

# Corporate practice of medicine in Iowa

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The corporate practice of medicine is not addressed in state statute or regulation but some generalizations about the common law prohibition can be made by examining Iowa's laws, court cases and attorney general opinions. The following statutes may be relevant:

Iowa Code 147.2 (license required for practice of medicine)

Iowa Code 148.3 (requirements for licensure)

Iowa Code 496C (incorporators of professional corporations must be licensees)

The following Iowa Attorney General opinion provides further guidance:

1992 Iowa Op. Atty. Gen. 28 (Iowa A.G.), 1991 WL 495669

Office of the Attorney General

State of Iowa

Opinion No. 91-7-1

July 12, 1991

**PHYSICIANS AND SURGEONS; LICENSING:** Corporate employment of doctors. Iowa Code ss 147.2, 148.1, 148.3 (1991). Iowa courts will consider elements of control and direction of practitioners in determining whether the common-law prohibition against corporate employment of practitioners is applicable, therefore 1954 Opinion, Iowa .Attorney General 122 is so modified. The determination whether employment by a non-profit corporation is permissible must be made after consideration of all elements of the employment relationship. (Donner to Szymoniak, State Senator, 7- 12-91)

**\*1 The Honorable Elaine Szymoniak**

**State Senator**

**2116 - 44th**

**Des Moines, Iowa 50310**

**Dear Senator Szymoniak**

We are in receipt of your request for an opinion of the Attorney General on the following question

May a non-profit hospital corporation provide medical services to the general public in its emergency room and clinics through employed physicians, where the contract of hire expressly prohibits lay control of the physician's medical judgment?

You note that in 1954 this office issued an opinion which prohibited physicians from employment by non-profit corporations. See 1954 Op.Att’yGen. 122. We conclude that the 1954 opinion should be modified insofar as the opinion fails to apply the criteria of dominion and control in analyzing the relationship between the corporation and the physician. A determination whether a particular relationship between a corporation and a physician gives rise to the unauthorized practice of medicine by the corporation must be resolved on a case-by-case basis.

The general prohibition against corporate practice of a “learned profession” has evolved through the common law. However, an analysis of this issue and the underlying rationale must begin with the statutory provisions which govern licensure of the practice of medicine and surgery. We note that corporate employment of professionals is statutorily permitted to a class of corporations, Professional Corporations (P.C.’s), under Iowa Code chapter 496C. However, ownership of those corporations is strictly restricted to members of the specific profession being practiced. Iowa Code ss 496C.4, 496C.6 (1991). Practice of a profession “by or through” a corporation organized under other provisions depends on whether that practice is “lawful under any other statute or rule of law of this state.” Iowa Code s 496C.22 (1991). Your question relates to non-professional corporations, requiring review of those statutes and rules of law.

Chapter 147 prohibits a “person” from the practice of certain professions without a license

A person shall not engage in the practice of medicine and surgery, podiatry, osteopathy, osteopathic medicine and surgery, psychology, chiropractic, physical therapy, nursing, dentistry, dental hygiene, optometry, speech pathology, audiology, occupational therapy, pharmacy, cosmetology, barbering, dietetics, mortuary science, or shall not practice as a physician assistant as defined in the following chapters of this title, unless the person has obtained from the department a license for that purpose.

\*2 Iowa Code s 147.2 (1991) (emphasis added). The practice of medicine and surgery, in turn, is functionally defined to include the following acts

1. Persons who publicly profess to be physicians or surgeons or who publicly profess to assume the duties incident to the practice of medicine or surgery;
2. Persons who prescribe or prescribe and furnish medicine for human ailments or treat the same by surgery;
3. Persons who act as representatives of any person in doing any of the things mentioned in this section.

Iowa Code s 148.1(1)-(3) (1991).

Notably the requirements for licensure involve education and training which a corporation could not satisfy

Each applicant for a license to practice medicine shall:

1. Present a diploma issued by a medical college approved by the medical examiners, or present other evidence of equivalent medical education approved by the medical examiners.
2. Pass an examination prescribed by the medical examiners . . .
3. Present to the Iowa department of public health satisfactory evidence that the applicant has successfully completed one year of internship or resident training in a hospital approved for such training by the medical examiners.

Iowa Code s 148.3 (1991). Clearly a corporation could not obtain a diploma, pass the necessary examinations, or complete the required training.

