

Business Entities Associated With Learned Medical Professions

An Evolution of Law and Policy

By Kim Breitmeyer

Historically, the “learned professions” fall into the general categories of law, medicine, and theology. This article focuses on the learned professions under the Michigan Public Health Code¹ and traces the development of law and policy in that area over the past 60 years.

In 1956, the Michigan attorney general concluded that the practice of medicine and the provision of osteopathic medical services were unlawful corporate purposes under the business corporation statutes of the time based on the “learned profession doctrine.”² It recognizes that only an individual, not a corporation, should qualify to practice certain professions such as medicine. The following rationale supports the learned profession doctrine:

- 1) Laymen should not be permitted, directly or indirectly by virtue of the corporate form, to practice medicine;
- 2) Necessary confidential and professional relationships existing between a physician and his patient could be destroyed by law shareholders interested only in profit;
- 3) The limited liability of the corporate form is not appropriate where the client must place such a high degree of trust and confidence in the physician; and
- 4) It is impossible for a corporation to fulfill the licensing and ethical requirements medical practice demands.³

In 1963, the former Professional Service Corporation Act, 1962 PA 192,⁴ became effective, providing a framework for those practicing a learned profession to incorporate in Michigan within constraints that take into account the doctrine. In 1980, the Board of Osteopathic Medicine & Surgery

asked the Michigan attorney general whether a for-profit corporation may be formed under the Business Corporation Act (BCA)⁵ with its stated purpose to provide osteopathic services and where one shareholder is a layperson and the other is an osteopathic physician.⁶ The attorney general determined that the practice of osteopathic medicine was a learned profession. Interpreting the provisions of the Professional Service Corporation Act, he concluded that the act required all shareholders of a corporation formed under the act to be individually licensed to render the professional service or services for which the corporation was formed. He reasoned that this prevented the unlicensed practice of medicine and other learned professions. He further reasoned that this ensures that not only the corporation but the individual rendering the services can be held liable for ethical violations, negligence, or other misconduct. He concluded that a corporation can be formed under both the Professional Service Corporation Act and the BCA to render osteopathic services, but it could not be formed solely under the BCA and could not include a layperson as a shareholder.

In 1989, the Michigan attorney general opined that for a business entity to hold itself out as a corporation providing a professional service under the Professional Service Corporation Act, each shareholder must be

“fully qualified to perform all of the professional services rendered by the corporation.”⁷ He further opined that corporations formed under the BCA “may not engage in the practice of the learned professions.”⁸ Instead, such corporations must form under the Professional Service Corporation Act; however, a professional service corporation may incorporate under the act to render more than one professional service as long as “each shareholder...is fully qualified to perform all of the professional services rendered by the corporation.”⁹ He advised the then Corporations and Securities Bureau to notify corporations performing professional service activities considered as one of the learned professions but formed under the BCA that they have the opportunity to comply with the requirements of the Professional Service Corporation Act “within a reasonable period of time.”

The BCA narrowly defines “services in a learned profession” as

services provided to the public by a dentist, an osteopathic physician, a physician,¹⁰ a surgeon, a doctor of divinity or other clergy, or an attorney-at-law. The term does not include services provided to residents of a nursing home, as defined in section 20109 of the public health code, 1978 PA 368, MCL 333.20109, by a dentist, osteopathic physician, physician, or

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surgeon who is an employee or independent contractor of the nursing home.¹¹

The Limited Liability Company Act¹² similarly defines “services in a learned profession” as

services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law. The term does not include services provided to residents of a nursing home, as defined in section 20109 of the public health code, 1978 PA 368, MCL 333.20109, by a dentist, osteopathic physician, physician, or surgeon who is an employee or independent contractor of the nursing home.¹³

By contrast, section 282(b) of the BCA defines “professional service” more broadly as

a type of personal service to the public that requires that the provider obtain a license or other legal authorization as a condition precedent to providing that service. Professional service includes, but is not limited to, services provided by a certified or other public accountant, chiropractor, dentist, optometrist, veterinarian, osteopathic physician, physician, surgeon, podiatrist, chiropodist, physician’s assistant, architect, professional engineer, land surveyor, or attorney-at-law.¹⁴

Section 902(b) of the Limited Liability Company Act defines “professional service” to include

a type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. Professional service includes, but is not limited to, services rendered by a certified or other public accountant, chiropractor, dentist, optometrist, veterinarian,

osteopathic physician, physician, surgeon, podiatrist, chiropodist, physician’s assistant, architect, professional engineer, land surveyor, or attorney-at-law.¹⁵

Shortly after the Michigan attorney general reviewed the issue in 1989, 1990 PA 166 amended the Professional Service Corporation Act to clarify that each shareholder of a professional service corporation must be licensed in one or more professional services rendered by the corporation. It contained a carve out if the professional service provided was included within the Public Health Code, in which case all of the shareholders must be “licensed or legally authorized in this state to render the same professional service.”

