

SECTION I ADVISORY RULINGS
Practice of Medicine

Corporate/Contractual Practice of Medicine

RULING: The Board of Licensure in Medicine has ruled that the Board holds each licensee individually accountable for his/her conduct without regard to any employment relationship. The Board will not accept as an excuse for either incompetence or unprofessional conduct the defense that someone else employs a physician or that the physician is simply carrying out the orders of another.

EFFECTIVE DATE: July 10, 1990

REVISION DATES:

HISTORY: In a letter dated May 2, 1990, John P. Doyle requested an advisory ruling concerning corporate practice. 32 M.R.S.A. §3282-A enumerates conduct for which a licensee is answerable to the Board. The Board declined to issue such a ruling but responded to Mr. Doyle by reinforcing their original opinion. That position has now been strengthened by letter dated November 2, 1992.

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DAVID R. HEDRICK
EXECUTIVE DIRECTOR

WILLIAM C. McPECK
ASST. EXECUTIVE DIRECTOR

November 2, 1992

John P. Doyle, Jr.
Preti, Flaherty, Beliveau & Pachios
P.O. Box 1058
Augusta ME 04332-1058

FILE COPY

RE: May 1990 Advisory Opinion Request

Dear Mr. Doyle:

Your are most gracious to take responsibility in your October 29 letter for having lost a written response from the Board to your May 2, 1990 request for an advisory ruling on what I have styled "the corporate practice of medicine."

In truth I think that after the Board reviewed your request on July 10, 1990, I trusted Ken Lehman to write a reply and he trusted that I did.

Belatedly, enclosed is a copy of the entry in the Board's minutes of July 10, 1990, reflecting the Board's action.

According to my notes of that meeting, Ken accurately elaborated the discussion leading to this motion when he subsequently conferred with you. That is:

* The Board felt it could not opine on matters out of its purview, such as the working out of corporation law as set forth in Title 13.

* Nonetheless, in respect to physicians subject to its license and jurisdiction, pursuant to Title 32, Ch. 48, the Board holds each individually accountable for his/her conduct without regard to any employment relationship. Whether a salaried employee of a corporate entity, a principal in a Professional Association, a partner, or a self-employed solo practitioner, each licensee of the Board must answer for their exercise of clinical judgment, ethics, and competency. None may defend themselves against a Board.

John P. Doyle, Jr.

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November 2, 1992

complaint by asserting that "company policy," not his conduct, is at issue.

* Please see 32 M.R.S.A. §3282-A for enumeration of conduct for which a licensee (including physician assistants) is answerable to the Board.

Yours truly,



David R. Hedrick
Executive Director

DRH:jmm

cc: E. David, M.D., J.D.
K. W. Lehman, J.D.

PRETI, FLAHERTY, BELIVEAU & PACHIOS

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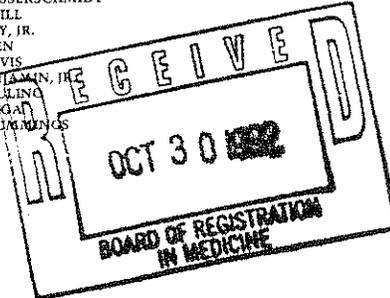
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ROBERT F. PRETI
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DAVID B. VAN SLYKE



October 29, 1992

David R. Hedrick
Executive Director
BOARD OF REGISTRATION IN MEDICINE
State House Station #137
Augusta, ME 04333

Re: May 1990 Advisory Opinion Request

Dear David:

I would appreciate your help in confirming to me the ultimate outcome of our May 2, 1990 request for an advisory opinion, copy of which is enclosed for ease of reference.