A series of Iowa Supreme Court decisions from 1931 to 1973 analyzed the relationship between corporations and the individuals who are licensed to practice various professions, including medicine. In State v. Bailey Dental Co., 211 Iowa 781, 234 N.W. 260 (1931), the Court held a corporation was unlawfully practicing dentistry where a corporation directed by unlicensed officers equipped and maintained offices and employed licensed dentists to treat patients. The corporation maintained that the relationship divided into two distinct functions: the corporation owned and operated the offices; the licensees practiced dentistry on the patients. Rejecting this distinction, the court observed that “ownership and control of the entire equipment is in the corporation and its officers, and not in the employees. Its unlicensed officials necessarily determine all its policies whether they be deemed professional or commercial.” 211 Iowa at 784, 234 N.W. at 262.

The Court further explained the public policy underlying the prohibition on this relationship:

There are . . . reasons of public policy why mere corporations might be barred from entering this field. There are certain fields of occupation, which are universally recognized as learned professions. Proficiency in these occupations requires long years of special study and of special research and training and of learning in the broad field of general education. Without such preparation proficiency in these professions is impossible. The law recognizes them as a part of the public weal and protects them against debasement and encourages the maintenance therein of high standards of education, of ethics and of ideals. It is for this purpose that rigid examinations are required and conducted as preliminary to the granting of a license. The statutes could be completely avoided and rendered nugatory, if one or more persons, who failed to have the requisite learning to pass the examination, might nevertheless incorporate themselves formally into a corporation in whose name they could practice lawfully the profession which was forbidden to them as individuals. A corporation, as such, has neither education, nor skill, nor ethics. These are sine qua non to a learned profession.

\*3 211 Iowa at 785, 234 N.W. at 262.

The following month the court issued State v. Baker, 212 Iowa 571, 235 N.W. 313 (1931), which upheld an injunction against the owner of a corporation practicing medicine without a license. The defendant in Baker was owner and proprietor of the Baker Institute which treated certain diseases, particularly cancer, with a secret formula. Licensed physicians were employed by the Baker Institute, but only for the purpose of diagnosis. Prescription and administration of the secret formula to patients was carried out directly by unlicensed “treaters.” The Court upheld the injunction against the owner for prescribing and administering the formula without further mention of the employment of physicians for diagnosis. 212 Iowa at 580-582, 235 N.W. at 317-18.

Two years later the Court upheld an injunction against a corporation itself for practicing optometry in State v. Kindy Optical Co., 216 Iowa 1157, 248 N.W. 332 (1933). Kindy Optical Company, like the Bailey Dental Company, was owned and operated by a corporation. The corporation, in turn, employed a licensed optometrist to conduct eye examinations and prescribe lenses. Under the employment arrangement the optometrist, Jensen, leased the business premises from the corporation under terms which purported to grant control of the eye examination to the optometrist. The optometrist, however, also executed a contract of employment for salary which provided that the “second party” - Jensen - “shall in all things be subject to the control and direction of the proper officers of the first part.” Kindy Optical Company, 216 Iowa at 1159, 248 N.W. at 333-34.

Analyzing the relationship between the corporation and the optometrist, the Court rejected the contention that only the optometrist actually practiced optometry and observed

The execution of the so-called lease between the defendant and its employee . . . in connection with the contract of employment between the same parties, was also a sham and fraud and a too evident plan, purpose, and intent to evade the provisions of the statutes herein referred to. . . .

The defendant company controlled the conduct and policies of the business. Jensen was simply its employee on a stipulated salary. The so-called lease between Jensen and the defendant, under the terms of which the defendant, as lessor, was to pay Jensen, as lessee, \$281 per month, was only a clever attempt to change the character of Jensen from an employee to a lessee, and does not change the fact that Jensen was an employee of the defendant company.

The defendant company could not conduct a business without a license. It could not obtain a license, and we can conceive of no reason why it should be permitted to continue to conduct a business under the license of an optometrist. We hold therefore that the defendant company was and is engaged in the practice of optometry and that it is so engaged in violation of the statutes of this state.

216 Iowa at 1162-1163, 248 N.W. at 335.

\*4 A few years later in State v. Ritholz, 226 Iowa 70, 283 N.W. 268 (1939), the Court reversed the entry of a permanent injunction against the practice of optometry by unlicensed persons. In

Ritholz opticians, whose business was selling lenses upon authorized prescriptions, rented office space to physicians. The physicians conducted eye examinations and retained all patient fees, although the opticians guaranteed the physicians a minimum weekly income which the opticians paid if patient fees were insufficient. Implicit in the arrangement was the understanding that the physicians referred patients who had been prescribed lenses to the opticians to fill their prescriptions. 226 Iowa at 73, 283 N.W. at 269.

Although the Court reaffirmed *Kindy Optical Co.*, it refused to apply the decision to require a permanent injunction against the opticians. Emphasizing the independence of the physicians the Court explained:

Plaintiff failed to establish its contention that the relationship of employer and employee existed between the defendants and the physicians. No witness testified for the plaintiff that the defendants under the arrangement had the right to control or influence a physician in making the examination. . . . All of these witnesses testified that defendants did not influence or coerce the physicians in making prescriptions or in refracting.

