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Hospitals and the Corporate Practice of Medicine

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HOSPITALS AND THE CORPORATE PRACTICE OF MEDICINE*

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INTRODUCTION

Practices long established in public and community hospitals throughout the Nation have in recent years come under attack in a number of states as constituting the illegal corporate practice of medicine. State attorneys general have divided on the issue, but several of them found that the practices in question are in violation of law. While the controversy has centered on the practice of pathology and radiology in these hospitals, the rationale of the adverse opinions, if they are correct, raises questions about many other aspects of the functioning of a modern hospital. At the least, this rationale obstructs certain organizational patterns that have been found widely useful; if it were carried to its seemingly logical conclusion, it could threaten the very existence of public and community hospitals as integrated institutions for the care of the sick.

These institutions have been created or authorized by state legislatures to serve an essential public purpose; it has been said that if private community hospitals did not exist, government would have to provide a substitute for them.[1] Any threat to the organizational integrity of these institutions, public or private, is a matter of grave public concern.

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* This article is a revision of a monograph published by the American Hospital Association in 1957, in the preparation of which Mr. Willcox, the General Counsel of the Association, was assisted by Miss Selma Levine and Mr. Morton Namrow, both of the District of Columbia bar. The foreword to the monograph stated:

> This paper undertakes a critical analysis of the "corporate practice rule" as applied to public and community hospitals. It is not intended as an argument either for or against the salaried practice of medicine, or for or against any other particular relationship between hospitals and physicians. Its thesis is that neither the law nor lawyers should dictate choice among the varied patterns of medical practice which are exemplified in public and community hospitals, and that within this broad range the appropriate relationship in each case should be fixed on non-legal grounds. The authors believe that this view of the law is likely to receive wider acceptance from the courts than has sometimes been supposed.

This paper makes no pretense to completeness. The problem is one of state law, and the range of possibly relevant material in each state is very broad indeed. There are suggested, in note 169, infra, lines of further inquiry which may usefully be pursued by an attorney concerned with the problem in a particular state.

† See Contributors' Section, Masthead, p. 558, for biographical data.

[1] Legat v. Adorno, 138 Conn. 134, 144, 83 A.2d 185, 191 (1951). For other holdings that community nonprofit hospitals serve a public purpose, see Kentucky Bldg. Comm'n v. Effron, 310 Ky. 355, 220 S.W.2d 836 (1949); Finan v. Mayor and City Council of Cumberland, 154 Md. 563, 141 Atl. 269 (1928); Craig v. Mercy Hosp., 209 Miss. 427, 45 So. 2d 809, suggestion of error overruled, 209 Miss. 427, 47 So. 2d 867 (1950); Craig v. North Miss. Community Hosp., 206 Miss. 11, 39 So. 2d 523 (1949); Opinion of the Justices, 99 N.H. 519, 113 A.2d 114 (1955); Parker v. Bates, 216 S.C. 52, 56 S.E.2d 723 (1949).

It is true that responsibility for the medical treatment of a hospital patient rests on the attending physician or surgeon, who typically is an independent practitioner related to the hospital only in that he has a privilege of using its facilities for the care of his patients and has accepted the professional responsibilities attendant upon staff membership. Until recent years he made relatively few demands upon the hospital, and his concern with the organization and quality of its services was largely confined to the facilities for surgery and the provision of nursing care. With the advances in medical science, however, it has become necessary, if the attending physician is properly to discharge his function, that he be able to call upon the hospital for more and more services, ranging from simple acts that can be performed by the untrained layman, through the whole gamut to complex procedures that demand highly specialized skills.

"The concept of the modern hospital is one of institutional synthesis of bringing together all the components of medical care which cannot be provided by the individual physician or patient."[2] Not only must the hospital have available at all times persons competent to substitute for the attending physician in case of emergency—a responsibility increasingly onerous as medical specialization has increased—but it must also have a great variety of technical, paramedical and special medical skills constantly available to the physician if he is to give to his patients the full benefit of present medical knowledge. The organizational patterns that have evolved to meet these demands are neither uniform nor static, nor can they be while medical science continues to progress. The development and staffing of each of these newer hospital services is a responsible and difficult task, and still more difficult is the organization of the whole in such fashion that each service is properly related to the others and that the combination of needed skills can be brought to bear effectively—and if need be, immediately—upon the care of the patient.

This complex organization is hampered, and could be threatened, by injection of the legal fiction that a corporation is doing things that are forbidden to it because only a human being can be licensed to do them. The ancillary services that contribute to medical treatment of the patient are usually performed by hospital employees, and thus, according to conventional legal concepts, by the hospital itself—that is, by a corporation. Which of these services constitute the practice of medicine, which belong to another profession, and which are nonprofessional in

[2] Brown (past president of the American Hospital Association), "The Hospital," Hospitals, Jan. 1, 1957, pp. 31, 32-33. See also Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (1957).

character, it is all but impossible to say. If a hospital may not legally practice medicine, may it practice nursing or pharmacy? If it may not make the chemical tests required in a pathology laboratory, may it administer medications ordered by the physician, or oxygen, or physical therapy? If these things, or any of them, may be done only by independent professional entrepreneurs, how is the hospital to direct and correlate and make them available to the physician when he needs them in the treatment of his patient?

It is of the first importance, of course, that professional acts and professional judgments be free from lay control. But it is also essential, if hospitals are to continue as centers of organized medical care, that their governing boards have authority to exercise the kinds of control over personnel—including certain professional personnel—without which the boards cannot discharge their responsibility to make the various services available when they are needed. The reconciliation of professional freedom with organizational control, though troublesome at times, presents basically no different problem from the employment of professional personnel in any large organization, public or private, which is managed by laymen.

Even when the governing boards and the professional groups do not see eye to eye, it has been observed that these differences "do not lend themselves readily to judicial determination."[3] All the more reason is there, when the parties are in agreement and the patient is well served, that the law should not intervene to disrupt a satisfactory relationship.

There is no evidence that state legislatures, unless in a very few instances, have consciously sought to limit the governing boards of hospitals and the various professional groups in working out solutions which are satisfactory to them and which serve the best interests of the public. Such legal limitations as have been urged stem in the main from judicial incrustations on medical practice acts, and originated in an effort to deal with situations wholly unlike those in public and community hospitals. The evils which courts have sought to check, such as commercialization of medical practice, exploitation of the public, and quackery, do not exist in these public and quasi-public institutions, whatever the economic relationship between the institution and the physician.

Rules which the courts have made they are free to limit. When the provision of medical services by nonprofit corporations has been challenged before the courts, the practices in question have been

[3] Murray (writing as President, American Medical Association), "Hospital Professional Relations," Hospitals, Jan. 1, 1957, pp. 31, 32.

sustained in virtually every instance, on one ground or another, against the charge that the corporations were illegally practicing medicine. Except as statutes in a few states restrict the courts' freedom of action in certain particulars, we believe they can and should so limit the corporate practice rule that it will not interfere with the operation of nonprofit hospitals in whatever manner may be conducive to the welfare of patients.

This study will consider, first, the nature and scope of the rule with respect to corporate practice of medicine, and second, the nature of the relationships between corporations and physicians which may give rise to a contention that the corporations as well as the physicians are practicing medicine. It will not explore the question of what particular acts, performed either by a physician or by an ancillary staff, constitute the practice of medicine.

We shall then indicate how extensively corporations (both hospitals and corporations of other kinds) are actually participating in the economics of medical practice, and how widely such participation, when it does not involve the evils commonly associated with profit-making corporate practice, has received either express or tacit approval from the courts.

The Nature and Scope of the Rule Relating to Corporate Practice of Medicine

With respect to medicine and allied professions, the rule forbidding corporate practice originated, as we have said, in cases involving quackery, commercialization of professional practice, or other obvious evils. But more often than not, the rule has been stated as a categorical prohibition of all corporate practice, without relation to the evils exhibited by the cases at hand, with the result that a shadow has been cast over the whole of that very large area in which corporations customarily participate, in one way or another, in the financing of medical care. The magnitude of this area, and the extent to which such corporate participation is accepted as normal by legislatures, by the medical profession, by the public, and even by the courts themselves, will be suggested at later points in this paper. Suffice it here to quote from the former Commissioner of Hospitals of New York City:

> If the employment of a physician by a hospital for any medical purpose is the practice of medicine by the hospital, the Federal Government, every state in the Union, many hundreds of cities and counties, state and private universities, ecclesiastical hospitals of many denominations, and nonsectarian community hospitals, are engaged in the practice of medicine.[4]

[4] Goldwater, "Medical Practice and Hospitalization," Hospitals, July, 1938, pp. 11, 13.

One is warranted in casting a skeptical eye at the statement of a rule of law in such broad terms as seemingly to condemn practices which are all but universally accepted, tacitly if not explicitly, both in hospitals throughout the Nation and in large segments of the organization of medical care outside of hospitals. No one supposes that the rule would be applied to all these practices, despite the breadth of its usual statement, and distinctions have been suggested as means of keeping the rule within bounds. Most of these distinctions have as yet received little or no overt judicial support, but there are a great many decisions that either turn a blind eye to the corporate practice rule or decline to apply it on grounds which, if consistently applied, would go far toward reducing the rule to a nullity. There are signs that the courts themselves are troubled by the broad sweep of the rule as they have generally pronounced it.

However frequently statements of the rule have been reiterated, the grounds on which it rests are surprisingly unclear. Is the rule derived from the words of statute law, or is it an expression of public policy evolved by the courts with an eye merely to general legislative purposes? If it is the latter, then the courts have power frankly to qualify the rule to bring it into better harmony with currently accepted practices. If it is the former, the function of the courts is obviously more circumscribed and the basic remedy must lie with the legislatures; though there remains, in the question what constitutes practice by a corporation,[5] an opportunity which some courts have used to give a large element of flexibility to the rule.

In these circumstances examination of the theoretical basis of the rule is appropriate, not to challenge its right to exist, but as bearing upon its present scope and its potential evolution. Analysis must be somewhat tentative, because the rule seems to result from a blending of several lines of thought which are often so interwoven in a single opinion that it is difficult to know where one ends and another begins. It is often unclear, for example, whether a court condemns a particular arrangement on the ground that it constitutes practice by a corporation ("corporate practice" in the true sense), or on the ground that the arrangement leads to results of other kinds which are illegal even though the corporation itself is not deemed to have become a practitioner. Distinctions such as this can determine whether the corporate practice rule is rigid or flexible, and whether the courts have power to adapt it to the many variations in the organization of medical practice.

The rule with respect to the practice of medicine, of course, is merely

[5] See p. 449 infra.

a part of the broader rule relating to corporate practice of the professions generally, or at least of the so-called "learned" professions. Inherent in the rule is the concept that (apart from legal inhibitions) an incorporeal legal entity is capable of practicing a profession.[6] The concept that a corporation itself can perform any physical act is difficult to grasp; the difficulty is highlighted when the action consists in the practice of a profession involving intimate personal relationships and the elements of trust and confidence that go with such relationships. Probably it is for this reason that we find the courts saying, in cases where an arrangement is condemned as corporate practice, that a corporation "can have neither honesty nor conscience,"[7] and that it "has neither education, nor skill, nor ethics."[8] If the issue were whether a corporation could itself be licensed to practice medicine, such remarks would be pertinent. But the amoral character of the corporate entity does not preclude banks from acting as fiduciaries, operating through individuals possessing the requisite ethics and skills, and we do not think it should preclude corporations from employing physicians. The *lay* character of the usual corporate management is a basic element in shaping the permissible corporate relationships to medical practice, but the *amoral* character of the corporation itself we think beside the point.

A. The Medical Practice Acts

Aside from this metaphysical consideration, the first element in the corporate practice rule with respect to medicine is the terms, and the fair implications, of the medical practice acts of the several states. These statutes are long and complex, and many of their provisions—or, indeed, provisions of many other statutes—may throw light upon the legislative intent.[9] There is no question at all, for example, that the

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[6] We do not deal in this study, as a separate problem, with the rules relating to ultra vires corporate activity. When courts have found that the practice of medicine is not within the authority granted by general or special statutes of incorporation, they have generally done so on the ground, not that the words of the statute are too narrow, but rather that the words must be construed in the light of a general rule forbidding corporate practice, which the legislature must be assumed to have intended as a limitation upon its grants. We think it unlikely, unless in a very unusual case, that any statute incorporating a hospital or authorizing its incorporation would he held to preclude by its terms any arrangement with physicians which is otherwise lawful. While the terms of a statute or a certificate of incorporation might have significance in some particular case, we believe these problems of interpretation are not of general importance.

[7] Dr. Allison, Dentist, Inc. v. Allison, 360 Ill. 638, 642, 196 N.E. 799, 800 (1935).

[8] State v. Bailey Dental Co., 211 Iowa 781, 785, 234 N.W. 260, 262 (1931).

[9] No attempt is made in this paper, at this or other points, to analyze all of the pertinent statutory materials in any state. Some variations in the statutes primarily involved, the medical practice acts and corporation acts, are mentioned in notes 12 and 14 infra. Among other statutes, laws governing licensure of other health personnel, basic science laws, and hospital licensure statutes may be especially pertinent. A multiplicity of statutes commonly govern public hospitals, and may provide specific answers to the problem of corporate or governmental practice in such institutions. Of concern primarily

legislatures have meant to confine licensure to human beings. Many courts have translated that limitation into a prohibition of corporate practice, and in doing so they have tended to center their attention on the provision, found in all these laws in roughly similar form, which forbids the practice of medicine by unlicensed persons. We may take the provision of the Illinois statute, for our purposes, as typical:

> No person shall practice medicine, or any of its branches, . . . without a valid, existing license so to do.[10]

An oft-quoted statement of the corporate practice rule is this:

> While a corporation is in some sense a person, and for many purposes is so considered, yet, as regards the learned professions which can only be practiced by persons who have received a license to do so after an examination as to their knowledge of the subject, it is recognized that a corporation cannot be licensed to practice such a profession. For example, there is no judicial dissent from the proposition that a corporation cannot lawfully engage in the practice of law.
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> A corporation cannot be licensed to carry on the practice of medicine. Nor, as a general rule, can it engage in the practice of medicine, surgery, or dentistry through licensed employees.[11]

The argument embodied in this statement seems to be that since the legislature has not contemplated and has not permitted the practice of medicine by other than a human being, it follows that a corporation may not engage in such practice. The question, however, is not what the legislature has permitted, but what it has forbidden. With few exceptions,[12] legislatures have given no indication that they intended

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to those hospitals that operate medical care prepayment plans are the "Blue Shield" laws in many states, which authorize such plans under medical auspices, and may or may not preclude similar organizations under other auspices. See, e.g., Pa. Stat. Ann. tit. 15, § 2851-1504 (Purdon 1958) (statutory prohibition of certain other plans); unpub. op. Att'y Gen. Ky. (Aug. 14, 1956) (located at the American Hospital Association, Washington, D.C.) (dental care prepayment plan, not authorized by "Blue Shield" law, held illegal). In California the "Blue Shield" law has been held not to preclude other prepayment plans. Complete Serv. Bureau v. San Diego County Medical Soc'y, 43 Cal. 2d 201, 272 P.2d 497 (1954). For a general discussion of these laws and their history, see Hansen, "Laws Affecting Group Health Plans," 35 Iowa L. Rev. 209, 222-28 (1950).

The search for clues to legislative intent is by no means confined to these examples. Comprehensive analysis of all pertinent legislation in even a single state is no inconsiderable undertaking.

[10] Ill. Ann. Stat. c. 91, § 2 (Smith-Hurd 1956).

[11] 13 Am. Jur. Corporations § 838 (1938).