Following our submission of this request, I conferred on a number of occasions with then-Assistant Attorney General Ken Lehman. Ken advised me in the summer of 1990 that the Board had reviewed our submission, and had ultimately determined not to issue a definitive ruling on each of the questions we had raised in the document. Rather, Ken had summarized the Board's position as one where the employment of a physician by a non-profit or for-profit corporation did not appear to constitute a per-se ethical violation under the Board's standards. Rather, the Board would hold such a physician accountable for any medical care rendered by him and it would not be an acceptable defense to assert that the nature or scope of care provided to him was directed by the corporation. Ken stressed the Board viewed as paramount the accountability of the physician or physicians involved in the treatment decision. He noted further that there had been prior occasions where the Board had been concerned with physician assertions of lack of accountability due to the corporate employment situation. Ken suggested some type of communication would be forthcoming from the Board

PRETI, FLAHERTY, BELIVEAU & PACHIOS

David R. Hedrick
October 29, 1992
Page 2

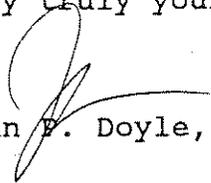
summarizing these findings. In reviewing my file recently I did not find a final response from the Board (though I acknowledge I may have received and misplaced such a document).

I regret my delay in pursuing this issue with you. It became less of a concern to the particular client who had asked us to raise the question initially. Nonetheless, I would greatly appreciate communication from you or the Board either confirming my understandings based on my discussions with Ken or otherwise setting forth the Board's position.

While I fully appreciate that Ken is now in private practice, I am forwarding a copy of this letter to him as a courtesy in the event that I have not fully or accurately stated the gist of his communications to me. I am also copying Ed David as I have discussed this issue with him as well from time to time.

Thank you for your attention to this request.

Very truly yours,



John P. Doyle, Jr.

JPD:djj
encls.

cc: Edward David, J.D., M.D.
Kenneth Lehman, Esq.

79555/.BD2

PRETI, FLAHERTY, BELIVEAU & PACHIOS

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October 29, 1992

Kenneth Lehman, Esq.
Bernstein, Shur, Sawyer & Nelson
One Hundred Middle Street
P.O. Box 9729
Portland, Maine 04104

Re: May 1990 Advisory Opinion Request

Dear Ken:

As a courtesy, I am enclosing copies of my letters of this date to Dave Hedrick and Ed David.

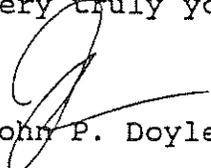
Recently, Beth Dobson of Verrill & Dana contacted me to seek background on the Board's position on the corporate practice of medicine issue. In reviewing my file, I determined that I had not received a confirming letter at the time from the Board itself.

I have attempted to restate my understanding of my discussions with you at the time, and I hope accurately.

I am not seeking any specific action on your part, but as a courtesy wanted to provide you with copies of these materials to the extent that you wish to comment further.

Best personal regards.

Very truly yours,


John P. Doyle, Jr.

JPD:djj
encls.

cc: David R. Hedrick
Edward David, J.D., M.D.
79555/.BD5

PRETI, FLAHERTY, BELIVEAU & PACHIOS

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October 29, 1992

Edward David, J.D., M.D., Chairman
BOARD OF REGISTRATION IN MEDICINE
498 Essex Street
Bangor, ME 04401

Re: May 1990 Advisory Opinion Request

Dear Ed:

I am enclosing for ease of reference a copy of my letter of this date to Dave Hedrick. I regret my delay in pursuing this question. I would appreciate Dave's response (or the appropriate response from the Board) confirming my understandings based on discussions with Ken at the time.

Best personal regards.

Very truly yours,


John P. Doyle, Jr.

JPD:djj
encls.

cc: David R. Hedrick
Kenneth Layman, Esq.

79555/.BD4

XII. 24 M.R.S.A. §2505 Report.

MOTION was made by Mr. Bradley to issue a complaint against the physician involved in this report with a letter explaining the source of the complaint, making it clear that the complaint did not issue from the patient or the family. The motion was seconded by Dr. Serrage and passed unanimously.

XIII. STANDING COMMITTEES. (no reports)XIV. CLEAR CONFERENCE

There will be no representation from the Board at the 1990 Clear Conference.

XV. RULES COMMITTEE APPOINTMENT/FSMB

With the Chairs permission Mr. Hedrick has tentatively accepted, subject to ratification by the Board, appointment to membership on the FSMB Rules Committee.

MOTION was made by Dr. Serrage to ratify the Executive Director's appointment to the FSMB Rules Committee. The motion was seconded by Dr. Watt and passed unanimously.

