

Constantino, Mike

From: Urso, Frank
Sent: Thursday, March 24, 2011 3:15 PM
To: Constantino, Mike; Avery, Courtney
Subject: FW: Corporate Practice of Medicine Doctrine in Illinois; Project # E-001-11
Attachments: Urso.pdf

From: Elisius, Dana J. [mailto:DJElisius@duanemorris.com] **On Behalf Of** Bilimoria, Neville M.
Sent: Wednesday, March 23, 2011 10:25 AM
To: Urso, Frank
Cc: 'seastwood@marioneye.com'
Subject: Corporate Practice of Medicine Doctrine in Illinois; Project # E-001-11

Please see the attached.

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March 23, 2011

VIA E-MAIL & U.S. MAIL

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Re: **Information on Corporate Practice of Medicine Doctrine in Illinois:**
E-001-11 Surgery Center of Southern Illinois, Marion

Dear Mr. Urso:

We represent Maqbool Ahmad, M.D. regarding Project E-001-11, the Application for a Change of Ownership Exemption (the "Application") involving the Surgery Center of Southern Illinois, Marion (the "Facility"). Specifically, we wanted to raise one problem with the Application that raises a significant legal issue that the Illinois Health Facilities and Services Review Board (the "Board") will need to address. Therefore, we consider it proper to bring it to your attention.

Background

Marion Surgical Center, Ltd. is a multispecialty ambulatory surgical treatment center ("ASTC") located at 806 North Treas, Marion, Illinois. Marion Holding, LLC currently owns 51% of the general partner interest and 9.6% of the limited partnership interest of the Facility. Cirurgia Centro, LLC is proposing to purchase a 100% interest in Marion Holding, LLC and, upon completion of this purchase, Cirurgia Centro, LLC will obtain ownership and control of the Facility. This includes control over the operation, physical plant, and capital assets. The cost of the transaction is \$1,512,500.

We write to raise a particularly important legal defect with the Application. Cirurgia Centro, LLC is a member-managed, wholly-owned corporation with a sole member, Ronald Osman (the "Applicant"). The Applicant is an attorney and, upon information and belief, is not a

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licensed physician or medical provider of any kind in Illinois or any other jurisdiction. The Applicant's proposal to have a non-physician take ownership and control of the Facility poses a substantial problem because his ownership of the Facility would violate the Corporate Practice of Medicine Doctrine ("Doctrine") in Illinois.

The Corporate Practice Of Medicine Doctrine In Illinois

In Illinois, the prohibition against the corporate practice of medicine derives from the language of the Medical Practice Act, which provides that no one may practice medicine without a license. The Doctrine is premised on the rationale that:

A corporation cannot be licensed to practice medicine because only a human being can sustain the education, training, and character-screening which are prerequisites to receiving a professional license [and] . . . since a corporation cannot receive a medical license it follows that a corporation cannot legally practice the profession. . . . [Accordingly] the employment of physicians by corporations is illegal because the acts of the physicians are attributable to the corporate employer, which cannot obtain a medical license.

Berlin v. Sarah Bush Lincoln Health Center, 179 Ill. 2d 1, 227 Ill. Dec. 769, 688 N.E.2d 106 (Ill. 1997).

The Supreme Court in *Berlin* declined to apply the Doctrine to licensed hospitals, however, and reasoned that the prohibition against the corporate practice of medicine is inapplicable "when a corporation has been sanctioned by the laws of this State to operate a hospital." See *Berlin*, 179 Ill. 2d 1. This very narrow exception to the Doctrine delineated by *Berlin* was later upheld by the Supreme Court in *Carter-Shields, M.D. v. Alton Health Institute*, 201 Ill. 2d 441, 268 Ill. Dec. 25, 777 N.E.2d 948 (Ill. 2002), wherein the Court recognized that the statutes enacted by the General Assembly "clearly authorize, and at times mandate, licensed hospital corporations to provide medical services" and that the "authority to appoint duly licensed physicians for that purpose is reasonably implied from these legislative enactments." *Berlin*, 179 Ill. 2d at 17; *Carter-Shields*, 201 Ill. 2d at 457.

The Court in *Berlin* and *Carter-Shields* held that because the General Assembly enacted a comprehensive licensing scheme for hospitals, thereby extending to hospitals the authority to provide medical services to the public, the Doctrine did not apply in that singular instance. See *Carter-Shields*, 201 Ill. 2d at 458. Indeed, *Carter-Shields* cites to the Hospital Licensing Act (as well as other hospital-related statutes) and specific language therein which the Court believed was intended to protect the public health through the establishment and enforcement of standards for patient care and quality health care. See *Carter-Shields*, 201 Ill. 2d at 459.