[12] The most significant exceptions we have found are the following: In three states, as a direct result of hospital-physician differences, legislation has been enacted within the past three years specifically designed to regulate certain aspects of hospital-physician relations. An Iowa statute permits hospital pathology and radiology services to be rendered by hospital employees but requires their supervision by a doctor of medicine, permits any relationship between him and the hospital other than one of employment, requires bills to be rendered by or on behalf of the physician, and even specifies statements to be set forth on hospital admission forms and hospital bills. Iowa Code Ann., §§ 135 B.19-B.32 (Supp. 1959). The Virginia medical practice act, which makes its definition of medical practice applicable to corporations, was amended to exempt certain state institutions from the corporate practice rule, but in other hospitals to forbid physicians to

to forbid either practice by a corporation or practice by a licensed individual in the employ of a corporation. Illegal practice is a crime, and a prohibition is not lightly to be implied; corporations no more than individuals may be prosecuted for acts which the legislature has not defined as criminal.

It is plainly true, as the quoted passage indicates, that a corporation is not a "person" within the licensing provisions of medical practice acts. But to argue, as is often done,[13] that because a corporation cannot be licensed it has therefore been forbidden by the legislature to practice, it is submitted, is a *non sequitur*. The typical medical practice act deals only with "persons" and does not mention corporations, and if we start with the premise that a corporation is not a "person," the only logical conclusion is that there is no statutory rule, one way or the other, with respect to corporate practice.[14]

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serve as residents for longer than three years each (subject to discretionary extension for further training). Va. Code Ann. §§ 54-275, 54-275.1, 54-276.7 (1958). A recent Wisconsin statute, not yet in effect, requires generally that physicians bill their patients directly, but makes an exception for specialists in pathology, physical medicine or radiology who may, as members of hospital medical staffs, contract with the institutions on any basis other than as employees, and may agree to billing by the hospitals if the names of the physicians are indicated on the bill. Wis. Stat. § 147.225 (1955) as amended Sept. 16, 1959, eff. Jan. 1, 1961.

In a few other states there are provisions of long standing which prohibit, or which it may be contended prohibit, the corporate practice of medicine. See Cal. Bus. & Prof. Code Ann. § 2008 (Deering Supp. 1959) (corporations "have no professional rights, privileges or powers"; see note 121 infra); Colo. Rev. Stat. Ann. § 91-1-29 (1953) (corporations forbidden, under criminal sanction, to practice medicine); Me. Rev. Stat. Ann. c. 75, § 1 (1954) (no person "or corporation" may practice a healing art unless licensed, under criminal sanction). Oklahoma apparently forbids such practice unless all members of the corporation are licensed to practice. Okla. Stat. Ann., tit. 59, § 510 (1941). Compare W. Va. Code Ann. § 1344(6) (1955) (nothing in the hospital licensure law "shall authorize any . . . corporation" to practice medicine).

It is interesting to note that the California courts have nevertheless been among the most liberal in approving the provision of medical services by nonprofit prepayment clinics.

[13] Many opinions have fallen into this logical fallacy. Even where the statute explicitly excluded corporations from the definition of "person," the Attorney General of Idaho, in concluding that a hospital might not practice medicine, said:

> By the foregoing definition of "person" the legislature apparently intended medicine and surgery to be practiced solely by natural persons.

Unpub. op. Att'y Gen. Idabo (May 26, 1954) (located at the Am. Hosp. Ass'n, Wash. D.C.). A statute forbidding any "person" to practice without a license, and defining the word "person" as excluding corporations, would seem to lead to the conclusion that the legislature had not dealt with the matter of corporate practice.

[14] Some medical practice or corporation acts contain provisions, other than the typical provisions described in the text, which lend support to the view that the legislature did not intend to forbid corporate, or at least hospital, employment of physicians.

Thus, the New Hampsbire medical practice act is declared to be inapplicable "to anyone while actually serving on the resident medical staff of any legally incorporated hospital; . . ." N.H. Rev. Stat. Ann. § 329:21 (1955). The Oregon medical practice act provides that it shall not "affect or prevent" medical or surgical practice "by a duly appointed member of the resident staff . . . in any legally incorporated hospital" recognized by the State Board of Medical Examiners. Ore. Rev. Stat. § 677.060 (Supp. 1953). Lacking time limits with respect to individual physicians, which are found in some other medical practice acts, these provisions are apparently not restricted to residents-in-training; they would seem to eliminate any corporate practice problem for hospitals in these two states.

The Idaho medical practice act expressly defines the word "person" as limited to natural

It is possible, of course, to rationalize the corporate practice rule if we can assume that a legislature used the word "person" with different meanings in two sections of the same statute, and that the prohibition of practice by an unlicensed "person" was intended to apply to a class broader than the class to which licenses could, under any circumstances, be issued. The New York Court of Appeals did so read a similar statute, but only after carving out nonprofit hospitals and like institutions as exceptions.[15] The Supreme Court of South Dakota, on the other hand, in a well reasoned opinion reached the opposite conclusion, that the prohibitory statute applied only to human beings.[16] In many of the cases on this subject citing the corresponding statutory prohibitions, it is impossible to know whether the courts construed the word "person" as including or excluding corporations. A leading Illinois case, for example, held the remedy of *quo warranto* appropriate to oust a corporation from the practice of medicine, on the ground that the remedies provided by the medical practice act were inapplicable to corporations, yet, at another point in the opinion, indicated that the corporation was forbidden by this very section of the statute to practice medicine.[17]

persons. Idaho Code Ann. § 54-1802(b) (1947). The corporation law of that state (id., § 30-102(l)) excludes the practice of a profession from the purposes for which a corporation may be formed,

> excepting that corporations may be created hereunder for erecting, owning and conducting hospitals and sanitariums for receiving and caring for patients, their medical, surgical and hygienic treatment, and the instructions of nurses in the treatment of diseases and hygiene.

While this language does not spell out the economic relationships that are permitted, one would have thought that authority for "conducting hospitals" for the "medical, surgical and hygienic treatment" of patients—especially when the authority is stated as an exception to the corporate practice rule—would remove any doubt of the propriety of their employing physicians. The Attorney General of Idaho, however, thought otherwise. Unpub. op. Att'y Gen. Idaho (May 26, 1954) (located at the Am. Hosp. Ass'n, Wash., D.C.).

The Ohio corporation laws prohibit profit-making corporations, other than "sanitariums," from being organized "for carrying on the practice of any profession"; but impose no such prohibition on nonprofit corporations. Ohio Rev. Code Ann. §§ 1701.03, 1702.03 (Supp. 1959). The intermediate appellate court held that this difference did not permit a nonprofit corporation to practice law, Dworken v. Apartment House Owners' Ass'n, 28 Ohio N.P. (n.s.) 115 (1930), aff'd, 38 Ohio App. 265, 176 N.E. 577 (1931), and the Attorney General reached the same conclusion with respect to the practice of medicine. Op. Att'y Gen. Ohio 750 (1952).

Several states have two or more provisions prohibiting the unlicensed practice of medicine, at least one of which by its wording is plainly inapplicable to corporations. Ky. Rev. Stat. §§ 311.560, 311.585 (1956); Md. Ann. Code art. 43, §§ 128, 136 (1957); N.J. Stat. Ann. §§ 45:9-6, 45:9-22 (1940 Supp. 1959); S.C. Code §§ 56-1355, 56-1374 (1952).

[15] People v. Woodbury Dermatological Institute, 192 N.Y. 454, 85 N.E. 697 (1908). The statute forbade "any person not a registered physician" to advertise to practice medicine. The court found that the legislature had authorized nonprofit hospitals, dispensaries, and the like to practice medicine; that it could not reasonably be supposed, by using the word "person" in the general medical law, to have intended to prohibit those corporations from advertising to do what they were legally authorized to do; and that reading the various statutes together, the proper conclusion was that the word "person" applied to any corporation not authorized to practice medicine.

[16] Bartron v. Codington County, 68 S.D. 309, 2 N.W.2d 337 (1942). The court proceeded, however, to condemn as contrary to public policy the conduct of a profit-making clinic.

[17] People v. United Medical Serv., 362 Ill. 442, 200 N.E. 157 (1936).

The more natural reading of the prohibition, it would seem, is that the "person" forbidden to practice without a license is the same "person" who, if he meets the stated qualifications, may obtain a license. The structure of the medical practice acts reinforces this view. These acts, dealing with qualifications, examinations, licensure, discipline and similar matters, can relate in the main only to human beings; and it would be surprising if a legislature, without more warning than use of the ambiguous word "person," intended to make a single section of an extensive statute applicable to corporations as well. As an English court has pointed out,

> . . . if a statute provides that no person shall do a particular act except on a particular condition, it is, prima facie, natural and reasonable (unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter, to exclude that construction) to understand the Legislature as intending such persons, as, by the use of proper means, may be able to fulfill the condition; and not those who, though called "persons" in law, have no capacity to do so at any time, by any means, or under any circumstances, whatsoever.[18]

Many of the decisions which have condemned corporate practice can be interpreted as resting the prohibition upon the terms of the medical practice acts. Yet few decisions are explicit on the point. The difficulty of deriving a prohibition from the terms of most such acts consistently with normal rules of statutory interpretation, the emphasis in the opinions on considerations of public policy, the use of phrases like "in general" to qualify statements of the conclusion,[19] as well as

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[18] Law Soc'y v. United Serv. Bureau, Ltd. [1934] 1 K.B. 343, 348, quoting Lord Selborne, L.C., in Pharmaceutical Soc'y v. London & Provincial Supply Ass'n, 5 App. Cas. 857 (H.L. 1880).

The United States Supreme Court has said in another context: "It is fair to assume that the term 'person,' in the absence of an indication to the contrary, was employed by the Congress throughout the Act in the same, and not in different, senses." United States v. Cooper Corp., 312 U.S. 600, 607 (1941).

With respect to governmental hospitals, an additional consideration may be mentioned. "There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." United States v. United Mine Workers, 330 U.S. 258, 272 (1947). "The Act does not define 'persons.' In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so." Id. at 275. In the Matter of Miller's Estate, 5 Cal. 2d 588, 55 P.2d 491 (1936), held the rule forbidding corporate practice of law inapplicable to a county, even if it were considered "a quasi corporation." See also Butterworth v. Boyd, 12 Cal. 2d 140, 82 P.2d 434 (1938).

[19] See United States v. American Medical Ass'n, 110 F.2d 703, 714 (D.C. Cir.), cert. denied, 310 U.S. 644 (1940). See also text accompanying note 11 supra.

The Supreme Court of Iowa, which had earlier condemned the corporate practice of the healing arts without qualification, said in State v. Winneshiek Co-op. Burial Ass'n, 237 Iowa 556, 560, 22 N.W.2d 800, 802 (1946): "The rule is that a corporation cannot in general practice one of the learned professions." This case also is interesting in that, although the same section of the law which forbids an unlicensed person to practice medicine likewise forbids an unlicensed person to practice embalming, the court found it possible to distinguish the two, and held that the corporate employment of licensed embalmers was not illegal. If this section of the law were an explicit prohibition of

the untoward results of a universal condemnation of corporate practice of the healing arts, all suggest that the courts have left themselves room to maneuver on this point and in an appropriate case might be persuaded to do so.

B. Public Policy Considerations

In suggesting that considerations of policy provide the surest base for the corporate practice rule, we have support not only from academic writers,[20] but also in the stress which courts have placed on these considerations (sometimes, to be sure, as indicative of probable legislative intent). As was said by the Supreme Court of South Dakota in dealing with a profit-making clinic,

> While decision has rarely turned on the naked issue of public policy, the expressions of the courts indicate a current of opinion, to which there are but few dissentients, that such practice contravenes the public interest and is contrary to public policy.[21]

It is a striking fact that corporate practice of the healing arts has rarely, if ever, been condemned on the basis of a textual analysis of the practice acts or other statutes.[22] The reasons given for condemning corporate practice have almost invariably[23] been reasons of policy. Thus, stress has been laid upon the dangers of lay control over professional judgment,[24] of commercial exploitation of medical or other practice, and the consequent lowering of professional standards,[25] and of division

corporate practice of medicine, it would necessarily be an equally explicit prohibition of the corporate practice of embalming.

20 Hansen, "Laws Affecting Group Health Plans," 35 Iowa L. Rev. 209 (1950); Laufer, "Ethical and Legal Restrictions on Contract and Corporate Practice of Medicine," 6 Law and Contemp. Prob. 516 (1939); Note, 25 Fordham L. Rev. 143 (1956); Note, 52 Harv. L. Rev. 809 (1939); Note, "Cooperation in Medicine," 35 Minn. L. Rev. 373, 384-88 (1951); Note, 34 N. Car. L. Rev. 385 (1956); Note, "Right of Corporation to Practice Medicine," 48 Yale L.J. 346 (1938); Note, 53 Yale L.J. 162, 166-71 (1943).

21 Bartron v. Codington County, 68 S.D. 309, 323-24, 2 N.W.2d 337, 344 (1942). The considerations to which the court referred as tending to debase the medical profession are, as pointed out in the following pages, considerations peculiar to corporations organized for profit.

22 A number of courts have examined the medical practice acts for the purpose of demonstrating the self-evident fact that a corporation cannot meet the requirements for licensure, and so cannot itself be licensed to practice. We have pointed out above the fallacy in concluding that, because a legislature has not permitted a corporation to practice, it has therefore forbidden the corporation to do so. Analysis of medical practice acts is not helpful if it stops short of showing an affirmative legislative prohibition of corporate practice.

23 We exclude those opinions which rest merely on previous judicial decisions, and which therefore do nothing to elucidate the reasons for the rule.

24 People v. Pacific Health Corp., 12 Cal. 2d 156, 82 P.2d 429 (1938), cert. denied, 306 U.S. 633 (1939); Bennett v. Indiana State Bd., 211 Ind. 678, 7 N.E.2d 977 (1937); People v. Carroll, 274 Mich. 451, 264 N.W. 861 (1936); State v. Buhl Optical Co., 131 Ohio St. 217, 2 N.E.2d 601 (1936).

25 Silver v. Lansburgh & Bros., 111 F.2d 518 (D.C. Cir. 1940); Funk Jewelry Co. v. State, 46 Ariz. 348, 50 P.2d 945 (1935); Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d 67 (1932); Winberry v. Hallihan, 361 Ill. 121, 197 N.E. 552 (1935); State v. Boren, 36 Wash. 2d 522, 219 P.2d 566 (1950).

of the practitioner's loyalty between his patient and his profit-making employer.[26] It has also been thought that corporate practice involves a deceptive cloaking of a licensed practitioner's indentity,[27] and is to be condemned on that ground.

Having concluded that corporate practice tends to produce evils which contravene the purposes underlying the practice acts, some courts seem to have inferred that the legislature must therefore be assumed to have intended a prohibition. Other courts have left the basis of decision in more doubt.[28] Even where a statutory prohibition has been found, the question of its scope has rarely received attention. There is hardly a court that could not—with recantation, at most, of some *obiter dicta*—reach a different result where it found that a particular form of corporate practice did not run afoul of legislative or other public policies.

The courts are not required here, as they are on some other issues, to formulate public policy in a legislative vacuum, for most of the basic considerations can be derived without difficulty from the purposes of the medical practice acts. A legislature which forbids unlicensed practice, for example, would plainly not countenance lay supervision of professional judgment in ministering to the sick. But a court avowedly seeking to carry out the underlying legislative purposes will not need to search for a prohibition which the legislature has usually not expressed, and will spare itself the need to deal in undiscriminating absolutes with a subject as subtly diverse as the organization of medical practice.[29]

1. Analogy to Corporate Practice of Law

Because the corporate practice of medicine has sometimes been likened to the corporate practice of law, which is all but universally disapproved,

[26] Silver v. Lansburgh & Bros., supra note 25; State Bd. of Optometry v. Gilmore, 147 Fla. 776, 3 So. 2d 708 (1941); Neill v. Gimbel Bros., 330 Pa. 213, 199 Atl. 178 (1938); State v. National Optical Stores Co., 189 Tenn. 433, 225 S.W.2d 263 (1949); State v. Superior Court, 17 Wash. 2d 323, 135 P.2d 839 (1943).