XVI. REQUEST FOR ADVISORY RULING CONCERNING
THE CORPORATE PRACTICE OF MEDICINE.

MOTION was made by Dr. David to respond to John P. Doyle's request for an Advisory Ruling concerning Corporate Practice by declining to issue an Advisory Opinion but to remind Mr. Doyle that the Board will not accept, as an excuse for either incompetence or unprofessional conduct, the defense that a physician is employed by someone else or simply carrying out someone else's orders. The motion was seconded by Dr. Darlington and passed with Mr. Annett, Drs. Bennert, Darlington, David, Serrage and Watt voting in the affirmative and Mr. Bradley voting against the motion.

XVII. SCHEDULING OF SEXUAL ABUSE SEMINAR - JONATHAN ROSS, M.A.

Dr. David announced the Board of Registration in Medicine will sponsor a seminar on the subject of Sexual Abuse, featuring Jonathan Ross, M.A. to be held October 12, 1990, with an alternative date of October 19. Board staff was directed to inquire about using the facilities at the Bradley Inn in Pemaquid.

MOTION was made by Dr. Serrage to enter Executive Session for the purpose of considering Progress Reports and Complaints. The motion was seconded by Dr. Bennert and passed unanimously.

ENTERED EXECUTIVE SESSION - 3:50 P.M.
RECONVENED - 5:04 P.M.

Department of Attorney General

RECEIVED

MEMORANDUM

JUN 15 1990

To: Members, Board of Registration in Medicine
~~David R. Hedrick~~, Executive Director,
Board of Registration in Medicine

From: Kenneth W. Lehman, Assistant Attorney General

Date: June 14, 1990

Subject: Request for an Advisory Ruling Concerning the
Corporate Practice of Medicine

BOARD OF REGISTRATION
IN MEDICINE

Dear Members of the Board and Mr. Hedrick:

Over the past several years, the Board has periodically received inquiries from physicians, hospitals, and attorneys (representing both) regarding the "corporate practice of medicine." The issues are well framed in the letter from Mr. Doyle, an attorney with Preti, Flaherty, et al., who has asked the Board for an advisory ruling on this issue. The Board Chair has asked that I write you a brief memo regarding this request.

You no doubt have one immediate question: What is meant by "an advisory ruling"? Pursuant to the Maine Administrative Procedure Act, anyone may request in writing that the Board issue an opinion regarding a particular situation, be it real or hypothetical, which comes within the purview of the Board's jurisdiction. The Board is being asked to make a ruling with respect to the applicability of statutes and rules administered by the Board to the particular facts presented. Advisory rulings must be in writing. An advisory ruling issued by the Board is not necessarily binding upon the Board, provided that in any subsequent enforcement action by the Board, a person's justifiable reliance upon the ruling should be considered.

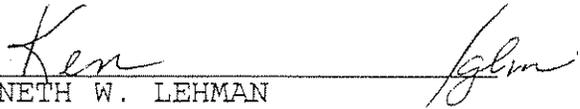
The Board may, if it so chooses: consider the facts presented; determine whether the matters fall within the jurisdiction of the Board; if so, evaluate the facts in regards to the applicable law; and, if appropriate, render an advisory ruling. Again, agencies do not have to issue advisory rulings; you may do so if deemed appropriate.

I would recommend that the Board focus on whether the issues posed are within the ambit of its jurisdiction and, if so, the significance of the issues presented to both the person posing the question and as regards to public policy.

Regarding the jurisdictional issue, Mr. Doyle seems to be asking for more than a decision regarding the licensure of physicians and the practice of medicine. Do the issues posed regarding the business relationships present matters for determination by the Board?

The impact of physicians being employed by corporations is before you each time the Board receives a complaint regarding the competency, etc. of the medical care rendered by a physician who is practicing in any arrangement other than as a sole practitioner. Is any ruling needed beyond the principal which has in the past been enunciated by the Board: that physicians are responsible individually for their practice decisions; that it is no defense for a physician to claim to have been merely following institutional policies or to have been pressured to pursue a course of treatment contrary to his best judgment.