In 1994, the Corporations Division issued a release further clarifying that “physicians and surgeons” may serve as shareholders of the same professional service corporation even if the shareholders are licensed in different professions.¹⁶ During a brief period between February 1996 and November 1997, some professional service corporations were formed with both physician’s assistants and physicians as shareholders based on the premise that a physician’s assistant provides the same service as a medical doctor or a doctor of osteopathic medicine and surgery. However, when 1997 PA 139 became effective on November 18, 1997, its underlying bill analysis made clear that the legislature considered amending the Professional Service Corporation Act to allow for this but ultimately decided not to do so. And the Professional Service Corporation Act chose the terms “physicians and surgeons” to specifically allow only podiatrists, allopathic physicians, and osteopathic physicians to incorporate with one another.

In 2004, the Michigan attorney general examined whether a chiropractor could organize a professional service corporation

with an allopathic or osteopathic physician with the stated purpose of providing medical and chiropractic services.¹⁷ First, he determined that chiropractors had a different scope of practice from the practice of medicine or osteopathic medicine since the Public Health Code limits chiropractors to the treatment of spinal subluxations or misalignments and specifically prohibits performing surgery or writing prescriptions. He contrasted chiropractors with podiatrists, who are allowed to organize a professional service corporation with allopathic or osteopathic physicians based on the fact that podiatrists may perform surgery and are considered within the definitions of “physician,” “practice of medicine,” and “practice of osteopathic medicine and surgery” found in the Public Health Code. In concluding that a chiropractor may not organize a professional service corporation with an allopathic or osteopathic physician under the Professional Service Corporation Act, he also cited as persuasive the legislative history of 1997 PA 139 in adding the terms “physicians and surgeons” to the act, indicating the legislature’s intent to limit the ability to organize a professional corporation to one or more other physicians and surgeons.

Section 17076(1) of the Public Health Code limits a physician’s assistant to providing “medical care services” under a physician’s supervision, and only if the type of services provided “are within the scope of practice of the supervising physician and are delegated by the supervising physician.”¹⁸ “Practice as a physician’s assistant” is defined as “the practice of medicine, osteopathic medicine and surgery,¹⁹ or podiatric medicine and surgery²⁰ performed under the supervision of a physician or podiatrist licensed under [article 17 of the Public Health Code.]”²¹ Thus, after passage of 1997 PA 139, the Corporations Division has not knowingly filed articles of incorporation for a professional corporation with shareholders that included only physician’s assistants. *Smith v Director, Corporation and Securities Bureau*²² allows the Corporations Division to reject articles of incorporation specifying an unlawful purpose as not substantially conforming to the requirements of the BCA.

Physician’s assistants were specifically prohibited from organizing a professional corporation with only physician’s assistants

as shareholders beginning on July 19, 2010.²³ That same year, they were also prohibited from organizing a professional limited liability company (LLC) with only physician's assistants as members.²⁴ Those amendments to the Professional Service Corporation Act and the Limited Liability Company Act instead allowed physicians and podiatrists to organize professional corporations or professional LLCs with physician's assistants as shareholders or members along with other physicians and podiatrists. However, notably, services rendered by a physician's assistant were added to the definition of "professional service" in both the Professional Service Corporation Act and the Limited Liability Company Act without being defined as a "learned profession." Other occupations under the Public Health Code—including chiropractors, veterinarians, and optometrists—are not considered learned professions, but are permitted to organize professional corporations or professional LLCs without the supervision of other licensees and without including other licensees as members or shareholders.

The 2010 amendments to the BCA and the Limited Liability Company Act were consistent with amendments to the Public Health Code in 2010 that required physicians or podiatrists who organized a professional service corporation or professional limited liability company with physician's assistants to also serve as shareholders in the same business entity as the physician's assistants they supervise.²⁵ Thus, physician's assistants are not required to organize as a professional corporation or as a professional LLC, but if they organize with physicians and podiatrists to provide medical services, such entities must form as professional corporations or professional LLCs.