[27] State Bd. of Dental Examiners v. Savelle, 90 Colo. 177, 8 P.2d 693 (1932); Winslow v. Kansas State Bd. of Dental Examiners, 115 Kan. 450, 223 Pac. 308 (1924).

Reference has occasionally been made to provisions of medical practice acts forbidding one person to practice in the name of another. These provisions raise the same question as the usual prohibition of unlicensed practice—that is, whether the "person" referred to includes a corporation. These provisions are apparently designed to forbid impersonation of a licensed physician, an offense which legislatures can hardly have supposed could be committed by a corporation.

[28] United States v. American Medical Ass'n, supra note 19; Silver v. Lansburgh & Bros., supra note 25; Parker v. Board of Dental Examiners, supra note 25; State Bd. of Dental Examiners v. Savelle, supra note 27; Worlton v. Davis, 73 Ida. 217, 249 P.2d 810 (1952); State v. Bailey Dental Co., 211 Iowa 781, 234 N.W. 260 (1931); Hodgen v. Commonwealth, 142 Ky. 722, 135 S.W. 311 (1911); Neill v. Gimbel Bros., supra note 26; State v. National Optical Stores Co., supra note 26; Ritholz v. Commonwealth, 184 Va. 339, 35 S.E.2d 210 (1945); State v. Superior Court, supra note 26.

[29] Probably in most states there are adequate civil remedies to prevent a corporation from acting in ways that are illegal as against public policy. At any rate, the criminal sanctions of the medical practice acts ought not to be extended beyond the reasonably clear intention of the legislature.

we digress briefly to point out that this analogy is more apparent than real. True, some considerations of policy apply to the two professions alike, such as the need for undivided loyalty to patient or client, and the need for freedom of professional judgment from lay control. These factors we deal with in the following pages.

In respect to corporate practice the differences between the two professions are greater than the similarities. For one thing, attorneys are officers of the court, and as such are subject to judicial surveillance to an extent that other professions are not. More important, what is useful or even necessary in one profession may be useless or even harmful in another. Legal practice affords no parallel to the modern public or community hospital, in which it is of the essence that there be brought to focus upon the care of a single patient the skills and services, not only of various physician specialists, but also of members of other professions, of numerous sub-professional personnel, and of lay technicians. The law has no need, in serving a general clientele,[30] for large organizations of interrelated professional and nonprofessional activity to which the corporate form is so uniquely suited, and institutions have not developed in the field of legal practice comparable in any way to the great health institutions of the country. There are, in short, no affirmative considerations of public policy with respect to legal practice which argue strongly, as do the needs of hospitals in the case of medical care, for the necessity of institutional practice in public and nonprofit organizations.

Determination of public policy by a court, as much as determination by the legislature, requires a balancing of considerations, pro and con. If the employment of physicians by public or community hospitals does not threaten lay control, division of loyalty, or the like—as we believe it does not—then a court may not disregard the reasons which have brought such arrangements into being and which make them important, and in some cases essential, to the discharge of the functions of those institutions. Neither legislatures nor courts have been called upon to deal with comparable situations in the practice of the law because comparable situations do not exist.

2. Corporate Practice of Medicine

There is no need to attempt an exhaustive statement of the policies of the medical licensure statutes. Their purpose, as stated by the courts,

[30] There may be a large aggregation of lawyers either in a government agency or in a private corporation, but ordinarily these lawyers have their employer as their sole client. This form of organization is not generally thought to raise any issue of corporate practice of law.

is to protect the public "against ignorance, incapacity and imposition,"[31] or

> against the unskilled treatment of the sick or diseased by persons having neither the preparation or skill to diagnose diseases or to administer powerful and poisonous drugs.[32]

This primary purpose of licensure acts need not concern us in considering the permissible relationships between a hospital and a duly licensed physician. It goes without saying that a corporation, as much as a human being, would be guilty of a crime if it were an accomplice to the practice of medicine by an unlicensed individual.

The prohibition of practice by an unlicensed individual carries with it, as a necessary corollary, a prohibition of control by a layman of the professional judgments or professional acts of a physician; the requirement of licensure may not be circumvented by submitting professional decisions to nonprofessional supervision.[33] But this implied prohibition can extend no further than those aspects of medical practice for which licensure is required—namely, its professional aspects. If other matters are to be immunized from lay interference, such as a physician's hours of work or his method of remuneration, it must be on grounds other than the prohibition of unlicensed practice.

In public and community hospitals we believe there is no danger of lay interference with the professional aspects of medical practice, in the sense of interference in the diagnosis of a patient's ailment, in the decision upon a course of treatment, or in the carrying out of that

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[31] Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 611 (1935).

[32] State v. Baker, 212 Iowa 571, 581, 235 N.W. 313, 317 (1931). Statements to a similar effect, with respect to licensure to practice one or other of the healing arts, can be found in countless cases.

The Federation of State Medical Boards issued in 1956 "A Guide to the Essentials of a Modern Medical Practice Act." This guide proposes a statement of purposes broader than any we have found in an existing practice act, and includes protection against "unprofessional conduct" by licensed practitioners. In the listing of recommended causes for disciplinary action, however, this phrase becomes "unprofessional conduct likely to deceive, defraud or harm the public"—a phrase in keeping with purposes of present laws. A proposed specific condemnation of practice as a corporate employee was deleted before the guide was adopted. See Hospitals, March 1, 1956, p. 80.

The American College of Radiology has declared unethical any arrangements under which a corporation collects for its own account fees for the services of radiologists. Similar positions have been taken from time to time by other specialty groups. Snoke, "Financial Relationships between Radiologists and Hospitals," Hospitals, Jan. 16, 1960, p. 38. The American Medical Association has recently reaffirmed its disapproval of such arrangements with respect to physicians generally. Professional views on matters of economics are unlikely to carry any special weight with the courts merely because they are wrapped in the cloak of "professional ethics." Courts cannot be expected to shape the public policy of their respective states merely to comport with the ipse dixit of professional societies, and unless it can be shown that the practices in question are harmful to the public in one of the ways discussed in the text, these pronouncements of professional organizations would seem to be irrelevant to the present discussion. See note 131 infra.

[33] California Physicians' Serv. v. Garrison, 28 Cal. 2d 790, 172 P.2d 4 (1946). See also cases cited note 24 supra.

decision.[34] We know of no suggestion that interference of this sort has been a problem. This issues that have disturbed hospital-physician relationships are of a quite different kind.[35]

Apart from the express and the necessarily implied prohibitions of the typical medical practice act, we must consider also certain other safeguards that are implicit in the regulated practice of medicine, and that courts may reasonably regard as embraced in the general legislative purpose of affording protection to the public. First among these is the avoidance of any division or attenuation of the loyalty which a physician owes to his patient, and the avoidance of any interference with the confidential relationship between doctor and patient or any interposition of a third party between them. These are the evils most often adverted to in condemning the practice of the healing arts by profit-making corporations,[36] and they furnish the most important differentiation from the standpoint of public policy between those corporations on the one hand, and public and community hospitals on the other. The *raison d'etre* of these hospitals is service to the patient; they were built by the public for that very purpose; their management either is public or is volunteered by civic-minded persons; they stand at the center of our whole system of medical care for the people of the Nation. Division of loyalty is not threatened, whatever the arrangements with the physician, for the loyalty of both parties is to the patient. Lay interposition in the doctor-patient relationship would be as repugnant to hospital management as it would be to the profession.

Other purposes that have been attributed to medical practice acts are the avoidance of commercialization of medical practice and the avoidance of exploitation of either the practitioners or their patients.[37] The precise meaning of these terms, however, is not made clear.

The word "commercial" is defined as "having financial profit as the

[34] We exclude the self-policing of the medical staff. Though the ultimate authority for any disciplinary measures ordinarily rests with the lay board, this policing is carried on essentially by professional persons.

[35] These issues have centered around the professional prestige and prerogatives of the physician and his economic welfare and security, in view of the expanding role of the hospital in the care of his patients, the complexity of hospital organization and of the interprofessional relationships which it entails, and the physician's increasing dependence upon access to the hospital and its facilities. We have no wish to minimize the legitimate concern of physicians as a result of these developments; indeed, they pose problems for both the hospital and the physician that call for wisdom and mutual understanding. But we do not believe that these problems can or should be settled by the law, and one can search most medical practice acts in vain for even a clue to their solution.

[36] See cases cited note 26 supra.

[37] "Basically, the rule against corporate practice of medicine is designed to protect the public from possible abuses stemming from commercial exploitation of the practice of medicine." County of Los Angeles v. Ford, 121 Cal. App. 2d 407, 413, 263 P.2d 638, 641 (1953). See also Complete Serv. Bureau v. San Diego County Medical Soc'y, 43 Cal. 2d 201, 272 P.2d 497 (1954), and cases cited note 25 supra.

primary aim."[38] It is difficult to see that a bona fide nonprofit organization can be guilty of commercializing the practice of medicine. Even if for one service it takes in more than the service costs, it renders other services at less than cost. The allocation of charges is influenced by many factors, but there is no more incentive to lowered quality or to divided loyalty in any services which return a profit than in those which show a loss. The overall financial motivations which constitute a danger in profit-making ventures are absent in genuine nonprofit institutions.

In sanctioning the operations of nonprofit health corporations courts have occasionally suggested that service to a limited membership stands on a different footing from service to the general public.[39] In some circumstances, without doubt, the size and nature of the clientele to which medical services are offered may be of controlling importance in determining whether medicine is being commercialized. Thus, a business corporation that may properly provide certain health services to its employees would run into trouble if it were to extend these services to its customers. But a community hospital, which exists for the very purpose of serving the public, is certainly not open to reproach because it does not limit its services to "members" who have enrolled in advance.

"Exploitation"[40] presents different questions. The medical practice acts were certainly not intended to deny to a physician the freedom enjoyed by others to decide what level of compensation for his services he is willing to accept.[41] Nor do the practice acts forbid him, we think, to let others share in the fruits of his labors, so long as the arrangement is not one that endangers the public—as, for example by tending to a division of the loyalty he owes to his patients.[42] We doubt that the

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38 Webster, 1 New International Dictionary 538 (2d ed. 1942).

39 Group Health Ass'n v. Moor, 24 F. Supp. 445 (D.D.C. 1938); People v. Pacific Health Corp., 12 Cal. 2d 156, 82 P.2d 429 (1938), cert. denied, 306 U.S. 633 (1939).

These cases seem to suggest that a corporation supplying medical services to a limited membership is not practicing medicine, apparently on the theory that in such cases the members are in effect dealing as a group directly with the physicians. But as pointed out at p. 457 infra, the circumstances of a limited clientele can hardly affect the question whether the corporation is or is not practicing when its employed physicians, for example, practice in the course of their employment. Only as bearing on the issues of public policy, we believe, can this factor ever become material.

40 "Exploitation" is defined as "Act of exploiting; utilization; now, esp., selfish or unfair utilization." Webster, 1 New International Dictionary 898 (2d ed. 1942).

41 There is sometimes a tendency in the medical profession, as there is in the legal profession, to view the requirements of licensure as designed to protect members of the profession from unlimited competition. It is improbable that the legislatures, in enacting the statutes, had that purpose in mind. Be that as it may, it certainly cannot be said that every arrangement which reduces a physician's income constitutes ipso facto "exploitation" in the individious sense, or that it is automatically "exploitation" if a salaried physician consents to receive less than the aggregate of fees charged for his services.

42 This, basically, is the objection to fee-splitting. But the arrangements between hospitals and physicians which have been subjected to attack are a far cry from the sort of clandestine arrangement by which one physician is paid for referring patients to another.

It is difficult to see how the payment of a salary, under any circumstance, can be con-

practice acts are directed against "exploitation" of the medical profession, except as "exploitation" may encompass other evils which we have already considered. Nor is the "exploitation" of patients an issue in the employment of physicians by hospitals, if only because it cannot be said that their employment has any tendency to increase the cost to patients over what it would be under other arrangements.

It is still open to the courts of many states to follow the lead of the Supreme Court of South Dakota, in *Bartron v. Codington County*,[43] and to view the corporate practice rule as essentially one of public policy, with only the boardest guide lines furnished by the legislature. While this is not the only way of bringing the corporate practice rule into harmony with the realities of medical practice,[44] we believe that in nearly all states it is the most satisfactory way and the most consistent with established canons of statutory interpretation. It avoids attributing to the legislatures a specific rule of law, carrying a criminal sanction, on a matter to which most legislatures seem to have paid no attention at all. It is flexible enough to accommodate the infinite variation in the organization of medical practice, and thus to confine the impact of the law to those situations which hold some appreciable threat to the welfare of the public. If, indeed, as courts have repeatedly said, the purpose of medical practice acts is to protect the public, this is the only approach that can carry out that purpose without extending far beyond it.

The Attorney General of Minnesota was called on to advise upon the legality of chartering a nonprofit corporation "to provide a means whereby the members of this corporation may secure for themselves and their families and dependents comprehensive prepaid medical and dental care . . . ." Distinguishing two cases in his state Supreme Court[45] on the ground that they dealt with profit-making activities, and calling

sidered as a splitting of fees. Where the physician is paid a percentage of the gross receipts for his services the question is a closer one, but when the arrangement is open and above board as it is in hospitals, no improper incentive is offered the physician. At any rate, a division of gross receipts reasonably reflecting the respective contributions of the parties in the rendition of the services has been held not to be illegal fee-splitting. Complete Serv. Bureau v. San Diego County Medical Soc'y, 43 Cal. 2d 201, 272 P.2d 497 (1954).

[43] Note 16 supra.

[44] See p. 459 infra.

[45] In re Otterness, 181 Minn. 254, 232 N.W. 318 (1930); Granger v. Adson, 190 Minn. 23, 250 N.W. 722 (1933). The Otterness case, though it dealt with the corporate practice of law, is one of the leading authorities for a sweeping prohibition of all corporate practice of the learned professions. The Attorney General's opinion illustrates the fact that, in the hands of a discerning judge or lawyer, the force of a precedent—even a precedent of binding authority—is to be appraised in the light of the circumstances that gave rise to it. More general recognition of this truth would in itself go far to reduce the corporate practice rule to its proper dimensions.

attention to decisions in other jurisdictions upholding the medical activities of nonprofit corporations, he concluded:

> The distinction made by the cases between business corporations and nonprofit corporations is based upon sound considerations of public policy and persuasive reasoning. The objectionable features of the "corporate practice of medicine," or of any other profession, as stated by the Minnesota Supreme Court in the cases cited above, and by the numerous other courts that have considered the problem, are that the exploitation of the profession leads to abuses and that the employment of the doctor by a business corporation interposes a middleman between the doctor and the patient and interferes with the professional responsibility of the doctor to the patient. The corporation considered here would be nonprofit and has a provision in its articles of incorporation prohibiting the corporation from intervening in the professional relationship between the doctors and the member-patients and confining the corporate activities to the economic aspects of medical and dental care. Therefore, a corporation so organized would not be subject to the objections urged against the business corporations that have been held prohibited from entering this field.
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> It is, accordingly, my opinion that a corporation organized as a nonprofit corporation for the purpose of carrying on the activities referred to in the statement of facts above is organized for a "lawful purpose," and, therefore, may be incorporated under the Minnesota Nonprofit Corporation Act.[46]

This opinion exemplifies, as well as any we have found, the approach which we believe courts should take, except in those few states where the matter is controlled by statute, to the practice of medicine by licensed physicians in the employ of nonprofit health corporations.

The Nature of the Relationship Between Corporations and Physicians Which may be Deemed to Constitute Corporate Practice

The second major question is, under what circumstances does the practice of medicine by a duly licensed physician constitute also practice by a corporation with which the physician has some economic relationship? It is important to determine what arrangements constitute practice by the corporation itself because, in many states, practice by the corporation is said to be automatically condemned, whereas there is no such rigid prohibition if the corporation is found to be merely providing the services of individual practitioners.[47] What facts determine

[46] [1956] Minn. Att'y Gen. Rep. 80, 88.