Even if the Board concludes that the questions posed by Mr. Doyle are not properly within its purview (or are not questions to which it otherwise intends to respond), the Board can respond that physicians shall continue to be held responsible by the Board for the decisions which are made in the care and treatment of patients, and treatment decisions driven by business considerations or inappropriate pressures forced by corporations do not constitute valid defenses to licensure actions brought by the Board.


KENNETH W. LEHMAN
Assistant Attorney General

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OF COUNSEL

ROBERT F. PRETI
ROBERT W. SMITH

May 2, 1990

Board of Registration in Medicine
c/o Edward David, M.D., J.D., Chairperson
State House, Station 137
Augusta, ME 04333

Members of the Board of Registration in Medicine:

At the suggestion of Ken Lehman, Assistant Attorney General, we are submitting this Request for an Advisory Ruling in accordance with the provisions of 5 M.R.S.A. §9001.

BACKGROUND:

This firm represents a Maine hospital which is considering the acquisition of an interest in an existing physician medical practice located within the hospital service area.

The practice is comprised of physicians in family practice and other specialties. The practice provides vitally needed medical services to families in the hospital's service area. Without significant financial assistance, there is a serious risk that the practice will fail. The hospital and its board wish to take steps to preserve the practice, but seek also to invest the hospital's resources prudently in a way which affords an ongoing role in the control and management of the practice so that it will continue to meet community needs.

The hospital has not yet definitely determined the most advantageous ownership structure but is considering both (1) the direct acquisition of the assets of the medical practice (including patient lists) by a hospital affiliate, with the subsequent employment of physicians to provide medical services, and (2) entry into a joint venture between the hospital affiliate

Board of Registration in Medicine
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Page 2

and the physicians who currently own the medical practice, whereby each of the physicians (most likely through the existing professional corporation) and a hospital affiliate would hold an equity interest in the medical practice.

The hospital wishes to structure this transaction in such a manner as to avoid violation of any prohibition against corporate practice of medicine, to the extent such prohibition may have vitality in Maine. Because of the absence of precedent on this issue in the State of Maine, and in light of various medical practices throughout the state which practice medicine through corporate structures, we, on behalf of our client hospital, seek an advisory ruling on this matter from the Board of Registration of Medicine.

We enclose with this Request for Advisory Ruling two Decisions and Orders of the Maine Health Care Finance Commission: Application for Restructuring of Osteopathic Hospital of Maine, Case #89-133; and Application for Restructuring of Maine Medical Center, Case #88-89, which may be of interest. In each of these cases, the Commission approved the acquisition, by a non-profit corporate affiliate of the hospital, of a physicians' medical practice. We also understand that there are other instances in the State of Maine where medical practices are owned by business corporations.

In order to assist our client in structuring its acquisition of the medical practice or an interest therein in a fashion so as to avoid violation of the prohibition against the corporate practice of medicine, we respectfully seek this Advisory Ruling.

DISCUSSION OF THE ISSUE:

The corporate practice of medicine doctrine, which has its roots in ethical prohibitions dating back to the 19th century, appears to be in decline in many jurisdictions. Commentators note that "corporate practice prohibitions generally have been ignored; those who might bring corporate practice charges have accepted the inevitable movement toward greater corporate involvement in medicine." *Corporate Practice of Medicine*, 40 Vand. L. Rev. 443 (1987). In the vast majority of states, the doctrine has been ignored, repudiated or significantly eroded. Wiorek, *Corporate Practice of Medicine Doctrine*. 8 J Leg Med. 465 (1987). As discussed below, the prohibition on the corporate practice of medicine has both corporate law and ethical components. We address each in turn.

Board of Registration in Medicine
May 2, 1990
Page 3

A. Corporate Issues:

Although there is little law in the State of Maine pertaining to the prohibition against the corporate practice of medicine, commentators in other jurisdictions have indicated that the prohibition against this practice stems both from state licensing statutes which bar the unlicensed practice of medicine and from public policy considerations. Wiorek, supra.

