doctrine to any licensed hospital.

To distinguish Kerner, the court pointed out that the Medical Practice Act contains no express prohibition on the corporate employment of physicians. Rather, the doctrine was inferred from the general policies supporting the Act. The appellant in Kerner was a general corporation possessing no licensed authority to offer medical services to the public. The corporate practice prohibition was designed to apply in such a situation. However, when a corporation has been licensed by the state to operate a hospital, as in the present case, the prohibition is inapplicable.

Support for the court's position was found in a number of legislative enactments which implied the authority to employ licensed physicians to provide medical services. In accordance with the policies underlying

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105 Id.
106 Id.
107 Id. at 112.
108 Id. at 112-13.
110 Id.
111 Id. at 113.
112 Id.
113 See Berlin, 688 N.E.2d at 113, citing the Hospital Licensing Act, 210 ILCS 85/3 (West Supp. 1995) (defining “hospital” as: “any institution, place, building, or agency, public or private, whether organized for profit or not, devoted primarily to the maintenance and operation of facilities for the diagnosis and treatment or care of *** persons admitted for overnight stay or longer in order to obtain medical, including obstetric, psychiatric and nursing, care of illness, disease, injury, infirmity, or deformity”); Hospital Lien Act, 770 ILL. COMP. STAT. 35/0.01 et seq. (West 1994) (providing “[e]very hospital rendering service in the treatment, care and maintenance, of such injured person” a lien upon a patient's personal injury cause of action); Hospital Emergency Service Act, 210 ILL. COMP. STAT. 80/0.01 et seq. (West 1994) (requiring “[e]very hospital *** which provides general medical and surgical hospital services” to also provide
these statutes, the court refused to distinguish between for-profit and not-for-profit hospitals.\textsuperscript{114}

As to public policy, the court found the traditional concerns that supported the corporate practice doctrine were inapplicable to licensed hospitals in the modern health care industry.\textsuperscript{115} Extensive changes, particularly the emergence of corporate health maintenance organizations, have minimized the concern over the commercialization of health care.\textsuperscript{116} When a licensed hospital is the physician's employer this concern is relieved because hospitals have an independent duty to provide for the patient's welfare.\textsuperscript{117}

Accordingly, a licensed hospital possesses legislative authority to practice medicine by employing a staff of physicians and is excepted from the corporate practice of medicine doctrine.\textsuperscript{118}

Justice Harrison dissented from the opinion.\textsuperscript{119} He stated the court did not have the power to amend a statute, and that adding another exception to the specific list is tantamount to changing the law.\textsuperscript{120} Where a statute specifies exceptions to a general rule, only those designated by the legislature will be recognized.\textsuperscript{121}

Justice Harrison failed to see any support for the majority's reliance on the cited statutes.\textsuperscript{122} Under the dissent's interpretation, none of these laws require that hospitals have the power to employ physicians directly.\textsuperscript{123}

The dissent also noted the Medical Practice Act contains a provision for the exemption of certain entities, subject to the discretion of the General Assembly.\textsuperscript{124} The legislature had already exempted employment of physicians by health maintenance organizations and professional emergency services).\textsuperscript{125}

\textsuperscript{114}Id. at 113.
\textsuperscript{115}Id.
\textsuperscript{117}Id.
\textsuperscript{118}Id.
\textsuperscript{119}Id. at 115.
\textsuperscript{120}Id.
\textsuperscript{121}Id. at 116.
\textsuperscript{122}Id. The Medical Practice Act provides it is inapplicable to "persons lawfully carrying on their particular profession or business under any valid existing regulatory Act of this State." 225 ILL. COMP. STAT. 60/4 (West 1994).
\textsuperscript{123}Id. See Health Maintenance Organization Act, 215 ILL. COMP. STAT. 125/1-1 et seq. (West 1994) (authorizing the employment of physicians by health maintenance organizations).
organizations. Presumably, therefore, if the General Assembly had intended to grant the same authority to hospitals, it would have explicitly done so.

In light of these reasons, the dissent agreed with the appellate court's decision that the corporate practice doctrine prohibited the Hospital from entering into an employment agreement with Dr. Berlin, and therefore, the agreement, including its restrictive covenant, was void and unenforceable.

Policy Implications of the Illinois Supreme Court's Decision

The Illinois Supreme Court's ruling in Berlin seems to have been anticipated by another case decided in March of 1997 by the Illinois Court of Appeals for the Second Circuit. In Holden v. Rockford Memorial Hosp., Dr. Holden and Rockford Memorial Hospital (Hospital) entered into an employment agreement on May 28, 1993. Pursuant to the agreement, Dr. Holden was an employee of the Hospital and was to provide reproductive endocrinology services in that department. Furthermore, Dr. Holden was to devote all professional practice time to, or on behalf of and at the discretion of, the hospital. The employment agreement also contained a restrictive covenant that was to last for two years after termination of employment, and cover certain surrounding counties.