[47] The term "corporate practice" is often used loosely to include any corporate relationship to medical practice which is thought objectionable. In this paper the term is used in a narrower and we believe more accurate sense, to describe only practice so conducted as to be considered a corporate act. As we point out below, however, a corporation which is merely providing the services of individual practitioners may be acting illegally, even though it is not practicing medicine, if the arrangements are such as to lead, for example, to the commercialization of medicine. People v. Pacific Health Corp., 12 Cal. 2d 156, 82 P.2d 429 (1938), cert. denied, 306 U.S. 633 (1939).

whether the corporation is doing the one thing or the other? A profit-making health clinic employing physicians on salary is, in most states, likely to be held guilty of illegal corporate practice,[48] while an industrial corporation employing a full-time salaried physician to provide medical care to its employees escapes similar condemnation, commonly on the theory that it is not "practicing medicine" but merely making medical services available. Why the difference? If both corporations employ physicians to practice medicine, why is one corporation practicing while the other is not?

A. The Physician as Officer or Employee of the Corporation

The first ground, and by far the clearest, on which argument is usually based that the professional acts of a physician are to be attributed to a corporation so as to render the corporation also a practitioner, is that the physician is an officer or employee of the corporation, and that his professional acts are performed in the course of his duties as such.

This basis for a finding of corporate practice is supported by a wealth of analogy in other aspects of corporate law. The acts of corporate officers or employees, performed in the course of their duties or employment, are commonly attributed to the corporation for the purpose of establishing its liability for torts or its rights and liabilities under contracts or other legal instruments.[49] While corporate engagement in professional practice might conceivably be tested by different criteria from, let us say, corporate responsibility for torts, we know of no test other than the distinction between employment and independent contract that has been suggested for this purpose. Some courts have given a large element of flexibility to the corporate practice rule, not by inventing a new test of corporate activity, but by taking advantage of the uncertainties inherent in determining whether a particular individual is an employee or an independent contractor.

There is no single definition of the employer-employee relationship.[50] The most important factor in establishing the so-called "common law" employment relationship is control or a right of control by the employer over the manner and means of performance of the work by the em-

[48] See, e.g., People v. United Medical Serv., 362 Ill. 442, 200 N.E. 157 (1936).

[49] It has been suggested that what is attributed to a corporation is not the acts of its officers and employees, but the legal consequences of those acts. Laufer, "Ethical and Legal Restrictions on Contract and Corporate Practice of Medicine," 6 Law & Contemp. Prob. 516, 525 (1939). This suggestion, which has been described as a "nice distinction," Note, 34 N.C. L. Rev. 385, 390 n.21 (1956), is unlikely to prevail over the usual assumption that a corporation does whatever its officers or employees do in the course of their employment.

[50] NLRB v. Hearst Publications, 322 U.S. 111, 120-22 (1944); Larson, The Law of Workmen's Compensation, ch. 8 (1952).

ployee.[51] But many other factors also enter into the determination, and may override a lack of control over the details of performance. A person working full time and paid a salary is likely, even in the absence of detailed control, to be held to be an employee.[52] Finally, and of great importance here, a person may be an employee for purposes of one statute or rule of law, yet be an independent contractor for purposes of another.[53]

The employment of a physician, except by another physician, raises peculiar problems because lay control of the manner and means of performance of his professional duties is forbidden by law.[54] He may nevertheless have all the other indicia of employment, such as payment in the form of salary, fixed hours of work, absence of assured tenure, place and tools of work supplied by the employer, and the like. He may, moreover, have not only professional but also administrative duties, over which the employer is free to exercise the same supervision as over any other employee.

Under these circumstances it is not surprising that the courts have taken several different courses in dealing with physicians as employees. For social security, workmen's compensation, income tax and withholding tax purposes, there is no longer much doubt that a physician may be an employee, despite the lack of control over his professional activities.[55] In tort cases there is a wide divergence of opinion, some courts applying the rule that an employer is liable, on the principle of *respondeat superior,* for the negligence of physician employees, while others exonerate the employer for all but negligence in the selection of the physician. Some opinions might warrant the conclusion that a physician can be an independent contractor for a few moments, yet be an employee throughout the rest of the day.

These uncertainties would be enough to explain a considerable diversity of opinion in cases in which corporate practice of medicine is alleged to result from corporate employment of physicians. But there is reason

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[51] Restatement (Second), Agency § 220 (1958); 26 C.F.R. § 403.204 (1949).

[52] McMurdo v. Getter, 298 Mass. 363, 10 N.E.2d 139 (1937); State v. National Optical Stores Co., 189 Tenn. 433, 225 S.W.2d 263 (1949).

[53] NLRB v. Hearst Publications, supra note 50; United States v. Silk, 331 U.S. 704, 713 (1947).

[54] See notes 24 and 33 supra.

[55] Bernstein v. Beth Israel Hosp., 236 N.Y. 268, 140 N.E. 694 (1923); National Optical Stores Co. v. Bryant, 181 Tenn. 266, 181 S.W.2d 139 (1944); 1956-1 Cum. Bull. 458; James v. Commissioner, 25 T.C. 1296 (1956).

> For compensation purposes . . . the appropriate test is not control of professional discretion, but chiefly the question whether the doctor, lawyer, or nurse is regularly at the disposal of the employer to perform a portion of the employer's work, as distinguished from being available to the public for professional services on his own terms.

Larson, The Law of Workmen's Compensation, § 45.32(a) (1952).

to think that we must look further if we are to explain the actual results of the cases. Two facts should be observed. The first is the tendency to find the physicians to be independent contractors in those cases, usually of nonprofit corporations, which do not exhibit the evils against which the corporate practice rule is designed.[56] The second is the failure of the opinions in these cases to discuss any of the ordinary indicia of the employment relation other than control, or even to note the usual assumption that a person working full time for a salary is *prima facie* an employee. It is difficult to escape the conclusion that these courts have used the uncertainties of the employment relationship as the most convenient means of confining the corporate practice rule within the bounds suggested by considerations of public policy.

To the extent that these courts have made the existence or nonexistence of corporate practice turn upon the single factor of lay control, they have centered attention upon the one element in the conventional test of the employment relationship which has a direct bearing upon the purposes of the medical practice acts. To any court which recognizes that the concept of employment may expand or contract in accordance with the purpose of the statute or rule of law to which it is being applied,[57] this should be a most persuasive consideration. Such a court may hold a corporation not guilty of corporate practice of medicine in the absence of lay control of the physician or lay intervention between him and his patient, and yet on a very similar state of facts hold the corporation liable for a tort committed by the physician.[58] To do this requires no more than emphasis in the one case, and de-emphasis in the other, in accordance with the purposes of the respective rules involved,

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56 Group Health Ass'n v. Moor, 24 F. Supp. 445 (D.D.C. 1938), aff'd on other grounds sub nom. Jordou v. Group Health Ass'n, 107 F.2d 239 (D.C. Cir. 1939); United States v. American Medical Ass'n, supra note 19. See also County of Los Angeles v. Ford, 121 Cal. App. 2d 407, 263 P.2d 638 (1953); Complete Serv. Bureau v. San Diego County Medical Soc'y, 43 Cal. 2d 201, 272 P.2d 497 (1954); County of San Diego v. Gibson, 133 Cal. App. 2d 519, 284 P.2d 501 (1955); Group Health Coop. v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951). These cases are discussed in detail at p. 459 passim, infra.

The Attorney General of California apparently interprets the decisions in his state as applying different rules to profit and nonprofit corporations, with respect to the facts necessary to establish corporate practice of medicine. See p. — infra.

57 This view has been stated explicitly by the Supreme Court of the United States. See note 53 supra. Much of the extensive literature on the employment relation is devoted to the wide disparity of application of the orthodox criteria, both as between different courts and as between the different contexts in which the question may arise.

58 Compare United States v. American Medical Ass'n, 110 F.2d 703 (D.C. Cir.), cert. denied, 310 U.S. 644 (1940), with Garfield Memorial Hosp. v. Marshall, 204 F.2d 721 (D.C. Cir. 1953); Complete Serv. Bureau v. San Diego County Medical Soc'y, 43 Cal. 2d 201, 272 P.2d 497 (1954), with Valentin v. La Societe Francaise, 76 Cal. App. 2d 1, 172 P.2d 359 (1946). The Supreme Court of Indiana, on the other hand, seems to be more ready to find an employment relation when the issue is corporate practice than when it is tort liability. Compare State v. Boston System Dentists, Inc., 215 Ind. 485, 19 N.E.2d 949 (1939), with Iterman v. Baker, 214 Ind. 308, 15 N.E.2d 365 (1938).

of the element which is usually deemed central to the existence of an employment relation.

There is no denying that this approach narrows materially the scope which many courts have given to the concept of "corporate practice," in the sense of practice deemed to constitute corporate action. But it does not mean that all corporate activity with respect to medical practice is lawful where lay control cannot be shown, for even if a corporation itself is not practicing medicine because it is not controlling professional work, the question remains whether it is violating other policies of the medical practice act. We do not believe that the courts of any state, unless they be those of Nebraska or Missouri,[59] would be content with a finding that the corporation itself was not practicing medicine, and would close their eyes to an allegation that corporate arrangements with nonemployee physicians tended to the commercialization of medicine or to other evils. This was the precise issue in a leading California case,[60] and though we have not found the issue raised so sharply in other states, the emphasis that is constantly placed on policy factors[61] leaves little doubt that they would follow the lead of California on this point.

The effect of narrowing the concept of practice by a corporation, then, is merely to enlarge the area in which courts are free to test the facts of each case by the considerations of public policy which are pertinent to that case.

B. Holding Out to the Public

The second ground on which it may be argued that a corporation is practicing medicine is that it has held itself out to the public as so doing.

The way in which a corporation describes itself to the public may shed light on the nature and quality of its activities, and of course may prop-

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[59] State Electro-Medical Institute v. Platner, 74 Neb. 23, 103 N.W. 1079 (1905); State Electro-Medical Institute v. State, 74 Neb. 40, 103 N.W. 1078 (1905). The court said with respect to a profit-making corporation having physicians in its employ:

> Making contracts is not practicing medicine. Collecting the compensation therefore is not practicing medicine, within the meaning of this statute. No professional qualifications are requisite for doing these things.

74 Neb. at 43, 103 N.W. at 1079.

Compare Tarry v. Johnston, 114 Neb. 496, 208 N.W. 615 (1926). The same result was reached on similar grounds in State v. Lewin, 128 Mo. App. 149, 106 S.W. 581 (1907). This decision received the approval of the Missouri Supreme Court in State v. Gate City Optical Co., 339 Mo. 427, 97 S.W.2d 89 (1936), involving alleged corporate practice of optometry.

[60] People v. Pacific Health Corp., 12 Cal. 2d 156, 82 P.2d 429 (1938), cert. denied, 306 U.S. 633 (1939). For discussion of this case, see p. 472 infra. See, to similar effect, Pacific Employers Ins. Co. v. Carpenter, 10 Cal. App. 2d 592, 52 P.2d 992 (1935).

[61] See notes 24-27 supra. This emphasis appears also in cases sustaining the legality of nonprofit clinics, cited in note 56 supra. The courts in these cases have found it necessary to establish the same two points—that the corporations themselves were not practicing medicine, and that their activities did not violate the policies underlying the medical practice acts.

erly be used for that purpose. But if we assume that a corporation is not otherwise engaged in the practice of medicine by reason of the activities of its officers or employees, it is difficult to imagine a case in which its public representations could convert it into a practitioner. In the unlikely event that a corporation were to say publicly, "This corporation offers to practice medicine," perhaps it would be precluded from denying that it is doing so.[62] If on the other hand it says merely, "This corporation offers to make available the services of qualified physicians," the public statement throws no light at all on the question whether the corporation is practicing medicine. A representation of this kind is consistent equally with a conclusion that the corporation is practicing medicine or with a contrary conclusion; the representation adds nothing to the evidence, either pro or con. In the case of public and community hospitals, we do not believe that any holding out to the public, whether express or implied, is likely either to support or to refute an allegation that the corporation is practicing medicine.

Advertising for medical practice is generally considered unethical, and under some practice acts is illegal, whether carried on by an individual physician or by a corporation. Abuses of this sort have at times been confused with the issue of corporate practice. Some corporations charged with illegal practice of the healing arts have been guilty of so many sins that refined analysis of each offense separately would have been supererogation on the part of the courts.[63] This is notably true of some of the cases dealing with the practice of optometry in conjunction with the commercial sale of eyeglasses,[64] which have involved flagrant advertising, obvious quackery, and other serious evils. Such reliance as courts in these cases may have placed on commercial advertising in aid of a finding of corporate practice is of no significance to public and community hospitals.

An accurate public statement of what a corporation is actually doing, and of its relationship with physicians, can neither strengthen nor weaken the contention that the corporation is engaged in the practice of medicine; it merely evidences the facts as they are.

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[62] Such a statement would really be a conclusion of law, and thus ought not to work an estoppel. But many statutory definitions of medical practice include holding oneself out as a practitioner, and a statement that the corporation is practicing might bring it within the literal wording of such a definition.

[63] We may note, by way of contrast, the careful analysis of the public statements of a bona fide nonprofit health corporation in Complete Serv. Bureau v. San Diego County Medical Soc'y, 43 Cal. 2d 201, 272 P.2d 497 (1954).

[64] A few of the multitude of cases on this subject are cited in note 73 infra. The selling of glasses is, in most instances, unquestionably corporate activity, and courts have tended to look askance upon claims that the opticians' work, which in some of the cited cases partook more of salesmanship than of professional practice, is in truth the exercise of an independent calling.

C. *Physicians as Agents of a Corporation*

Some of the cases dealing with corporate practice of the healing arts have used the words "employee" and "agent" as though for this purpose the two words were interchangeable.[65] It is, of course, true that the law attributes to a principal the acts of his agent within the scope of the agency, much as it attributes to an employer the acts of an employee within the scope of his employment. But if the physicians through whom a corporation provides services are not its officers or employees, there is ordinarily no reason to find that they are its agents.

Let us suppose that a nonprofit clinic has undertaken to provide its members with stated medical services in consideration of a subscription charge paid in advance, and that the physicians who render the services are found to be independent contractors rather than employees of the corporation. Vis-à-vis its subscribers, the corporation is a contractor and the individual physicians are subcontractors. If we were to start with the assumption that the corporation is engaged in practicing medicine, it might be reasonable to infer that the physicians are its agents in carrying out that enterprise, but if we start with the contrary assumption there is ordinarily no reason at all to find an agency relationship. To argue that such a corporation, not otherwise engaged in corporate practice, is so engaged because the physicians are its agents, is to lift oneself by his bootstraps.

D. *The Corporation's Receipt of Payment for the Professional Service of Physicians*

A contention frequently and earnestly pressed by attorneys for certain medical groups is that receipt by a corporation of fees for medical services constitutes *ipso facto* medical practice by the corporation. We know of no decision so holding. The only argument which has come to our attention in support of this view is that the corporation, because it receives payment, is "selling" the services of physicians; the theory probably being that what is "sold" by the corporation must emanate from it, and so must be a corporate act.

Before examining this supporting rationale, we may note that the contention is inconsistent with a number of decided cases and that, if correct, it would seem to prove far more than its sponsors intend and to invalidate many arrangements which are accepted by the medical profession itself as proper. The contention is at odds with all the decisions holding that nonprofit corporations providing medical services

[65] See Pacific Employers Ins. Co. v. Carpenter, 10 Cal. App. 2d 592, 52 P.2d 992 (1935); Neill v. Gimbel Bros., 330 Pa. 213, 199 Atl. 178 (1938).

were not practicing medicine,[66] for in all of them the corporations were receiving payments for the services provided. The argument, indeed, would make a practitioner of nearly every corporation that makes medical services available to anybody,[67] for in most cases these services are not provided gratuitously by the corporation. If the receipt of payment turns the corporation into a practitioner, it cannot matter whether the payment is for medical services only or includes other things as well;[68] whether it comes from the recipient of the services or from a third party, as in workmen's compensation cases and in publicly financed care of the indigent;[69] or even whether the consideration consists of money or of some other thing of value, as it generally does in employer-financed industrial health plans. If this test of what constitutes corporate practice were accepted and applied consistently, there would be many more corporate practitioners than has generally been supposed.