The Hospital Licensing Act's language protecting patient health and welfare is not as robust in the Ambulatory Surgical Treatment Center Act ("ASTC Act"), 210 Ill. Comp. Stat. 5/1 *et seq.* Indeed, attempts to expand the exceptions to the Doctrine beyond licensed hospitals in Illinois have, since the *Berlin* decision, failed. In *Carter-Shields*, the employment agreement entered into between an unlicensed, non-profit health care corporation was determined to be void from its inception since the contract with the physician-plaintiff violated the prohibition against the Doctrine. The corporation in question was not licensed to provide medical services to the public, and the concerns of lay control over professional judgment and the division of the physician's loyalties which underpin the prohibition against the Doctrine were apparent. *Carter-Shields*, 201 Ill. 2d at 460-461. *Carter-Shields* noted that 50% of the company in question was owned by a health system whose president was not a licensed physician. Because of the lack of physician ownership, the contact between the owner and the physician was deemed void against the corporate practice of medicine. But *Carter-Shields* did not extend the exceptions to the Doctrine beyond licensed hospitals and licensed professional corporations as stated in *Berlin*.

No other cases in Illinois have strayed from the isolated hospital exception to the Doctrine delineated by the Supreme Court. In *Riggs v. Woman to Woman, Obstetrics and Gynecology*, 351 Ill. App. 3d 268, 286 Ill. Dec. 12, 812 N.E.2d 1027 (2nd Dist. 2004), the Appellate Court ruled that a failure of physician's former employer, a licensed professional corporation, to register with the then-Illinois Department of Professional Regulation pursuant to the Professional Service Corporation Act did not render the physician's employment agreement void absent a showing that the physician was prejudiced as a result of the failure to register. In the *Riggs* case, the physician claimed that, because the employer-defendant was not a licensed professional corporation, it violated the Doctrine. *Riggs* distinguished *Carter-Shields* and *Berlin* by stating that, because the company in *Riggs* was a professional corporation which is owned and operated by licensed medical professionals, the contract between the company and the physician was not void because of the Doctrine.

In *Orthodontic Centers of Illinois, Inc. v. Michaels*, 403 F. Supp. 2d 690 (N.D. Ill. 2005), an orthodontist was successful in arguing that a contract between the orthodontist and an orthodontic service company not licensed under Illinois law violated the Doctrine and was therefore void. In this case, the Court referred to the orthodontic center as an unlicensed party that unlawfully held itself out as capable of providing dental care. It ruled against the orthodontic center accordingly. *Id.*

The ASTC Act specifically states that "any person" may apply for licensure, but that at least one physician must provide appropriate medical supervision. See Section 6(3)(a). Despite that language from the ASTC Act, one cannot categorically conclude that any ASTC licensed in Illinois is excused from the Doctrine. To the contrary, it is clear under the *Berlin* case and its progeny that *only* licensed hospitals in Illinois have been excepted from the Doctrine. Therefore,

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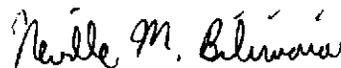
although the ASTC Act does not specifically discuss the issue of corporate ownership, the Doctrine provides a legal barrier to a non-physician-owned ASTC.

The core of the Doctrine is rooted in public policy and Illinois common law which is particularly apt to these circumstances. Physicians should direct medical decisions. The presumption is that, at the end of the day, a physician will make decisions as a physician first and a businessperson second. The Applicant is not a physician. Nevertheless, he proposes to employ physicians and manage the Facility. The Applicant makes this very clear in the Application. The funding is contributed entirely from the Applicant's personal funds in the name of his solely-owned, member-managed limited liability company ("LLC"). See Attachment 2 to the Application. The Applicant has certified that he and his LLC "**will maintain ownership and control of the facilities** for a minimum of three years." See Certification to Attachment A to the Application. Finally, the Applicant presents the curious claim of being "well versed in all aspects of operating an outpatient surgical center. . . ." See Attachment 4 of the Application. Presumptively the most important aspect of operating a surgical center would be the practice of medicine, something the Applicant is not licensed to do.

We understand that there are arguments that the Applicant could raise. He could suggest that the ASTC Act is sufficiently similar to the Hospital Licensing Act and, as in *Berlin*, argue that ASTCs should be exempt from the Doctrine's prohibitions. It is not the role of the Board to make new law, and certainly not in the course of an application for *exemption*. Moreover, as discussed above, arguments of that ilk have been repeatedly made in Illinois, and *Berlin* and its progeny continue to suggest that the very narrow exception from the Doctrine is limited to hospitals, as opposed to all other licensed entities in Illinois, *i.e.*, nursing homes, laboratories, pharmacies, or surgery centers.

Mr. Silberman and I are available to discuss this matter with you further, as you deem necessary and proper.

Very truly yours,



Neville M. Bilimoria

NMB/dje

cc: Dr. Maqbool Ahmad
Mark J. Silberman