This court has repeatedly held that the test of the employer-employee relation is the right of the employer to exercise control of the details and method of performing the work. We find that the defendants under the arrangement did not have the right to control or seek to control examinations of eyes by the physicians. The physicians, all of whom had practiced optometry prior to the arrangement, were not performing the business of defendants but were carrying on their own business of optometry under a reciprocal arrangement with the defendants for the mutual financial benefit of both parties. When a patient came to consult one of these physicians there was the personal relationship of patient and physician between them. The physicians, in making the refraction, represented the patient and not the defendants.

226 Iowa 75-76, 283 N.W. at 271.

Finally, in *State v. Plymouth Optical Co.*, 211 N.W.2d 278 (Iowa 1973), nearly twenty-five years later, the Court revisited the issue of corporate practice. In *Plymouth Optical* a corporation leased office spaces and equipment to a licensed optometrist under a five- year lease. The “lease,” however, included specific conditions, the occurrence of which would terminate the agreement: 1) a drop of ten percent or more in business volume; 2) the absence of a licensed professional in a lease location for 30 or more days; 3) a breach of a separate agreement to escrow assignments of any employment contracts between the optometrist and personnel at the leased offices to the benefit of the corporation. In addition, the optometrist was required to execute in blank and escrow new signature cards for any bank accounts connected with the business, retain the services of a specific advertising agency and spend a minimum percentage of the gross volume for advertising, and utilize a bookkeeper recommended by the corporation. *Id.* at 280. Significantly, an optometrist purportedly hired by the lessee to work at one of the leased sites

testified he, in fact, had never met the lessee but was hired directly by the vice president of Plymouth Optical Company. *Id.* at 282.

\*5 Reviewing these facts, the Court concluded that the injunction should be affirmed

We feel the trial court was amply justified in relying upon the evidence in this area when considered in the light of the entire record in reaching the conclusion the corporate defendants exercised improper dominion and control over the defendant doctors. The State has seen fit to regulate the practice of optometry, as it has the practice of medicine and dentistry under the aeg is that it directly affects the public health and is a proper subject of legislative regulation and control. Inferentially, then, the practice acts . . . require the relation of the optometrist to his patients to be personal.

The Court declined to modify the injunction to remove all elements of corporate control. Rather, the Court let stand a prohibition against practicing optometry as an employee of the corporation. *Id.* at 283.

Synthesizing these cases, it is evident that the common thread underlying the corporate practice prohibition is the vesting of improper dominion and control over the practice of a profession in a corporate entity. Where the corporation exerts undue dominion and control over the licensed professional, the corporation in essence becomes the “practitioner,” which is not permitted under statute. However, not all relationships between a corporation and a licensed professional are prohibited. Where, as in *Ritholz*, the licensed professional retains control over the relationship with the patient, the Court has declined to intervene by injunction.

A review of other states reveals that this is and has been an issue of contention across the nation. Declining the opportunity to obviate the corporate employment prohibition, the California Supreme Court noted in 1939 that “(what) we have before us is the proof of a controversy, which has raged for years, between medical men, sociologists and others, as to the future course of medical practice.” *People v. Pacific Health Corp.*, 12 Cal.2d 156, 82 P.2d 429 at 431 (1938), cert. denied, 306 U.S. 633 (1939) (implicitly stating that non-profit corporations do not exert the type of control and dominion which underlie the corporate employment prohibition).

The course of analysis in many jurisdictions has been to examine the details of the relationship but to halt the analysis upon determining that a “prohibited employer-employee relationship exists.” *Sears Roebuck & Co. v. State Board of Optometry*, 213 Miss. 710, 57 So.2d 726 at 733, (1952). See also, *State v. National Optical Stores Co.*, 189 Tenn. 433, 225 S.W.2d 263; generally, Annot., 82 ALR4th 816, 833 et seq., ss 3, 5(a), 6(a) and 7(a) (1990). However, as the Iowa cases have implicitly recognized, simply asking the question as to whether or not there is an employer-employee relationship begs the question -- the factual question of dominion and control determines whether a prohibited employer-employee relationship exists, not the designation given that relationship in the parties’ contractual arrangement.