The phrase "selling medical services," though for some purposes a convenient short-hand expression,[70] is not an accurate description of the arrangements in question, and carries misleading implications. A service is not a chattel, title to which may pass by sale from one owner to another, and the implication is incorrect that whenever the payment goes to the corporation the service must come from it. The essence of

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[66] See note 56 supra. The argument here under discussion seeks to state as law a position sometimes asserted as a matter of professional ethics. See note 32 supra.

[67] For an indication of the number and variety of corporations which participate in the provision of medical services, see p. 459 infra.

[68] When it is contended that a corporation, admittedly conducting certain professional activities through its regular employees, should escape the corporate practice rule on the ground that these activities are de minimis, or are purely incidental to its other and legitimate business, it may be pertinent to consider whether the corporation makes a separate charge for these professional activities. Merrick v. American Sec. & Trust Co., 107 F.2d 271 (D.C. Cir. 1939), cert. denied, 308 U.S. 625 (1940). But this is quite different from saying that a corporation, because it receives money for the professional services of independent contractors, is therefore practicing the profession. If the corporate receipt of money for this purpose is illegal, it cannot matter whether or how the bill is itemized.

[69] If the receipt of money is illegal, it must be equally so (in the absence of special legislative authority for corporate practice) when the money is received from the state or county for care of the indigent. The corporation—as witness the currency of the phrase "vendor payments" in this connection—is "selling" medical services in these cases as much as in any other, whoever may be considered the "purchaser." A county's contract for the care of the indigent was held illegal in Bartron v. Codington County, supra note 16, because it was made with a profit-making clinic; similar contracts with nonprofit corporations were sustained in two California cases. See note 125 infra.

[70] It is common practice to speak of "selling" a service, and the phrase has been used in at least one judicial opinion dealing with a hospital. Berg v. New York Soc'y for Relief, 1 N.Y.2d 499, 136 N.E.2d 523 (1956). Yet the same court, when dealing with an issue that required precise analysis, had held that the administration of a blood transfusion to a hospital patient was not a sale because it was part and parcel of a transaction which was primarily one of service. Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954). Accord, Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956).

all legitimate medical practice is a direct dealing between the individual physician and his patient, and this is no less true because payment may be routed to or through a corporation. The phrase "selling medical services" conjures up the specter of a corporation standing between the physician and his patient—a specter which has no reality, either in public or community hospitals or in properly operated medical care programs of any kind.

There is no reason that a corporation may not contract to provide the services of a third person and receive payment therefor, without making the acts of that person its acts. This is done in many business transactions and, as noted above, we are accustomed to speaking of the third person as a subcontractor. Perhaps in common parlance the principal contractor may be "selling the services" of the subcontractor, but if that is so it does not change at all the legal relationships involved or the nature of the corporate activity. We see no ground for applying a different rule to the practice of medicine, or for holding that a corporation is practicing medicine when it undertakes, in consideration of money paid to it, to secure the services of physicians who are independent contractors.

E. Providing Services to the General Public

A few cases have hinted that providing medical services to a limited membership is not corporate practice,[71] and these cases may be thought to suggest a different result when the services are offered to the general public, as is done by the typical community hospital. The reasoning of these cases seems to be that, since a group of individuals may properly retain a physician to give them medical service, their organization in corporate form does not change the substance of the arrangement or render it unlawful. Pertinent though this reasoning may sometimes be to issues of public policy, it cannot negate corporate activity unless by disregard of the corporate fiction—by asserting that in reality it is still the members, rather than the corporation, who are dealing with the physicians. The courts have not spelled out such a theory, and in any event it would not be a very satisfactory basis for escaping from the corporate practice rule, especially when the membership of a prepayment plan runs to many thousands of people. Even if the reasoning is usable for this purpose, however, it lends no support to the converse proposition, that a corporation is practicing medicine merely because it makes services available to all comers.

Community hospitals exist to serve the public. Certainly performance

[71] See note 39 supra.

of this function does not render their operation illegal. There are ample grounds for this conclusion without resorting to a supposition that the corporation does not exist.

F. Conclusion

We have now examined the grounds, as far as we can ascertain them, on which contentions have been based that medical practice carried on by licensed physicians should be attributed to corporations so as to render the corporations also practitioners.[72] It is true that the whole concept of practice by a corporation is a legal fiction, and that one cannot safely be dogmatic about the dimensions of a fiction. But fictions are designed to serve recognizable ends, and we can perceive no possible reason to extend this one beyond the narrowest confines consistent with established principles of law. If corporate activity outside these narrow confines is found to violate public policy, let it be dealt with accordingly, and not in the guise of a criminal violation of the medical practice act.

Established legal principles furnish one, but only one, persuasive analogy: a corporation should be deemed to be practicing medicine if it appoints a physician as a corporate officer or hires him as a corporate employee, and charges him in his capacity of officer or employee with the duty of practicing medicine. In applying even this analogy, moreover, there is both good reason and impeccable authority for taking a more restricted view of the employment relationship than is commonly taken for other purposes.

Opinions in many of the older cases condemning corporate practice are as obscure in delineating what constitutes practice by the corporation as they are in explaining why such practice is illegal. There is a tendency in more recent cases, however, particularly in cases dealing with the practice of optometry,[73] to treat the existence of an employment relationship as a controlling or at least a major element in a finding of corporate practice. The cases exonerating nonprofit corporations on the ground that the physicians are not employees reinforce this view. A court

[72] It has been suggested, as perhaps another ground, that since a corporation may not practice medicine directly, it should not be permitted to do so indirectly through the medium of physicians who are independent contractors. Benjamin Franklin Life Assur. Co. v. Mitchell, 14 Cal. App. 2d 654, 58 P.2d 984 (1936). But the later California cases indicate that any issues raised by action through independent physicians are issues of public policy and not of practice by the corporation itself. See p. 466 infra.

[73] See, e.g., State v. Ritholz, 226 Iowa 70, 283 N.W. 268 (1939); State v. Goldman Jewelry Co., 142 Kan. 881, 51 P.2d 995 (1935); McMurdo v. Getter, 298 Mass. 363, 10 N.E.2d 139 (1937); Sears Roebuck & Co. v. State Bd. of Optometry, 213 Miss. 710, 57 So. 2d 726 (1952); State v. Buhl Optical Co., 131 Ohio St. 217, 2 N.E.2d 601 (1936); State v. National Optical Stores Co., 189 Tenn. 433, 225 S.W.2d 263 (1949). There are other cases, however, which pay little or no attention to the existence of an employment relationship. See, e.g., Neill v. Gimbel Bros., 330 Pa. 213, 199 Atl. 178 (1938).

disposed to limit the corporate practice rule accordingly, and to remit other issues to the domain of public policy, will not lack judicial precedent for so doing.

CORPORATE PARTICIPATION IN MEDICAL PRACTICE AS AN ACCEPTED FACT

Though recent experience of hospitals[74] warns that even long-accepted practices may be subjected to serious legal attack, it still remains true that legislative and administrative acquiescence over a period of years, coupled with acceptance by the public and the professional groups concerned, should be significant in the interpretation of statutes which are as ambiguous as those affecting the legality of corporate practice of medicine. Even more persuasive is the fact that the courts themselves have repeatedly enforced rights and liabilities growing out of medical practice conducted under corporate auspices. In the case of nonprofit hospitals and similar institutions courts have generally done this without any suggestion that the method of conducting the practice is unlawful. In most cases the legality of the practices of such institutions has not even been challenged; almost without exception[75] it has, whenever challenged, been sustained. The action of courts in enforcing rights growing out of the employment of physicians by these hospitals is persuasive evidence that the rights are not grounded in illegality.

A. The Extent of Corporate Participation in Medical Practice

It has been estimated that of 191,000 active physicians in this country in 1949, about 15,000 were engaged in salaried clinical practice, in addition to the 7,000 in the armed forces and the 25,000 residents and interns.[76] A recent survey of the opinion of medical leaders reports

[74] See notes 137 and 138 infra.

[75] The only clear exception we have found is the unreported Iowa District Court decision in Iowa Hosp. Ass'n v. State Bd. of Medical Examiners, Equity No. 63095, Polk County, Iowa, Nov. 28, 1955. Appeal in this case was taken to the State Supreme Court, but was withdrawn as a result of the 1957 Iowa legislation. See note 12 supra.

Boykin v. Atlanta-Southern Dental College, 177 Ga. 1, 169 S.E. 361 (1933), held illegal a proposed amendment of the charter of a nonprofit dental college which would have permitted the collection of fees for services of unlicensed students. The dental practice act, as the court construed it, permitted such practice only if no fees were charged, but it appears probable that the court's condemnation of corporate practice did not rest wholly on the violation of this condition. See also Atlanta Southern Dental College v. State, 51 Ga. App. 379, 180 S.E. 620 (1935); Rivers v. Atlanta Southern Dental College, 187 Ga. 720, 1 S.E.2d 750 (1939).

In Spears Free Clinic v. Denver Area Better Business Bureau, 135 Colo. 464, 312 P.2d 110 (1957), the court expressly left open the question of corporate practice, decided by the trial court adversely to the clinic. The character of the institution in question was not such as to bring into play the considerations of public policy applicable to the typical community hospital.

Dicta in two Iowa malpractice cases (see note 152 infra), though inconclusive, should also be listed among possible exceptions.

[76] Davis, Medical Care for Tomorrow 53 (1955); 124,000 physicians were engaged in practice as individuals or as members of medical partnerships.

a majority view that salaried practice is on the increase.[77] While not all the salaried clinical practitioners are in the employ of corporations, the figures are large enough to indicate that practice in that capacity is at least no rarity.

1. Public and Community Hospitals and Clinics

A recent opinion of the New York Court of Appeals describes the function of a modern hospital as follows:[78]

> The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and internes, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of "hospital facilities" expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.

If we consider first the public and community hospitals of the country, we find that most of the larger ones utilize salaried physicians as residents, whose duties include the rendition, under supervision of more experienced physicians, of medical services to paying as well as to nonpaying patients. For some purposes, at least, these residents are employees.[79] Some medical practice acts give express recognition to this practice, others do not.[80]

Hospitals also, under varying arrangements, utilize and finance the services of medical specialists, including pathologists and radiologists whose contractual relationships to the hospitals have been under attack in several states. In most of the smaller hospitals, which can afford these specialists only on a part-time basis, the specialists should presumably be considered as independent contractors rather than as employees.[81]

The current state of affairs with respect to contractual physicians in general hospitals throughout the United States is the subject of a study being conducted by the Sloan Institute of Hospital Administration in the Graduate School of Business and Public Administration at Cornell University. This survey will explore the extent of such physician-hospital relationships, in terms of the types of specialists, their methods of remuneration, and the characteristics of the hospital.

77 Perrin, "Why More Doctors Are Going on Salary," Medical Economics, Feb. 1957, p. 226.

78 Bing v. Thunig, 2 N.Y.2d 656, 666, 143 N.E.2d 3, 8 (1957).

79 See note 55 supra.

80 As is true of much legislation bearing on particular applications of the corporate practice rule, these special statutes may often be urged as lending support to either side of the general question. On the one hand, the exception is said to prove the rule. On the other, the exceptions at least tend to negative any universal legislative policy against the corporate practice of medicine.

81 If the work of lay technicians in the laboratories constitutes the practice of medicine,

In the large hospitals full-time specialists commonly have administrative, teaching and other duties in addition to those that may constitute the practice of medicine, and at least to the extent of these other duties they are in most cases probably to be considered as employees.[82]

Finally, in many of these hospitals salaried physicians (other than residents who are completing their training) render a part, and sometimes a very large part, of the clinical and surgical service to all hospital patients, both paying and nonpaying. This is conspicuously true of hospitals of the Federal Government and of many state mental and tuberculosis hospitals, which give a large part of their patient care through salaried staff.[83] It is also true, to a lesser extent, of many of the large teaching hospitals of the country, both public and private.[84]

Some other nongovernmental hospitals also utilize salaried physicians for general clinical work. "There are hospitals in which the entire staff is salaried, such as the Henry Ford Hospital in Detroit, the Imogene Bassett Memorial Hospital in Cooperstown, New York, the 'Permanente' hospitals in California."[85] The world-famous Mayo Clinic operates through a staff of salaried physicians, employed by a "voluntary associa-

as held by the Iowa District Court (note 75 supra), the status of these technicians as employees of the hospital or of the medical specialist in charge of the laboratory presumably must be considered on the issue of corporate practice, as well as the status of the specialist himself.

82 Many of these specialists are paid a percentage of the income of the laboratories which they direct, or a percentage in combination with a salary. Except for the lack of control over their professional activities, however, the usual criteria of an employment relationship are ordinarily satisfied where the contract is with an individual specialist on a full-time basis. Compare James v. Commissioner, 25 T.C. 1296 (1956) (so holding on the facts presented).

83 The organization of public hospitals varies over a wide range. Many hospitals of the Federal Government are integral parts of an executive department or agency, subject to straight-line administrative supervision. At the other extreme, perhaps, are those county and municipal hospitals which are operated in much the same fashion as private nonprofit hospitals, except for the manner of selection of their governing boards and for such right as the hospitals may have to call upon tax funds to meet a deficit.

In some of these hospitals the problem is technically one of "governmental" rather than of "corporate" practice. This difference appears significant only as courts tend to construe regulatory statutes as inapplicable to the sovereign. See note 18 supra.

More significant is the fact that some public hospitals have a legislative mandate, more or less clearly expressed, to furnish medical services through salaried physicians. In contrast to statutes relating to residents, such mandates are unlikely to be expressed as exceptions to medical practice acts, and the chief significance of salaried practice under such legislative sanction is that it supplies evidence against the existence of any over-all public policy opposed to the corporate practice of medicine.

It should be observed, however, that a statutory mandate to furnish medical care to the indigent does not necessarily constitute a statutory authorization of corporate practice. See note 69 supra. Much of the medical care of indigents is provided by physicians without compensation. Where legislation authorizes the physicians to be paid, it does not necessarily authorize them to serve as corporate employees. Where there is no statutory authority for employment, the propriety of paying hospitals for care of the indigent by salaried physicians seems indistinguishable from the propriety of paying them for the care, similarly provided, of other patients.

84 From the standpoint of the corporate practice rule it seems to us immaterial whether the salaries of these physicians are paid by the hospitals or by the medical schools.

85 Davis, op. cit. supra note 76, at 130.

tion" which apparently has some of the attributes of a corporation.[86] The ten hospitals recently established by the United Mine Workers, through their Memorial Hospital Association, utilize a combination of salaried and other staff.[87]

The most widespread and long-established example of hospitals which provide service largely through salaried medical staff is found in the railway hospital associations. The earliest of these associations date back three-quarters of a century or more.[88] In 1949, 20 of them were operating 36 hospitals in 22 states; in addition, these associations also contracted with many private hospitals, for the care of about 550,000 members in all.[89] While some of these plans originated as direct operations of the railroads, they are now generally operated by separate nonprofit corporations.

Similar to hospitals, for present purposes, are nonprofit clinics and like institutions—some organized under medical auspices; many organized by cooperative groups, labor unions, or other representatives of consumers—but all providing medical service either to the public generally or to some defined segment of the public, and all charging for their services either when they are rendered or through some plan of prepayment. Except as special legislation in some states has resolved the issue, chiefly for plans organized under medical auspices, these corporations may be divided broadly into two categories: first, those corporations that provide medical services through salaried physicians, paid directly

[86] Publication of the Mayo Clinic, "Mayovox," Rochester, Minn. (Dec. 4, 1954).