On October 26, 1995, Dr. Holden submitted his resignation, and five months later, he filed a complaint for declaratory judgment and injunctive relief seeking a declaration that his employment agreement with the

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126 Id. See generally Professional Service Corporation Act, 805 ILL. COMP. STAT. 10/1 et seq. (West 1994) (allowing physicians to incorporate); Medical Corporation Act, 805 ILL. COMP. STAT. 15/1 (West 1994) (permitting physicians to form corporations to provide medical services); Professional Association Act, 805 ILL. COMP. STAT. 305/1 et seq. (West 1994) (granting physicians the right to practice in a professional association); Limited Liability Company Act, 805 ILL. COMP. STAT. 180/1-1 et seq. (West 1996) (giving physicians the right to organize and operate limited liability companies to practice medicine).


128 Id.


130 Id. at 343.

131 Id.

132 Id.

133 Id.
The Hospital was void and unenforceable as a matter of law. The Hospital filed a counterclaim for injunctive relief against Dr. Holden and damages from his breach of the employment agreement.

The court in Holden was faced with the same issue presented in Berlin -- whether hospital employment of physicians was equivalent to practicing medicine, in violation of the corporate practice of medicine doctrine. Even though the employment agreement in Holden was declared invalid as a violation of the corporate practice prohibition, the court clearly acknowledged the realities of modern health care and stressed that it came to its decision only by way of deference to the state supreme court.

In its conclusion, the court stated the corporate practice of medicine doctrine arose in response to fears that corporate involvement in medicine would restrict physicians' independence, commercialize medical practice, and threaten physician/patient loyalty. However, the health care industry has changed drastically since the doctrine was established. Hence, prohibiting hospitals from employing physicians in the present day may do more harm than good.

Despite this recognition and the apparent willingness to change the state of the law, the court declined the opportunity, stating that it was not its place to implement new law or institute new policy regarding the corporate practice of medicine doctrine. Instead, the Illinois Supreme Court's precedent, set sixty years ago, still provides the definition of "practicing medicine."

Now that the Illinois Supreme Court has ruled on the issue and declared that hospitals do not violate the corporate practice prohibition by

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125 Id.
126 Id.
127 Id. at 348.
128 Id. at 347. See also, Darling v. Charleston Community Memorial Hosp., 332, 211 N.E.2d 253 (Ill. 1965), quoting Bing v. Thunig, 143 N.E.2d 3, 8 (1957) (“The conception that the hospital does not undertake to treat the patient, does not undertake to act through its physicians and nurses, but undertakes instead simply to procure them to act upon their own responsibility no longer reflect the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and internes [sic], as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action.”).
130 Id. at 348.
131 Id.
employing physicians, the decision may provide the impetus for change in the legislature. The decision of the Illinois Supreme Court will also have a significant effect on how the corporate practice of medicine prohibition is interpreted and applied throughout the nation. Because another court has been persuaded that a medical facility's employment of physicians is acceptable and does not violate the corporate practice doctrine, other states may follow this rationale and bring the reality of modern medical care in line with statutory and common law provisions.

**IMPACT**

Some courts have adopted the reasoning that since a corporation is unable to obtain a medical license, it cannot practice medicine.\(^{142}\) This overlooks the fact that corporations do not purport to practice medicine in the strict sense that physicians do.\(^{143}\) The more logical interpretation of state licensure and medical practice acts would be to allow employment relationships between medical corporations and physicians.\(^{144}\) Entering into employment contracts should be distinguished from diagnosing or treating a patient. Otherwise, the purpose of state medical practice acts and licensure requirements would be stretched to an illogical breaking point.\(^{145}\)

Most courts have been reluctant to distinguish between a physician's professional services and a lay person's administrative duties, holding that corporations are illegally practicing medicine based solely on their employment of physicians.\(^{146}\) Several courts, however, have accepted the distinction between the professional and managerial facets of a medical corporation.\(^{147}\)

The courts recognizing this difference distinguish between a corporation's managing certain functions and the actual furnishing of medical services by professionals, such that the mere employment of physicians does not equate with practicing medicine. In Connecticut, the business of providing health care personnel does not translate into the

\(^{142}\) Mars, *supra* note 8, at 250.

\(^{143}\) *Id.*

\(^{144}\) *Id.* at 251.

\(^{145}\) *Id.*

\(^{146}\) *Chase-Lubitz, supra* note 4, at 468.