\*6 Other states have explicitly analyzed the issue to examine the doctrine's origins and purpose, concluding that an examination of the elements of dominion and control is necessary to determine whether, in any particular situation, there is prohibited corporate employment. See generally, Annot., 82 ALR4th 816, 835 et seq., ss 4, 5(b), 6(b), 7(b) (1990). In Wyoming State Board of Examiners of Optometry v. Pearle Vision Center, Inc., 767 P.2d 969, 978, 82 ALR4th 781,798-799 (Wyo. 1989), the court stated:

A finding that Pearle is engaged in the practice of optometry because of a contractual relationship or employment of a licensed optometrist could only be premised upon facts demonstrating that Pearle exercised control over the optometrist in his practice of optometry. It is incumbent upon the Board to demonstrate facts that constitute a violation of the statute rather than only to assert a theory that the franchise arrangement could function in a way that would violate the statutes.

An examination of the franchise agreement persuades us, as it did the district court, that Pearle does not exercise control over (the optometrist) in his practice of optometry. It does not set the fees he charges to his patients; it does not purport to control the manner in which he performs his optometric functions; it does not address his work schedule in the practice of optometry; it does not say anything about the patients whom he may or may not see; it does send statements to (the optometrist's) patients; it does not receive payments made for (his) optometric service from either the patients or (the optometrist); nor does it purport to direct or control the conduct of (his) practice of optometry in any other way. We conclude that the significant concern is control over the optometrist in his practice of optometry that might inhibit the freedom necessary for the optometrist to practice in a manner which assures that the interests of the patient are given primary consideration. That is the reason that the legislature may restrict the practice of optometry from corporate influence under its police power.

(Emphasis added.) See also, Albany Medical College v. McShane, 481 N.Y.S.2d 917, 104 A.D.2d 119, 21 Ed. Law Rep. 958 (1984).

A number of Attorneys General have been faced with the issue, and have issued opinions with varying outcomes. See, Minn. Op.Att'yGen. 92-B-11, Oct. 5, 1955 (excluding non-profit corporations as a class from prohibition under public policy rationale, based on assumption that as a class, these corporations do not exhibit the abuses and negative consequences associated with corporate control and dominion); SC-AG Sept. 3, 1982 (applied test of corporate direction and control in determining that certain corporation would probably occupy position of master/employer over licensee who would be servant/employee, and would be improper); Wisc. OAG 39-86 (implicitly excluding non-profit corporations from prohibition without distinguishing rationale); Tenn. Op.Att'yGen. 88-152 (physician providing services to patients acting on behalf of a general corporation would violate prohibition, without discussion of control); Tex. Op.Att'yGen. JM-1042, April 24, 1989 (drug permit may not be issued to corporations employing physicians, discussion of control criteria justifying prohibition); VA-AG

June 28, 1989 (nonstock, nonprofit foundation of medical college may permissibly “employ” physicians, as there is no exercise of any control over the professional judgment of physicians, with discussion of contractual arrangement); NM-AG Opinion No. 87-39 (see below).

\*7 The New Mexico Attorney General considered the issue specifically in the context of the health care environment of today, and observed that:

These market forces may redound to the benefit of consumers of health care, and restraints on the commercial practice of physicians that inhibit their “affiliating with non-physicians or engaging in other novel arrangements which may provide more convenient or accessible health care service to the public” may invite the scrutiny of the Federal Trade Commission. See, Remarks of Acting F.T.C. Chairman, Terry Calvani, 5 Trade Reg. Rep. (CCH), p. 50,479 at 56,279 (Feb. 20, 1986).

In the absence of an express statutory answer to the question posed, we conclude that, unless prohibited by statute or by public policy considerations against lay control of medical judgment and lay exploitation of the practice of medicine, corporations organized and controlled by non-physicians, may provide medical services to the public through employed physicians.

NM-AG Opinion No. 87-39 at p. 11. (Emphasis added.)

Notably, an explicit exemption to the corporate employment prohibition exists in regard to radiologists and pathologists. See, Iowa Code s 135B.26 (1991). The legislature has determined that in regard to those two classes, corporate control and dominion are not relevant to protecting the public health, safety, and welfare -- in both instances, there is essentially no “physician-patient” relationship which could be compromised.

In conclusion, the Iowa court employs an in- depth evaluation of the particular facts at hand; the mere classification of the profit or non-profit status of the corporation or a mere recitation of the corporation’s intent regarding the independence of the employed licensed professions, or the mere denomination as an “employee” would be only elements of the entire picture which would be examined. Any finding of a violation of the corporate practice/employment prohibition would be based on a detailed factual review of the corporate-physician relationship at issue. However, 1954 Op.Att’yGen. 122 fails to apply this case-by-case evaluation of dominion and control in analyzing the relationship between the corporation and the physician. It is therefore modified to that extent.

**Sincerely,**

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**1992 Iowa Op. Atty. Gen. 28 (Iowa A.G.), 1991 WL 495669**