[87] United Mine Workers of America Welfare and Retirement Fund Ann. Rep. 23 (1956). In some coal-mining areas served by the UMW Health and Welfare Fund but not by these hospitals, "some physicians who provide a large volume of service to fund patients have been placed on a retainer basis." Final Report, Committee on Labor and Public Welfare, Welfare and Pension Plans Investigation, S. Rep. No. 1734, 84th Cong., 2d Sess. 180 (1956). This report also describes funds established at the instance of the International Ladies Garment Workers Union and the Amalgamated Clothing Workers Union which, through health centers in various cities, provide extensive medical care to union members under arrangements that undoubtedly would be thought by some to constitute the "corporate practice" of medicine. Id. at 113-15, 121.

[88] The Southern Pacific Hospital Association was established in 1869. The dates of establishment of other major railroad hospital organizations are as follows: Missouri Pacific 1876, Northern Pacific 1881, Denver & Rio Grande 1883, Illinois Central (hospital dep't) 1884, Missouri Pacific Lines 1884, Atchison, Topeka & Santa Fe 1885, St. Louis Southwestern (hospital trust) 1887, Texas & Pacific 1890, Gulf, Col. & Santa Fe 1891, Wabash 1896, Chesapeake & Ohio 1897, Atlantic Coast Line (relief dep't) 1898, Kansas City Southern 1898, Santa Fe Coast Lines 1904, Frisco 1906, Western Pacific (hospital dep't) 1909, Southern Pacific Lines in Texas and Louisiana 1910, Milwaukee 1912, East Coast 1914, Missouri-Kansas-Texas 1921, Central of Georgia (hospital dep't) 1927.

[89] Brotherhood of Railway Clerks, Freight Handlers, Express and Station Employees, "Contributory Health Plans on Class I Railroads" (Cincinnati, 1949). In 1956 the number of covered employees and pensioners was about 500,000. Letter from H. J. Mohler, President, Missouri Pacific Employee Hospital Association.

Railroad association hospitals are situated in Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Missouri, Montana, New Mexico, North Carolina, South Dakota, Texas, Virginia, Washington and West Virginia.

by the corporation; and second, those which, perhaps to escape the corporate practice rule, have organized their medical staffs as partnerships, with salaried physicians (if there are any) paid by the partnership rather than by the corporation. These forms of organization have occasioned some controversy. That their legality has been sustained whenever it has been tested, and that they are accepted or tolerated in other jurisdictions, go far to show that the corporate practice rule is less sweeping than is sometimes contended.

A 1954 survey[90] shows 174 group-practice centers (including railroad hospital associations) operating under prepayment plans in 34 states and the District of Columbia, providing medical care to about 3 million people. Seventy-seven of these plans were established before 1930, the oldest of them dating from 1851 and a number of others from before 1900. This form of practice was by no means unknown when the medical practice acts were passed.

Of these plans all but 10 own their own clinics, and 89 of them either own hospitals as well or have contracts with outside hospitals. While only 20 plans limit themselves entirely to full-time physicians, many more of them utilize salaried physicians for some part of the medical services they supply.[91] Even those that do not use salaried physicians involve the "sale" of medical services by a corporation or lay organization.

Akin to these activities of nonprofit hospitals and clinics, so far as corporate practice is concerned, is the receipt by medical schools of fees or a part of the fees charged to private patients by salaried members of the schools' faculties. Still more closely akin is the practice, common in both public and private universities and found also in some private schools, of operating student health programs[92] for which separate annual fees are charged. When these programs are operated through salaried physicians, all of the elements commonly supposed to constitute corporate practice are present.

The general acceptance of these activities of nonprofit hospitals, clinics, medical schools, and general institutions of learning—their acceptance as legal, as wholly ethical, indeed as necessary—cannot be

90 Brewster, "Group-Practice Prepayment Plans: 1954 Survey," Soc. Sec. Bull., June 1956, p. 3. The number 174 refers to the group-practice clinics, rather than to the organizations arranging for the services and handling the finances. On the latter basis the number would be 140 (including a few group-practice dental plans, which present substantially the same issues regarding corporate practice).

91 Compare Hansen, "Laws Affecting Group Health Plans," 35 Iowa L. Rev. 209, 231 (1950).

92 Harvard University, for example, maintains a "full- and part-time staff of approximately fifty doctors and other scientists" for medical care of students, faculty and other employees, and for preventive health work. Report of the President of Harvard University 9 (1955-56).

squared with sweeping condemnations of all corporate practice of medicine, and specifically cannot be squared with those state attorney general rulings[93] that have held illegal the employment of physicians by nonprofit hospitals. It is interesting to note, for example, that at least one railroad association hospital is operating in each of the states, except Idaho and Ohio, in which such attorney general rulings have been made. We do not suppose these law officers intended to question the method of operation of such long-established and reputable institutions, yet they would be hard put to find a rational distinction.[94] Certainly, the supposed corporate practice rule is not applied consistently and never has been.

2. Industrial and Other Profit-Making Corporations

In addition to these activities of nonprofit corporations, there are large areas in which the employment of physicians by profit-making corporations is widely if not universally accepted as legitimate and proper. The employment of physicians by industry has resulted from two main causes. One is the need of concerns operating in isolated areas to provide or make available to their workers complete medical care. The other is the need of employers to provide necessary medical care for industrial injuries, and their interest in developing a hygienic workplace, in reducing industrial health hazards, and in furnishing in-plant health services.

Railroads, mining and lumbering concerns operating in isolated, unsettled areas—areas without physicians and hospitals—had to take steps to provide or make available necessary medical care to their employees and to their families. Thus, during the 1860's, '70's and '80's, many of the new transcontinental railroads built hospitals and employed physicians to provide medical care to the employees and their families.[95] Mining and lumbering companies operating in remote, undeveloped areas also set up facilities and programs to make medical care available to

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[93] See note 137 infra.

[94] No distinction can be found in the fact that these railroad association hospitals ordinarily make no charge to their members at the time of service. Until 1956 the plans were financed, at least in part, by members' contributions. Some of the plans, moreover, including hospitals in Iowa, Virginia and West Virginia, provide services to dependents of members at reduced charges made at the time of service.

These associations, it is true, serve only their membership and some dependents, rather than the general public. We have pointed out above (p. 457 supra), that this difference, though sometimes pertinent to issues of public policy, does not bear on the question whether the corporation is or is not practicing medicine.

[95] As late as 1920 the U.S. Railroad Administration listed 87 railroads providing services through surgical staffs and 52 doing so through railway hospital associations. See, Survey and Recommendations of the Committee on Health and Medical Relief (1920). In more recent years health insurance protection has been provided to employees not members of hospital associations.

their personnel. Generally the physicians providing service under these programs were paid by salary.

By 1900 there were perhaps a million and a half or two million persons in this country who were receiving all or most of their medical care through medical care programs operated or sponsored by industry. In the course of time control of some of the programs was transferred to employee benefit associations, or control was shared between the concern and an association representing the employees. There has been little further development of such programs since 1900 or 1910, and in fact some concerns with such programs have since liquidated them and substituted nonprofit prepayment plans or commercial insurance.

The other and now more important set of factors contributing to the employment of physicians by industry has been the need of providing care for industrial injuries, and the interest of industry in industrial hygiene and in-plant health services.

Workmen's compensation legislation which began to develop in the early 1900's placed the responsibility upon industry of providing medical care of injured workers. Concerns which elected to do this by self-insurance had, through one means or another, to provide necessary medical care for work accident cases. In any case, industry found it necessary to provide emergency and first aid care for accident cases, and large concerns frequently employed one or more physicians either on a full- or part-time basis to provide such treatment. Where the employer was self-insured these physicians provided a good part of the care necessary for full treatment of injury cases.

Other reasons for the employment of physicians have been the desire to control occupational disease, to examine applicants for employment, to improve employee health and reduce absenteeism due to illness. At the present time the great majority of large concerns—concerns with 1,000 or more employees—employ one or more physicians on a part- or full-time basis to provide in-plant health services. Generally their work includes physical examinations, first aid, treatment of industrial injuries, supervision of health precautions in dangerous occupations, treatment of minor illnesses and the like. Ordinarily, no charge is made to the employee for such services.

The Occupational Health Program of the Public Health Service estimates that at present there are in the neighborhood of 6,700 physicians engaged in in-plant industrial health work, about 1,000 of them on a full-time basis and the rest part-time.

As this review has indicated, there is a long and substantial history of the employment of physicians by industrial and commercial corpora-

tions, much of it being employment for the express purpose of rendering medical care.[96] Certainly the practice conducted by these physicians in the discharge of their duties as employees constitutes corporate activity if anything does. This point is underscored in the admiralty law, which not only permits but often requires shipowners to practice medicine:

> To provide a ship's physician was therefore no mere act of charity. The doctor in treating the seaman was engaged in the shipowner's business; it was the ship's duty that he was discharged in treating the injured eye.[97]

Business corporations, then, do practice medicine. They do so extensively, though somewhat less extensively than before the advent of prepayment and of health insurance. The practice grew up from necessity, from the lack of health facilities in outlying regions; it has continued from convenience.

If the corporate practice of medicine is forbidden by statute, neither convenience nor necessity can justify a violation of the law. If it is forbidden only when it violates public policy, either necessity or convenience may justify such practice when there is no serious threat of harm.

B. The Legal Authorities

1. Decisions Sustaining the Legality of Operations of Nonprofit Hospitals and Clinics

Virtually without exception, courts have sustained the legality of the operations of nonprofit health corporations, including the legality of their making available the services of physicians who are either on salary from the corporation or under other contractual arrangements with it. The basis of these decisions has been either that the legislature has authorized corporations of this kind to practice medicine,[98] or alternatively, that the corporations are not in fact practicing medicine but are merely making medical services available to their patrons. The second ground of decision has been coupled with findings that corporations of this kind do not violate the purposes of the medical practice acts.

The leading case which takes the former approach is *People v.*

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[96] There is no need to consider what functions of such employed physicians constitute the practice of medicine and what do not, cf. Mrachek v. Sunshine Biscuit, Inc., 308 N.Y. 116, 123 N.E.2d 801 (1954), since industrial medicine usually includes some responsibility for the treatment of individual patients which clearly constitutes the practice of medicine.

[97] De Zon v. American President Lines, 318 U.S. 660, 668 (1943). See also Aguilar v. Standard Oil Co., 318 U.S. 724 (1943).

[98] We exclude here those statutes which expressly authorize nonprofit corporations organized under medical auspices to pay the cost of medical services.

Woodbury Dermatological Institute,[99] decided by the New York Court of Appeals in 1908. In holding certain provisions of the general medical law applicable to commercial corporations, the court distinguished such business enterprises from

> hospitals, dispensaries, and similar corporate institutions, which are unquestionably authorized by law to practice medicine, although, of course, only through the agency of natural persons who are duly registered as physicians.[100]

The court concluded that the provisions of the statute relating to practice without registration could not have been intended to apply

> to corporate bodies which by the express provisions of other statutes are authorized to carry on the practice of medicine upon compliance with their provisions and without registration.[101]

This language is something more than dictum, something less than decision; but however it may be described, it seems to have settled the law of the state.

The language quoted is not in terms limited to *nonprofit* hospitals and the like. The statutory references, however, are to the membership corporation law, and the effect is to limit the exemption to nonprofit organizations.[102] This point is important, not only in New York, but as bearing on the usefulness of the New York precedent in other states. When a legislature authorizes either the incorporation or the licensing of nonprofit hospitals, it can usually be assumed that the legislature intends to permit such corporations to do those things that nonprofit hospitals conventionally do—including the employment of physicians, nurses, and other professional personnel, and the provision of diagnostic and therapeutic services of many kinds. If, however, by the same statutory language the legislature has authorized also the incorporation or the licensing of profit-making hospitals, it becomes more difficult to argue that the legislature has authorized the one group of hospitals to do things which the other group is forbidden to do.[103] In any event, however, laws of incorporation and laws of licensure are

[99] 192 N.Y. 454, 85 N.E. 697 (1908). In Bing v. Thunig, note 78 supra, the Court of Appeals described realistically, with no hint of disapproval, modern hospital practices in the provision of medical service and the collection of charges therefor. It is difficult to suppose that the Court entertained any doubt of the legality of the practices it described.

[100] Id. at 457, 85 N.E. at 698.

[101] Id. at 457, 85 N.E. at 699.

[102] Godfrey v. Medical Soc'y, 177 App. Div. 684, 164 N.Y. Supp. 846 (2d Dep't 1917).

[103] If a court were to conclude that the legislature had affirmatively authorized profit as well as nonprofit hospitals to employ physicians to engage in clinical practice, the court could hardly condemn such actions of profit-making hospitals as being contrary to public policy. But if in a particular state differences can be shown in the practices that are in fact customary in the two groups of institutions, perhaps the legislature can be assumed to have envisioned a different scope of activity in profit and nonprofit hospitals, and thus to have sanctioned in the one what it has not sanctioned in the other.

both acts conferring affirmative legal authority, and use of the word "hospital" in either kind of law may imply a legislative sanction of any practices widely followed at the time when the law was enacted.

The Attorney General of Connecticut, relying on the state hospital licensure law and on the *Woodbury* case, reached the same conclusion with respect to charitable hospitals as did that case, but did so without the aid of any separate statutory provisions with respect to nonprofit hospitals.[104] A similar opinion has been expressed by the Attorney General of North Carolina, with the curious reservation that the hospital not make a profit from the services of the physician.[105]

In Texas, a statute authorizing incorporation for the "erection and maintenance of sanitoriums" was held, in *Republic Reciprocal Ins. Ass'n v. Colgin Hosp. & Clinic*,[106] to permit a corporation so organized

> to provide medical treatment to the patients, and to employ, for that purpose, those persons who are duly licensed to practice medicine . . .[107]

The Court referred to the prohibition of practice by an unlicensed person, and said

> but, when those requirements are met, there is nothing in the statutes which implies a prohibition against such person engaging his services to another. The prescribed requirements have regard to his authority to practice medicine upon human beings, and not to the character of his employer.[108]

It is not clear whether this decision applied to hospitals organized under other provisions of Texas law, though the Attorney General applied it to a section authorizing the formation of charitable corporations for the purpose "of owning and operating nonprofit cooperative hospitals."[109] After the decision in the *Colgin* case there was added to the medical practice act a prohibition[110] of "impersonation of a licensed practitioner, or permitting, or allowing, another to use his license" to practice medicine; and in two recent cases, on the basis of this provision, revocation of physicians' licenses was held proper because they had practiced as employees of profit-making clinics owned by laymen.[111] The opinions

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104 Unpub. op. Att'y Gen. Conn. (December 3, 1954) (located at the Am. Hosp. Ass'n, Wash., D.C.).

105 Unpub. op. Att'y Gen. N.C. (December 9, 1955) (located at the Am. Hosp. Ass'n, Wash., D.C.).

106 123 Tex. 31, 65 S.W.2d 286 (1933).

107 Id. at 34, 65 S.W.2d at 287.

108 Id. at 34, 65 S.W.2d at 287.

109 Unpub. op. Att'y Gen. Tex. (Nov. 5, 1948) (located at the Am. Hosp. Ass'n, Wash., D.C.), dealing with a hospital organized under Tex. Rev. Civ. Stat. art. 1302 (2A) (1925).

110 Tex. Rev. Civ. Stat. arts. 4505(12), 4506 (1925). For discussion of such provisions, see note 27 supra.

111 Rockett v. Board of Medical Examiners, 287 S.W.2d 190 (Tex. Civ. App. 1956);

did not discuss the question whether the legislature intended this provision, couched as it is primarily in terms of impersonation, to apply to corporations, but the result of these decisions is to leave the Colgin case probably no longer authoritative as a statement of Texas law.

The second ground of decision is that the corporation is not in fact practicing medicine. This rationale, which has been accepted in Nebraska and Missouri with respect to the employment of physicians by both profit and nonprofit corporations,[112] has been applied by decisions in the District of Columbia and in California to uphold the legality of nonprofit prepayment plans of one kind or another. A decision in the State of Washington points strongly in the same direction.