\(^{147}\) *Id.*
business of caring for patients. New Jersey also acknowledges that non-professional business matters, such as paying office expenses and managing business records, do not constitute practicing medicine under the corporate practice of medicine doctrine. The Kansas Supreme Court stated the general position most accurately when it announced that requiring a hospital to accomplish what it is licensed to do "without employing physicians is not only illogical but ignores reality."

Other courts are not faced with a problem in this area because they never interpreted the corporate practice of medicine doctrine as prohibiting hospitals from employing physicians. Alternatively, some state legislatures have avoided the problem by limiting the scope of the corporate practice doctrine.

The main issue in allowing hospitals to employ physicians is whether the relationship between a physician and the hospital patient becomes so transformed as to allow the hospital to become the medical practitioner.

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148 See Daw's Critical Care Registry v. Department of Labor, Employment Security Div., 622 A.2d 622, 636, (CT. 1992), aff'd, 622 A.2d 518 (CT. 1993) (distinguishing between operating a health facility and practicing medicine because the health facility did not have control over how services were provided to the patients).

149 See Women's Med. Ctr. v. Finley, 469 A.2d 65 (NJ. 1983), cert. denied, 475 A.2d 578 (1984) (stating all health care providers must perform business, administrative, and management chores, but as long as these functions do not "impinge upon professional control by the physicians of the medical practice" the corporation is not practicing medicine).


151 See State Electro-Medical Inst. v. Platner, 103 N.W. 1079 (NE 1905) (separating the professional aspects from the administrative aspects in a for-profit medical service corporation, finding that the intent of the state medical practice statute was to assure that those persons practicing medicine have sufficient personal qualifications, and noting that making contracts is not practicing medicine, thus, no restrictions exist if one is not actually diagnosing or treating disease); State ex rel. Sager v. Lewin, 106 S.W. 581 (MO 1907) (construing the state medical practice act as granting corporations the same rights as individuals to contract with physicians to provide medical care, and finding support in private hospitals' ability to incorporate to furnish medical services through licensed physicians); Group Health Ass'n v. Moor, 24 F. Supp. 445 (D.C. 1938), aff'd sub nom., Jordan v. Group Health Ass'n, 107 F.2d 239 (D.C. Cir. 1939) (refusing to apply the corporate practice rule to an arrangement in which a health association employed physicians because the physicians were independent contractors, rather than agents of the corporation).

152 See, e.g., S.D. CODIFIED LAWS ANN. § 36-4-8.1 (Michie Supp. 1995) ("A corporation is not engaged in the practice of medicine ... and is not in violation of [this section] by entering into an employment agreement with a physician licensed pursuant to this chapter if the agreement or the relationship it creates does not? ... [T]In any manner, directly or indirectly, supplant, diminish or regulate the physician's independent judgment concerning the practice of medicine or the diagnosis and treatment of any patient").

A better test to determine whether one is practicing medicine in the sense covered by state licensure and medical practice acts is whether or not one holds himself out as being able to diagnose or treat any human disease or physical condition. Unless a corporation is interfering with its physicians' medical judgments, there is no basis for the continued prohibitions on employment arrangements that have been held to violate the corporate practice of medicine doctrine.

CONCLUSION

"As the complexity of health care delivery system[s] increases, the continued viability of the corporate practice doctrine becomes questionable in light of its 'chilling effect' on the development of innovative health care delivery approaches which further cost containment efforts." It is difficult to reconcile cases which hold that the corporate practice of medicine doctrine is being violated simply because a corporation is employing physicians, with the more logical interpretation of the doctrine that recognizes a distinction between professional duties and managerial or administrative responsibilities.

A better policy would be to allow corporations to employ physicians as long as the physicians retain their freedom of action. In this scenario, the problems of lay control, divided loyalty, and commercialism would have little effect on the physician-patient relationship. By focusing on the physicians' freedom of action, courts will no longer be confined by abstract notions of corporate form.

Even though the corporate practice of medicine doctrine is outdated, it should not be abolished. It must, however, be modified to adapt to the current movement toward managed care and integrated health care delivery systems. The doctrine should only serve to protect physician

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154Rush, 205 So. 2d 11 (quoting Watson v. Centro Espanol DeTampa, 158 Fla. 796, 30 So. 2d 288 (1947)).
155Mars, supra note 8, at 251-52.
157Mars, supra note 8, at 265.
158Id.
159Id.
160Id.
161Hayward, supra note 3, at 428.
sovereignty in health care decisions.\textsuperscript{162} Narrowed in this manner, the doctrine can benefit both physicians and patients without infringing on the corporate entity's role to contain costs and monitor quality.\textsuperscript{163}