Public Act 569 of 2012 repealed the Professional Service Corporation Act and added many of its provisions to create Chapter 2A of the BCA—MCL 450.1281 to MCL 450.1289—in part to avoid the confusion caused by having two separate statutes governing the incorporation of professional business entities.²⁶ It also mirrored the approach already taken by Article 9 of the Limited Liability Company Act—MCL 450.4901 to MCL 450.4910—by requiring a corporation to incorporate as a professional corporation

under Chapter 2A of the BCA if it provides one or more services in a learned profession, although it could also provide other professional services. Those corporations previously incorporated under the Professional Service Corporation Act would be subject to Chapter 2A of the BCA. But a corporation that organized in Michigan before the Professional Service Corporation Act was adopted in 1963 need not adhere to Chapter 2A of the BCA unless it affirmatively amended its articles of incorporation to state that the shareholders elected to bring the corporation within the provisions of Chapter 2A. A corporation incorporated to provide professional services not included within the definition of a learned profession has the option whether to incorporate as a professional corporation under Chapter 2A or as a corporation under Chapter 2 of the BCA. Therefore, each shareholder or member of a professional corporation or a professional LLC individually licensed under the Public Health Code must either be licensed to provide the same professional service or services or the licensed shareholders or members may form a professional corporation or professional LLC with other physicians, osteopaths, podiatrists, or physician's assistants licensed under the Public Health Code. And physician's assistants may only be shareholders or members if a supervising physician is also a shareholder or member of the business entity. ■

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ENDNOTES

1. MCL 333.1101 through MCL 333.25211.

2. 2 OAG, 1955–1956, No. 2451, p 124 (March 7, 1956).

3. OAG, 1979–1980, No. 5676 (April 8, 1980).

Interestingly, the Michigan attorney general later opined that the learned profession doctrine did not apply to corporations formed under the Nonprofit

Corporation Act, MCL 450.2101 *et seq.* OAG, 1993, No. 6770 (September 17, 1993). On January 15, 2015, this was codified in amendments to the Nonprofit Corporation Act, MCL 450.2261(6), specifically allowing nonprofit corporations to provide services "in a learned profession." 2014 PA 557.

4. This act was repealed by 2012 PA 569, effective January 2, 2013.

5. MCL 450.1101 *et seq.*

6. OAG, 1979–1980, No. 5676 (April 8, 1980).

7. OAG, 1989, No. 6592 (July 10, 1989).

8. *Id.*

9. *Id.*

10. A physician is "an individual licensed under [article 17 of the Public Health Code] to engage in the practice of medicine." MCL 333.17001(1)(d). "Practice of medicine" includes the "diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts." MCL 333.17001(1)(f).

11. MCL 450.1109(1).

12. MCL 450.4101 *et seq.*

13. MCL 450.4102(2)(f).

14. MCL 450.1282(b).

15. MCL 450.4902(b).

16. Tyson, Corporation Division Release 94-1a-C (March 14, 1994).

17. OAG, 2004, No. 7151 (March 9, 2004).

18. MCL 333.17076(1).

19. "Practice of osteopathic medicine and surgery" includes a separate, complete, and independent school of medicine and surgery utilizing full methods of diagnosis and treatment in physical and mental health and disease, including the prescription and administration of drugs and biologicals, operative surgery, obstetrics, radiological and other electromagnetic emissions, and placing special emphasis on the interrelationship of the musculoskeletal system to other body systems. MCL 333.17501(1)(d).

20. "Practice of podiatric medicine and surgery" includes the examination, diagnosis, and treatment of abnormal nails, superficial excrescences occurring on the human hands and feet, including corns, warts, callosities, and bunions, and arch troubles or treatment medically, surgically, mechanically, or by physiotherapy of ailments of human feet or ankles as they affect the condition of the feet. It does not include amputation of human feet, or the use or administration of anesthetics other than local. MCL 333.18001(1)(c).

21. MCL 333.17001(1)(g).

22. *Smith v Dir, Corp and Securities Bureau*, 79 Mich App 107, 110; 261 NW2d 228 (1977).

23. MCL 450.222 and MCL 450.224, as amended by 2010 PA 125.

24. MCL 450.4902 and MCL 450.4904, as amended by 2010 PA 126.

25. MCL 333.17048, as amended by 2010 PA 124.

26. Senate Legislative Analysis, SB 1316 through SB 1320, October 22, 2012.