It is difficult to determine from a review of the Maine licensing and corporate statutes whether the Legislature intended to provide a statutory prohibition on the corporate practice of medicine. The Professional Services Corporation Act (13 M.R.S.A. §701 et seq.) provides for the "incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed...." 13 M.R.S.A. §702, but requires that each shareholder in a professional services corporation be a duly licensed professional in the area of corporate practice. 13 M.R.S.A. §710. "Professional service" includes "any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to October 1, 1969 and by reason of law could not be performed by a corporation." 13 M.R.S.A. §704. The professional services rendered by physicians and surgeons are specifically named as services subject to the Act. Id. With respect to non-profit corporations, 13-B M.R.S.A. §1307 of the Non-Profit Corporations Act specifies that "(e)xcept as otherwise expressly provided by law, a non-profit corporation shall not be required to obtain a license or to be registered to practice a profession or occupation". (Emphasis added).

The precise meaning of these provisions is not clear. One implication which may be drawn from these statutory provisions is that only corporations meeting the statutory requirements may be involved in the practice of medicine. Conversely, these several provisions may be interpreted to mean that (1) where physicians form a for-profit corporation for purposes of practicing their profession, such corporations must have 100% physician ownership, and (2) non-physicians may own a for-profit corporation which employs physicians to practice their profession, so long as they are duly licensed.

Beyond the preceding, no explicit statutory prohibition on the corporate practice of medicine exists in the State of Maine. Pursuant to 32 M.R.S.A. §3270, "(u)nless duly registered and

Board of Registration in Medicine
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licensed by said Board [of Medicine], no person shall practice medicine or surgery...."¹ Courts in other jurisdictions have held similar language to constitute a prohibition against corporate practice of medicine, noting that the letter of the applicable statute authorizes only "persons" to engage in the practice. See e.g., Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d 67 (1932). It has been noted, however, that "little sense exists in extrapolating a legislative intent to outlaw a corporate practice from statutes that unambiguously apply to individuals." Corporate Practice of Medicine, 40 Vand. L. Rev. 443 (1987). This commentator notes that the only sound conclusion is that there is no statute which addresses the issue of corporate practice; however, courts have interpreted the statutes otherwise.

Determination of legislative intent is further complicated in the State of Maine because, despite the absence of any express prohibition against the corporate practice of medicine, express statutory prohibitions do exist with respect to the practice of other professional services. For example, 32 M.R.S.A. §2435 specifies that "no registered optometrist...may associate himself in any way with any...corporation", while 32 M.R.S.A. §1081 states that "no corporation shall practice, offer or undertake to practice...dentistry".

Given the express prohibition on the corporate practice of other professions, and the absence of any prohibition with respect to the corporate practice of medicine, it appears as though a prohibition on the corporate practice of medicine, if one exists in the state of Maine, must be based on public policy grounds. According to the commentators, policy considerations provide the best rationale for a prohibition against corporate practice of medicine. Three considerations are generally stated as support for the prohibition: (1) lay control over professional judgment; (2) commercial exploitation of the medical practice; and (3) division of physician's loyalty between patient and employer. Id.

In his Journal of Legal Medicine article, John Wiorek states that Maine is one of the nineteen states where the prohibition against the corporate practice of medicine has been largely ignored or repudiated. Wiorek, supra at 483. Wiorek cites the Maine licensing statute (32 M.R.S.A. §3270) and the case of Small

¹/ This statute has not been changed in any relevant respect since October, 1969, the effective date of the Professional Service Corporation Act.

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v. Maine Board of Registration & Examination in Optometry, 293 A.2d 786 (Me. 1972) as support for this statement. In Small, the Law Court considered the application of 32 M.R.S.A. §2452 which stated that "no...registered optometrist...shall associate himself in any way with [a]...corporation...for profit or division of profit, which enables any such...corporation to engage, either directly or indirectly in the practice of optometry...." Optometrist Small leased office space adjacent to premises occupied by Pearle Optical of Portland, Inc., apparently after Charles McClintock, an officer of the corporation owning the property, and Dr. Small agreed that there would be mutual referrals of business as between Pearle Optical and Dr. Small. Such mutual referrals in fact ensued, and in two instances, Pearle Optical "adjusted" eyewear in a fashion that might be construed to be the practice of medicine. The Law Court determined, however, that the evidence fell short of demonstrating that Pearle Optical engaged in the practice of optometry, and that given the absence of any proven relationship between Charles McClintock and Pearle Optical, the state had failed to prove that the association between Small and Pearle Optical was "for profit or division of profit." Notwithstanding Wiorek's statement, it is difficult to conclude from this case, in which the Law Court found no clear evidence of Pearle Optical's practice of medicine, that the Law Court necessarily would ignore or repudiate the corporate practice of medicine doctrine in a clearer case.