Group Health Association of Washington, D.C., has been before the courts on two occasions. First, it brought an action against the United States attorney and obtained a declaratory judgment that it was not engaged in the illegal corporate practice of medicine.[113] Later, in an anti-trust prosecution of the American Medical Association for its interference with Group Health Association, the legality of the latter's activities was put in issue as a supposed defense to the prosecution. On the first appeal of this case, from the dismissal of the indictment, the Court of Appeals sustained the legality of Group Health activities insofar as the facts were shown by the indictment.[114] On the subsequent appeal from the conviction of the Medical Association the Court of Appeals

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Watt v. Board of Medical Examiners, 303 S.W.2d 884 (Tex. Civ. App. 1957), cert. denied, 356 U.S. 912 (1958). The State Supreme Court, in sustaining these decisions, did not, as we understand, necessarily indicate agreement with the reasons given by the intermediate appellate court. In another recent case, however, the Texas Supreme Court followed a similar rationale in applying a statute forbidding an optometrist to place his license "at the disposal or in the service of any person not licensed to practice optometry." Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957).

In Woodson v. Scott & White Hosp., 186 S.W.2d 720 (Tex. Civ. App. 1945), the court cited the Colgin case as still subsisting authority. It said that "the general rule is that a corporation organized for profit" may not practice medicine. The reasoning of recent cases makes distinction between profit and nonprofit hospitals logically difficult to support, but it remains true that there is no authoritative decision directly involving a nonprofit institution.

112 The courts in both these states have taken the view that the corporation is not practicing medicine. See note 59 supra. In State v. Lewin, 128 Mo. App. 149, 155, 106 S.W. 581, 583 (1907), the St. Louis Court of Appeals said:

> In all the larger cities, and connected with most of the medical colleges in the country, hospitals are maintained by private corporations, incorporated for the purpose of furnishing medical and surgical treatment to the sick and wounded. These corporations do not practice medicine, but they receive patients and employ physicians and surgeons to give them treatment. No one has ever charged that these corporations were practicing medicine.

113 Group Health Ass'n v. Moor, 24 F. Supp. 445 (D.D.C. 1938). Appeal was taken by the superintendent of insurance, who had also been named as a defendant, but the issue of corporate practice of medicine was not presented on the appeal. Jordan v. Group Health Ass'n, 107 F.2d 239 (D.C. Cir. 1939).

114 United States v. American Medical Ass'n, 110 F.2d 703 (D.C. Cir.), cert. denied, 310 U.S. 644 (1940).

did not go further into this question,[115] and the issue was not before the Supreme Court on certiorari.[116]

Group Health Association provides health services, on a prepayment basis, to employees of the Federal Government in the Washington area, and to their dependents; in recent years, it also provides medical services to other residents of the area. Medical services are provided through salaried physicians, though at the time of the declaratory judgment action some or all of these physicians were apparently permitted to engage also in private practice.[117] At the time of the anti-trust litigation the physicians seem to have been devoting their full time to Group Health Association.[118]

In the declaratory judgment case the district court remarked that if an individual might contract with a physician for services on a prepayment basis, so might a group of individuals; and it "would seem that this group of individuals might incorporate themselves for their own mutual benefit for the same purpose." The opinion continues:

> Such a corporation, not for profit but for the mutual benefit of its members, is in my opinion not engaged in the practice of medicine or in holding itself out as doing so. It is true that a corporation can act only through its agents and employees, but the physicians with whom the plaintiff makes contracts are rather in the position of independent contractors, and the plaintiff does not in any way undertake to control the manner in which they attend or prescribe for their patients.
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> * * * * *
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> The question here is one of statutory construction. It is evident that the purpose of the statute was to protect the public from quacks, from the ignorant and incompetent. The actions of the plaintiff in no way tend to commercialize the practice of medicine.
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> * * * * *
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> In my opinion, therefore, the conduct of the plaintiff as set forth in the bill is not a violation of the statute.[119]

On the first appeal in the anti-trust case, the Court of Appeals posed the question "whether, as described in the indictment, Group Health is necessarily violating the law." The court remarked that commercialization or exploitation of medical practice is unlawful, and that "speaking

115 American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943).

116 317 U.S. 519 (1943).

117 See Jordan v. Group Health Ass'n, 107 F.2d at 242 n.7 (D.C. Cir. 1939).

118 The indictment alleged that medical care was provided by a salaried medical staff under the sole direction of a medical director. United States v. American Medical Ass'n, 110 F.2d 703, 706 (D.C. Cir. 1940). In reviewing the case after trial, the Supreme Court said: "Group Health employed physicians on a full-time salary basis. . . ." 317 U.S. at 526 (1943). This statement appears in the Court's recital of the facts, and should not be taken as a holding that an employment relationship existed—a point not in issue before the Supreme Court.

119 Group Health Ass'n v. Moor, 24 F. Supp. 445, 446-47 (D.D.C. 1938).

generally" the corporate employment of physicians and collection of fees for their services has been held illegal; but continued:[120]

> But in all the cases we have examined in which the practice has been condemned, the profit object of the offending corporation has been shown to be its main purpose, and in no case were the circumstances precisely like those described in the indictment, i.e., a nonprofit organization, conducted so that the proper doctor and patient relationship is preserved; prospective patients organized only for the purpose of providing a clinic and paying doctors and hospital service out of members' dues; a plan designed not to interfere with the doctor's loyalty to his patient so as to commercialize medicine in a way contrary to the best interests of patient or practice, *or to subject the physician to the corporation's control and make his practice a corporate act.* As thus described, it is no more than a group of persons, under corporate organization, contributing stated sums of money monthly for the payment of prospective medical services to the extent they may be required. In these respects, it differs from the medicine-practicing corporations which in many of the States have been held to be illegal. Without more, therefore, than now appears, we are unable to say that Group Health is illegally practicing medicine. (Emphasis added.)

The rationale of these decisions concerning Group Health Association combines two lines of thought—first, that the operations of the Group Health Association do not violate the purposes underlying the medical practice act and the corporate practice rule, and second, that the association's salaried physicians are independent contractors. If there is a unifying element in these two lines of thought it must be found in the lack of lay control over the physician's professional work, which obviates one major objection under the medical practice act and at the same time affords a basis for finding the physicians to be independent contractors.

The words we have italicized in the Court of Appeals opinion indicate that unless the physician in his practice is subject to the corporation's control, his practice is not *for this purpose* a corporate act even though he be paid a salary. If this is so, corporate practice, in the strict sense of practice by the corporation itself, is limited to cases in which the corporation controls professional activity. But the opinion indicates that a second question must also be answered, that is, whether an arrangement which falls short of corporate practice in this sense nevertheless so endangers the public as to violate the policies of the medical practice act. Neither branch of this rule, we believe, holds any threat to public or community hospitals.

Though California cases have not presented the issue of employment so sharply, the same general rationale seems to underlie decisions in that state, where the courts are circumscribed in their dealing with this sub-

120 110 F.2d at 714. The opinion was written by Groner, C. J., and concurred in by Justin Miller, J., and Vinson, J., subsequently Chief Justice of the United States Supreme Court.

ject by a statutory prohibition of the corporate practice of medicine.[121]

In *People v. Pacific Health Corp.*,[122] a proceeding in quo warranto, a narrowly divided court held illegal the operations of a profit-making corporation offering medical services to the public through the medium of physicians who were independent contractors. The corporation admitted that it could not lawfully practice medicine, but urged that it was not doing so because the physicians were not its employees. To this argument the majority of the court replied that the "policy of the law" could not be thus circumvented, reasoning that the evils of divided loyalty, lay control and the like were not obviated by casting the corporation's payments to the physicians in the form of fees rather than salary. The defendant also contended that a judgment ousting it from the business of supplying medical services would necessarily condemn also many nonprofit and fraternal organizations which had long engaged in similar practices for the benefit of their members. The majority opinion pointed out important differences between the commercial business of the defendant and these philanthropic activities "which have been tacitly approved for generations"; it noted, among others, that these nonprofit organizations generally provide medical service "to a limited and particular group" rather than to the general public.

One cannot say with assurance precisely what factors controlled the judgment of the court or led it to distinguish commercial from nonprofit operations. A reading of the opinion as a whole, however, leaves little doubt that the controlling factors were considerations of public policy rather than the terms of the medical practice act.[123] The dissenting justices distinguished these two issues sharply, saying:

> This case presents only two questions for decision: (1) Does the plan followed by the appellant . . . violate the provisions of the Medical Practice Act, and (2) If not, is its plan violative of public policy?[124]

These justices answered both questions in the negative.

A more recent case gives explicit support to the view that, at least

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121 Cal. Bus. and Prof. Code § 2008 (Deering 1937, Supp. 1959). The utility to hospitals of the decisions discussed in the text may be affected by a 1951 amendment of this section of the code, permitting the board of medical examiners to authorize the employment of physicians on salary by certain charitable institutions, if no fees for their professional services are charged to patients. This amendment is expressed as enabling legislation; whether it may have also some restrictive effect is not clear.

122 12 Cal. 2d 156, 82 P.2d 429 (1938), cert. denied, 306 U.S. 633 (1939). See also Pacific Employers Ins. Co. v. Carpenter, 10 Cal. App. 2d 592, 52 P.2d 992 (1935).

123 This reading of the opinion finds additional support in the court's discussion of the contention that public policy was changing and that the law should change with it. The opinion recognized the court's power to make a change, if on this question "the social view of people generally" had changed, but found no evidence that this was the fact. So drastic a change as abolition of the corporate practice rule, said the court, "should" come from the legislature, but there is no suggestion that only the legislature had power to make a change, as would be the case if the rule were one of statute law.

124 12 Cal. 2d at 161-62, 82 P.2d at 432.

in the absence of corporate employment of physicians, the issue of corporate practice, in the strict sense which is forbidden by the California statute, turns on the single question of corporate control over professional activity, and that the remaining issues are those of public policy. In *Complete Serv. Bureau v. San Diego County Medical Soc'y*,[125] the court sustained the legality of operating a prepayment clinic which granted to its subscribers, some 10,000 in number, reduced fees for medical services rendered by members of a panel of licensed physicians —undoubtedly independent contractors by any test. The corporation collected these fees and remitted one-half of them to the physicians.

The court dealt specifically with an allegation that the corporation was practicing medicine, "which if true would be a violation of Business and Professions Code section 2008." This allegation was disposed of by citing the unanimous testimony of seven physicians associated or formerly associated with the corporation that their professional work was subject to no lay interference. The court said that this testimony constituted substantial evidence to support a finding that the corporation was not "engaged, directly or indirectly, in the practice of medicine or surgery." To avoid a violation of the statute, in other words, it sufficed to show that laymen did not interfere with the physicians' professional work.

Another issue presented was "whether a nonprofit medical service corporation may be formed" under the general nonprofit corporation

125 43 Cal. 2d 201, 272 P.2d 497 (1954). Two recent cases in the intermediate appellate courts should also be mentioned: In County of Los Angeles v. Ford, 121 Cal. App. 2d 407, 263 P.2d 638 (1953), the county had contracted with two private nonprofit medical schools to provide, through their faculty members, medical services to patients in a public hospital, both "indigents and other patients lawfully admissible thereto." Payment for these services was to be made by the county to the medical schools. In rejecting the charge of corporate practice, the district court of appeals pointed out that the rule forbidding such practice is designed "to protect the public from possible abuses stemming from commercial exploitation of the practice of medicine." The opinion further states:

> Such service is actually furnished by medical practitioners who happen to be members of the teaching staff of the two medical schools, and in no sense by the medical schools of the College and the University.
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> The contracts here in question do not call upon the College, the University or their respective medical schools to practice medicine. The actual diagnosis and treatment of patients will be done by licensed physicians, to wit: faculty members. Perhaps that fact alone would not be conclusive, if the schools were soliciting the public or offering medical services to the public generally. In the instant cause, the schools have no legal or factual contact with the public or with the hospital patients. As a result, they play no part in the relationship of doctor and patient.

Id. at 414, 263 P.2d at 642-43. Perhaps this case may be distingnished on the ground of the schools' inactive role. Yet here were corporations furnishing the medical services of their salaried physicians and receiving payment for so doing.

In County of San Diego v. Gibson, 133 Cal. App. 2d 519, 284 P.2d 501 (1955), another district court of appeals sustained a contract similar to that in the Los Angeles case, made with a nonprofit foundation organized by the medical staff of the county hospital for the purpose of receiving payment for their services and devoting it to medical research and similar purposes. The court merely said:

> Under established principles it cannot be held that this contract provides for the corporate practice of medicine by the Foundation.

Id. at 524, 284 P.2d at 504.

law. The court recognized, as stated in earlier decisions, that professions are not open to commercial exploitation and that it violates public policy to permit a "middleman" to intervene for profit between physician and patient. The court noted, however, that this principle was not contravened by permitting individuals to form a nonprofit corporation to secure for themselves medical services at a low cost.

Although the issues in the case concerned only the Complete Service Bureau, it may be noted that the court in the course of its opinion referred without suggestion of disapproval to the California Physicians Service (organized by the state medical society), the Kaiser Foundation Health Plan, and "many fraternal and beneficial organizations which provide medical services to their members." We believe that challenge to any of these organizations, on the ground of corporate practice, would be difficult to make.

It is true that these organizations, like the Complete Service Bureau, the nonprofit organizations referred to in the *Pacific Health* case, and Group Health Association in the District of Columbia, generally provide services only to their members or to some other limited group of people, and thus lend color to the argument that the corporation is merely a mechanism by which these people secure medical services for themselves. But the distinction between serving a membership and serving the general public wears thin when membership is open to all comers, as was true in the Complete Service Bureau and some of the other cases.

If we are right in our reading of these California cases, they refer to the difference between a limited and an unlimited clientele, not to determine whether the corporation itself is practicing medicine, but only as bearing upon the issues of public policy involved.[126] Unless there is some other objection to its mode of operation, a community hospital serving the general public will hardly be said to violate public policy merely because it does not enroll its patients as "members." While membership is undoubtedly important in some contexts, it would seem completely unimportant in institutions created expressly to serve the general public.

These cases shed no light on the legality of the employment of physicians on salary by California hospitals.[127] At least in the absence of

[126] We have pointed out (p. 457 supra) that this consideration could affect corporate practice, in the strict sense, only through a disregard of the corporate fiction. We have also noted (p. 444 supra) that under some circumstances the size and composition of the group to which a corporation supplies medical service may be of controlling importance from the policy standpoint.

[127] Query whether the California courts would follow the District of Columbia Court of Appeals in holding that a salaried physician's practice is not "a corporate act," for purposes of the corporate practice rule, if he is not subject to the corporation's control. With respect to general hospitals, the question is further complicated by the peculiar provision of the California statute. See note 121 supra.

an employment relationship, they do seem to indicate that there is no violation of statute unless the professional work of the physicians is subject to control. The point that most clearly emerges, however, is that the dominant considerations in all such cases are apt to be those of public policy, and that practices which do not exhibit the evils associated with corporate practice are likely to pass muster.

A recent opinion of the California Attorney General states that control of the physician, actual or potential, is "the meat of the violation" of section 2008; but it also states that nonprofit corporations are subject to a different rule from business corporations.[128] This opinion seems to accord with our analysis of the California cases, but with the added thought that in the case of a business corporation potential control suffices to bring about a violation of the statute.

The Supreme Court of Washington, in *Group Health Coop. v. King County Medical Soc'y*,[129] sustained a civil action by a cooperative prepayment plan to enjoin a conspiracy by members of the medical profession to injure it. Various questions concerning the legality of incorporation of the plaintiff were raised by the defendants and rejected by the court, but there seems to have been no direct charge that it was practicing medicine in violation of the corporate practice rule, despite the fact that it employed physicians on salary. The plaintiff was registered as a "health care service contractor,"[130] which gave it statutory exemption from insurance laws and permitted it to receive prepayment for health care services, but did not purport to exempt it from any prohibition of the practice of medicine through employed physicians.

