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# Update on Corporate Practice of Medicine Under Idaho Law

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In 2016, the Idaho Board of Medicine abandoned its position that Idaho law prohibits physicians from being employed by non-physicians. The Board's new position removes obstacles to non-physician investments in medical practices and other transactions that previously were prohibited by the Board's enforcement of an antiquated rule known as the corporate practice of medicine doctrine ("COPM").

COPM is enshrined in the laws of several states and prohibits a licensed physician from being employed by a person other than another licensed physician or a professional entity that is owned by other licensed physicians. This doctrine has, at best, scant support in Idaho law, and has historically been enforced solely by the Idaho Board of Medicine against physicians licensed in Idaho. The doctrine in Idaho was declared to be at death's door in 2011 in an article in the Idaho Law Review by Michelle Gustavson and Nicholas Taylor.<sup>[i]</sup> In March 2016, the Idaho Board of Medicine ceased enforcing COPM.<sup>[ii]</sup> With this change in policy, the COPM doctrine no longer appears to have any relevance under Idaho law.

This article briefly reviews the history of COPM, the legal arguments the Board historically made to support COPM in Idaho, and the current state of the law following the Board's 2016 decision.

## **History of the COPM Doctrine**

The COPM doctrine's history is tied to the development of organized medicine in the 19th and early 20th centuries.<sup>[iii]</sup> In particular, COPM is one of the principles that the American Medical Association advanced to organize licensed physicians and protect them from competition.<sup>[iv]</sup> COPM is sometimes defended as a rule to preserve the integrity of the physician-patient relationship or the integrity of the physician's medical judgment. But from the outset, the COPM was primarily a rule intended to protect the physician's pocket book and only secondarily about protecting patients.<sup>[v]</sup>

Over time, some states have expressly incorporated COPM into their medical licensing statutes.<sup>[vi]</sup> Idaho statutes, however, do not codify COPM. Indeed, Idaho's Medical Practice Act expressly prohibits natural persons from engaging in the unlicensed practice of medicine.<sup>[vii]</sup> The statute says nothing about whether the person practicing medicine is employed, nor does it state that a corporate employer of a physician is

engaged in the unlicensed practice of medicine.[viii]

### ***Worlton v. Davis***

The pre-2016 Board of Medicine and other proponents of COPM have essentially relied on a single statement in a single Idaho Supreme Court case from 1952 as the foundation for asserting that COPM has a place in Idaho law. That case, *Worlton v. Davis*,<sup>[ix]</sup> held as follows: “[n]o unlicensed person or entity may engage in the practice of the medical profession through licensed employees; nor may a licensed physician practice as an employee of an unlicensed person or entity. Such practices are contrary to public policy.”<sup>[x]</sup>

The precedential value of *Worlton*, however, is suspect. First, the case involves facts under which a non-physician owner of a clinic exerted control via contract over the licensed physicians' practice of medicine.<sup>[xi]</sup> The *Worlton* court found the contract in question as void against public policy without reference to the Idaho Medical Practice Act.<sup>[xii]</sup> Second, the Idaho Medical Practice Act has been amended and recodified substantially since the date of the *Worlton* decision with the current statute dating from 1977.<sup>[xiii]</sup> Third, subsequently enacted Idaho statutes expressly allow several types of corporate entities to employ physicians including hospitals, managed care organizations, public health districts, and home health agencies.<sup>[xiv]</sup>

These newer statutes appear to demonstrate that Idaho has no overriding public policy against the employment of physicians. Indeed, the concerns of the *Worlton* court regarding a non-physician influence over a physician's medical judgment are better addressed through the Medical Practice Act's prohibitions on the unlicensed practice of medicine and common contract provisions that preserve the independent medical judgment of physicians.<sup>[xv]</sup>

### **The Practice of Medicine Since *Worlton***

The world has changed since 1952. First, a 1975 case in the Second Circuit invalidated the AMA ethical standards that provided the basis for the adoption of COPM earlier in the century. <sup>[xvi]</sup> Second, many states have rescinded or ceased to enforce COPM.<sup>[xvii]</sup> Third, the practice of medicine by independent, physician-owned medical groups is increasingly rare. Many physicians are now directly employed by hospitals or managed care organizations or by medical groups that are wholly owned by a hospital or managed organization. Fourth, the industry long ago developed a means to effectively evade COPM by placing a medical group's hard assets and non-clinical staff, including business management, into one legal entity and the physicians into a second legal entity that contracts with the first entity for management services.

COPM does not bar non-physicians from owning shares of the management company, and such a bifurcated structure permits all of the revenue from the practice—net of physician's salaries—to flow into the management company and out to the non-physician owners. The success of these structures over the decades amply demonstrates the irrelevance

of COPM. In such arrangements, the contractual provisions serve to protect the physician's independence and to ensure compliance with the Idaho Medical Practice Act and professional ethics.

### 2016 BOM Decision

The Idaho Board of Medicine's decision in 2016 to abandon COPM was a much-anticipated development, and is consistent with the trend in other states towards the derogation or outright abrogation of COPM. COPM is an antiquated doctrine that has no sound basis in public policy, no firm basis in Idaho law, and has been widely repudiated by other states. If COPM was at death's door when Gustavson and Taylor wrote their article in 2011, the Idaho Board of Medicine's 2016 decision appears to have finished it off.

No new Idaho case law or legislation has appeared since 2016 that formally rescinds COPM for all purposes under Idaho law, but the consensus appears to be that the effect of any such legislation or case law would be merely to pound the final nail in the coffin.<sup>[xviii]</sup> As a practical matter, the Idaho Board of Medicine's abandonment of COPM has opened the door in Idaho for non-physicians to invest in medical practices and for physicians to accept direct employment with any kind of employer.<sup>[xix]</sup>

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[i] Michelle Gustavson and Nick Taylor, *At Death's Door—Idaho's Corporate Practice of Medicine Doctrine*, 47 IDAHO L. REV. 480 (2011).

[ii] Kim Stanger, *Idaho Board of Medicine Disavows the Corporate Practice of Medicine Doctrine* (Sept. 23, 2016) <https://www.hollandhart.com/idaho-board-of-medicine-disavows-the-corporate-practice-of-medicine-doctrine>.

[iii] *See, generally*, Gustavson, note 2.

[iv] *See* Gustavson note 2 at 490–91.

[v] *See id.* at 492–3.

[vi] *See id.* at 498; *see, e.g.*, Col. Rev. Stat. Section 12-240-138.

[vii] Idaho Code § 54-1803.

[viii] *See also* Gustavson, note 2 at 504-505 (refuting arguments that the Idaho Medical Practice Act somehow adopts COPM by “negative

inference”).

[ix] 73 Idaho 217 (1952).

[x] *Id.* at 221.

[xi] *Id.* at 222.

[xii] *Id.* at 221.

[xiii] Idaho Medical Practice Act, ch. 199, 1977 Idaho Sess. Laws 536.

[xiv] See Gustavson, note 2, 511–17.

[xv] See *also* Gustavson, note 2, 509–10.

[xvi] *Am. Med. Ass’n v. Federal Trade Comm’n*, 638 F.2d 443 (2nd Cir. 1980); see Gustavson, *supra* note 2, 496–98.

[xvii] See Gustavson, note 2, 498–501.

[xviii] Kim Stanger, *Non-Physicians Owning or Investing in Medical Practices in Idaho* (Nov. 8, 2017) <https://www.hhhealthlawblog.com/2017/11/non-physicians-owning-or-investing-in-medical-practices-in-idaho.html>.

[xix] See *id.*

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