From our review, we have concluded that there is no clear prohibition against the corporate practice in Maine. Although one inference which can be drawn from the provisions of the Maine Professional Services Corporation Act is that the only business corporations (other than non-profit entities) which may be involved in the provision of medical services are those wholly owned by physicians, another inference that may be drawn is that physicians may not be co-owners with non-physicians in a business corporation, but that a number of non-physicians may organize a business corporation for the practice of medicine (provided, of course, that only duly licensed physicians provide the services). Finally, it may be that, at the time of the adoption of the Professional Services Corporation Act, there was a statutory provision prohibiting the corporate practice of medicine, which has since been repealed, and thus the statement in 13 M.R.S.A. §703 that medicine "by reason of law could not be performed by a corporation" refers to an outdated prohibition.

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B. Ethical Issues:

As mentioned above, the prohibition against the corporate practice of medicine also has an ethical base. Until 1975, the American Medical Association Principles of Medical Ethics contained a prohibition against the provision of services under conditions that might prevent a physician from exercising medical judgment with complete freedom. This principle had been interpreted by the AMA so as to severely restrict contract-style and corporate practices of medicine. The American Medical Association modified its ethical rules to eliminate this restriction after the 2nd Circuit Court of Appeals found that the restrictions violated federal anti-trust laws. American Medical Association v. Federal Trade Commission, 638 F.2d 443 (2d Cir. 1980). According to the commentators, the abolition of this ethical restrictions greatly weakens the foundation upon which the corporate practice of medicine doctrine was built. Corporate Practice of Medicine, 40 Vand. L. Rev. 443 (1987). Given this background, and in light of the existence of corporate medical practices in the State of Maine, we cannot determine whether this prohibition has any continuing vitality in the State of Maine.

C. Questions Presented:

In this Request for an Advisory Ruling, we seek guidance as to whether our client, through a hospital affiliate, may form a business corporation for the ownership of a medical practice. If such an entity can be formed and operated without violation of any prohibition on the corporate practice of medicine, it will provide a structure whereby the physicians who currently own the medical practice may have a continuing equity involvement in the newly formed corporation. In addition, even if the hospital affiliate is the sole shareholder of the medical practice corporation, formation of this entity as a business corporation may have advantages from a tax and regulatory standpoint.

From our review of 13-B M.R.S.A. §1307, we have concluded that a non-profit corporation formed by the hospital affiliate could properly own and operate a medical practice. If you believe this analysis to be incorrect, we would appreciate your so indicating.

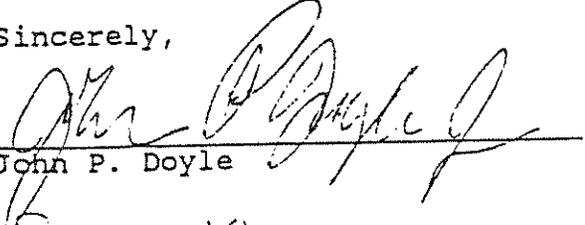
D. Conclusion:

We seek an advisory ruling as to whether our client may properly own and operate a business corporation which will provide medical services, and as to whether one or more

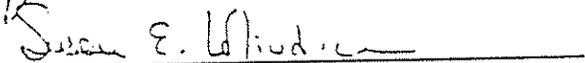
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physicians may properly be minority shareholders in this corporation. We also seek clarification as to whether the analysis differs if the physicians providing the services are independent contractors or employees, or whether employee Physicians are paid a flat salary or a percentage of gross or net revenues.

Sincerely,



John P. Doyle



Susan E. LoGiudice

JPD:pd

SEL/00000.DZ4