The opinion in this case discussed at length, and rejected, an allegation that the plaintiff's salaried physicians were practicing in violation of professional ethics as enunciated by the American Medical Association. The court observed:

> That it is perfectly ethical for physicians to be compensated by salary is further demonstrated by the fact that several members of the [King County Medical] Society are employed in Seattle hospitals on a salary basis.[131]

In *Bartron v. Codington County*,[132] the South Dakota Supreme Court

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128 34 Ops. Att'y Gen. Cal. 73, 77 (1959).

129 39 Wash. 2d 586, 237 P.2d 737 (1951).

130 See Wash. Rev. Stat. § 6131-10 (Rem. Supp. 1947).

131 39 Wash. 2d at 611, 237 P.2d at 751. The court did not indicate what significance it would have attached to a violation of professional ethics if one had been found. There is no suggestion that this would have rendered plaintiff's operation illegal. The suit was one to restrain a tortious conspiracy, and probably defendants had sought to justify their acts as professional discipline. Compare United States v. Oregon Medical Soc'y, 343 U.S. 326, 336 (1952); hut see American Medical Ass'n v. United States, 130 F.2d 233, 238-41, 244-50 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943).

132 68 S.D. 309, 2 N.W.2d 337 (1942). A somewhat similar holding was made by the

placed the corporate practice rule squarely on the ground of public policy. While there is nothing in the opinion affirmatively suggesting the propriety of practice by nonprofit corporations, the reasoning of the court plainly forecasts a different result in any case in which the court might be satisfied that public policy is not contravened. It is reasonably safe to say that public and community hospitals in South Dakota have nothing to fear from the corporate practice rule.

The Attorney General of Minnesota[133] applied much the same reasoning to a proposed nonprofit corporation and concluded that it would not violate the corporate practice rule.

A case now pending before the Supreme Court of South Carolina challenges the constitutionality of a provision in a county appropriation act for payment to the radiologist in a county hospital of a percentage of receipts of the department, subject to a ceiling of $25,000 a year. In sustaining a demurrer to the complaint, the lower court noted that no case had been cited invalidating arrangements in a governmental hospital on the ground of corporate practice, and that decisions in other states had sustained the operations of nonprofit hospitals in this regard.[134]

To summarize: In New Hampshire and Oregon, if the phrase "resident medical staff" or "resident staff" is given its natural meaning, hospitals are largely exempt from the corporate practice rule. In Iowa, Virginia and Wisconsin the legislatures have undertaken specific regulation of hospital-specialist or hospital-physician arrangements, which generally rules out an employment relation but, in varying degree, leaves other arrangements open to the choice of the parties.[135] There are authoritative court decisions in the District of Columbia and in California, Missouri, Nebraska, New York, South Dakota, and Washington which go far to eliminate the danger that public and community hospitals may run afoul of the corporate practice rule. In Connecticut, Minnesota, and North Carolina we find attorney general opinions that support the same conclusion. An opinion in Wisconsin intimated, without deciding, that the law of that state, prior to the recent amendment, was to the same effect.[136]

Circuit Court of Kanawha County, West Virginia. Amick v. Staats Hospital, No. 12990, Cir. Ct. Kanawha County, April 18, 1938. But see note 12 supra, with respect to present West Virginia statutory law.

133 See note 46 supra.

134 Plenge v. Russell, Judgment Roll No. 46364, C.P. Spartanburg County, July 7, 1959. The constitutional attack is difficult to take seriously. The most plausible argument, that there is unreasonable discrimination against the radiologists since other staff members may charge and collect what they like, is answered by the fact that the radiologists enjoy a practical monopoly of hospital business and a large amount of assistance from lay hospital employees.

135 See notes 12 and 14 supra.

136 Unpub. op. Att'y Gen. Wisc. (June 4, 1959) (located in the office of the Am. Hosp. Ass'n, Wash., D.C.). For reference to the recent amendment, see note 12 supra.

To the contrary are opinions by state attorneys general in Colorado, Florida, Idaho, Iowa, New Mexico, Ohio, Virginia, and West Virginia,[137] and one district court decision in Iowa,[138] which have undertaken to apply the corporate practice rule to nonprofit hospitals. These opinions have held illegal certain arrangements under which pathologists and radiologists have for many years served as heads of hospital laboratories. The Iowa court decision, and the opinions in that state and Virginia, dealt with the law prior to the recent amendments.[139]

Generally, these attorneys general have reasoned along the conventional lines: that corporations, not being "persons" within the medical practice acts, cannot be licensed to practice medicine; and that from this fact it follows that corporations are forbidden to practice. We have already discussed the fallacy in this reasoning.[140] Except in Colorado, moreover, where the legislature has expressly forbidden corporate practice,[141] we believe that the attorneys general might properly have given thought both to the qualifications of the corporate practice rule which courts have expressed,[142] and to the considerations of public policy which have bulked large in so many of the judicial opinions; had they done so, they might have concluded that the corporate practice rule is inapplicable to nonprofit hospitals. In none of these states was the issue foreclosed by authoritative court decision, or even by dictum of their own courts.

Nor do these opinions evidence much consideration of the grounds upon which the practice of medicine by pathologists and radiologists (assuming their work to constitute the practice of medicine) is to be attributed to the hospitals, so as to render the hospitals also practitioners. Collection by the hospital of fees for these specialists' services

137 [1953-54] Colo. Rep. Att'y Gen. 84; Ops. Att'y Gen. Ohio 750 (1952); Ops. Att'y Gen. Va. 146 (1954-55). Unpub. ops. Att'y Gen. Fla. (March 25, 1955); Idaho (May 26, 1954); Iowa (Feb. 19, 1954); N.M. (Aug. 13, 1958); W. Va. (July 11, 1950) (located in the Am. Hosp. Ass'n, Wash., D.C.).

The Virginia attorney general held that pathology and diagnostic radiology did not constitute the practice of medicine. He disagreed on that point with the opinion or assumption of other attorneys general, who accepted without discussion statements by boards of medical examiners that these physicians were engaged in the diagnosis of disease.

138 Iowa Hosp. Ass'n v. State Bd. of Medical Examiners, Equity No. 63095, Dist. Ct. Polk County, November 28, 1955. Appeal to the state supreme court was withdrawn by appellants, without conceding the correctness of the lower court decision, after the enactment of legislation which incorporated the compromise agreement between the hospital association and the medical society.

139 For reference to the recent amendments, see note 12 supra.

140 See p. 437 supra.

141 See note 12 supra.

142 In Iowa, for example, the attorney general might have observed the statement of the State Supreme Court, that corporate practice of the learned professions is "in general" forbidden. See note 19 supra. Had he recognized the existence of exceptions to the rule, as thus indicated by his own court, he might well have concluded that the most obvious of all cases for an exception is that of a nonprofit community hospital.

does not, in our view, result in corporate practice if the specialists are in fact independent subcontractors, as they undoubtedly are in most of the smaller hospitals, and as they also probably are in any case where the hospital is served by a firm of specialists rather than by an individual.

In most other cases, however, the specialists are presumably employees under the usual tests of the employment relation despite the lack of control over their professional work.[143] If one starts with the assumption that corporate practice even by a nonprofit hospital is *ipso facto* illegal, one cannot quarrel seriously with a finding, in these cases of full-time specialists, that the hospitals are in fact practicing medicine through employed physicians.[144] But even on this point, if the attorneys general had been more sensitive to the purposes of the medical practice acts, they could have found impressive judicial precedent for holding that in the absence of lay control there is no corporate practice.

In appraising the probable persuasiveness of these opinions with the courts, if and when the issues reach the stage of litigation, we must bear in mind not only the judicial and attorney general opinions to the contrary, but also the apparently broad reach of the adverse opinions in striking down many other accepted practices both of hospitals and of corporations of other kinds.[145] If we are right in believing that courts

143 See note 82 supra.

144 It is easier to take issue with the arguments used by these attorneys general in finding an employment relation than it is to take issue, in the case of the full-time specialist, with their conclusion on this point.

Thus, the Attorneys General of Florida and Idaho (in identical words) found the existence of an employer-employee relationship on the ground that "the hospital, and not the patient, compensates the practitioner for services rendered." Unpub. op. Att'y Gen. Idaho (May 26, 1954) (located at the Am. Hosp. Ass'n, Wash., D.C.); Unpub. op. Att'y Gen. Fla. (March 25, 1955) (located at the Am. Hosp. Ass'n, Wash., D.C.). This circumstance, of course, as a multitude of decided cases demonstrates, is quite as consistent with the status of independent contractor as with that of employee.

The Attorney General of West Virginia said that a hospital employing a physician on salary "necessarily controls his discretion even if only in a general way as to the patients he shall treat and the method of treatment"—a statement which we think plainly not true of the method of treatment. Unpub. op. Att'y Gen. W. Va. (July 11, 1950) (located at the Am. Hosp. Ass'n, Wash., D.C.).

The Attorney General of Colorado stated that "in an employment or agency relationship in which a doctor is an employee of an unlicensed person or corporation, the employer necessarily has the power of control over the doctor in the conduct of his professional duties as such employee"—a statement which reverses the usual approach and makes control, not a test, but a consequence of employment. [1953-54] Colo. Rep. Att'y Gen. 84.

145 At least two of these attorneys general had soon to explain or qualify their opinions to avoid an imputation of illegality in other situations.

In holding that the employment of residents and interns is lawful, the Attorney General of Ohio relied in part on the rule of strict construction of criminal statutes and on the effect of long-continued administrative interpretation. Unpub. op. Att'y Gen. Ohio (Oct. 14, 1952) (located at the Am. Hosp. Ass'n, Wash., D.C.). He offered no reason, however, why these defenses were less available in the case of radiologists than in the case of residents and interns.

The Attorney General of Florida held that a county hospital might lawfully employ a radiologist on salary, stating that the arrangements did not interfere with a proper physician-patient relationship. Unpub. op. Att'y Gen. Fla. (Nov. 15, 1956) (located at

will be slow to accept a position cutting so wide a swathe through the current organization of medical practice, we should expect them to cast a wary eye at opinions of legal officers which would have the same effect.

We turn now to certain "secondary evidence" in support of the legality of the employment of physicians by public and community hospitals for the medical care of their patients, and the legality of the collection by hospitals of fees for their services. This evidence is more widespread geographically than the primary evidence we have thus far considered.

Though we have made no effort to exhaust the field of statutory research, there is one item of statutory evidence too important to omit from this discussion. In thirty-one states and the District of Columbia there are statutes giving to a hospital a lien upon a patient's cause of action for personal injury, to enable the hospital to collect its charges, not only for hospitalization, but usually also for treatment.[146] The few reported cases applying these statutes are in accord with the interpretation that the treatment for which a lien is given to the hospital includes medical and surgical treatment.[147]

No reason suggests itself for recognition of the legality of practice by hospital physicians in personal injury cases if such practice in other cases were illegal.[148] These statutes are of course particularly telling in answer to the argument that hospitals may not legally collect fees for medical services, since their very purpose is to facilitate the collection of such fees.

The lien statutes of Connecticut, Delaware, Illinois, Missouri, New York, and North Dakota, and the subrogation statute of Louisiana, are limited to publicly supported or to public and nonprofit hospitals. In these states we think these statutes furnish very strong evidence indeed that the hospitals to which they apply may furnish medical

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the Am. Hosp. Ass'n, Wash., D.C.). Here again, the argument would seem equally applicable to the facts upon which his earlier opinion was rendered.

146 These statutes are collected and analyzed in Univ. of Pitts. Health Law Center, Hospital Law Manual (1959).

A subrogation statute in Louisiana is similar in effect to a hospital lien law. La. Rev. Stat. §§ 46:8-46:15 (1950).

147 Meyer v. New York Hosp., 7 App. Div. 2d 60, 180 N.Y.S.2d 918 (1st Dep't 1958), appeal dismissed, 5 N.Y.2d 1021, 158 N.E.2d 248 (1959); Finkel v. Kushner, 183 Misc. 64, 48 N.Y.S.2d 717 (Sup. Ct.), aff'd, 268 App. Div. 912, 51 N.Y.S.2d 756 (2d Dep't 1944); Higley v. Schlessman, 292 P.2d 411 (Okla. 1956); Heights Hosp. v. Patterson, 269 S.W.2d 810 (Tex. Civ. App. 1954); Layton v. Home Indem. Co., 9 Wash. 2d 25, 113 P.2d 538 (1941). Compare Peart v. Rykoski, Inc., 195 So. 30 (La. Ct. App.), aff'd, 195 La. 931, 197 So. 605 (1940); Prevost v. Smith, 197 So. 905 (La. Ct. App. 1940); Wright v. Home Indem. Co., 1 So. 2d 709 (La. Ct. App. 1941); Persson v. United Parcel Serv., 202 Misc. 876, 110 N.Y.S.2d 865 (Sup. Ct. N.Y. County 1952). See Roosevelt Hosp. v. Loewy, 185 Misc. 113, 55 N.Y.S.2d 414 (Sup. Ct., App. T. 1945).

148 Emergency conditions, requiring resort to the services of any available physician, are doubtless more common in personal injury cases than in the average run of hospital admissions. But the liens are not limited to emergency cases.

care through salaried physicians and collect the charges for such services. In Illinois, for example, where the court has condemned a profit-making clinic,[149] it seems plain that the legislature has drawn a distinction between such institutions on the one hand, and public or community hospitals on the other. We see no way in which the courts of that state could extend their condemnation to hospitals of the latter sort without nullifying, so far as it concerns medical treatment, the lien law which the legislature has enacted.

In the other states, which have not in terms limited their lien laws to nonprofit institutions, it will of course be said that the argument proves too much because it encompasses profit-making hospitals. This, however, is not necessarily so, for in enacting a lien law a legislature is not ordinarily validating transactions otherwise illegal, merely because they fall within the literal terms of the lien. The broad hospital lien statutes in these states should probably be read with an implied limitation that the medical services have been lawfully rendered. So read, they still stand as persuasive evidence that *some* practice of medicine by *some* hospitals is legal, and that these hospitals may bill and collect for such services. Either the hospital lien for medical treatment is a completely futile enactment, or it is a complete refutation of the contention that *all* practice of medicine by hospitals is illegal. A broad lien law does not tell us what hospital medicine is legal and what illegal; but it does tell us plainly that *some* of it is legal. And if any of it is legal, surely the generally accepted practices of public and community hospitals must fall within the area of legality.

The many litigated cases in which hospitals have been permitted to recover their charges for medical and surgical services offer additional "secondary evidence." Here again, the evidence is particularly persuasive in answer to the contention that hospitals may not legally collect fees for the services of physicians, for it would be strange law that would permit the collection of such fees through the processes of the courts while denying, as illegal, their collection through the normal processes of billing.

In some instances the right of a hospital to collect for medical services is granted by special statute, as is frequently the case, for example, with public mental institutions. Since these hospitals commonly employ salaried physicians, the existence of such statutes argues against any all-embracing public policy opposed to the corporate practice of medicine; but the cases applying them do not add to the argument, and we have sought to exclude such cases from our citations.

149 See note 17 supra.

Another group of cases involving collection by hospitals for medical services has arisen under workmen's compensation laws. Except in Louisiana,[150] we have found nothing in these laws to legalize the practice of medicine by hospitals or to authorize them to sue for the services of physicians. The statute may afford the occasion to sue the employer or the insurance carrier rather than the patient, but it does not otherwise confer rights upon the hospital, and workmen's compensation cases are thus as pertinent as common law cases to the question here at issue.

Apart from the cases we have already discussed, and one other,[151] the opinions give no indication that the issue of legality has been raised. But if the practice of medicine by licensed physicians employed by hospitals were illegal, it would be the duty of a court to raise the issue on its own motion, and to deny recovery for services illegally rendered.

> Illegality, if of a serious nature, need not be pleaded. If it appears in evidence the court of its own motion will deny relief to the plaintiff. The defendant cannot waive the defense if he wishes to do so.[152]

Occasionally, of course, a court may overlook a defense not pleaded or briefed by counsel; occasionally argument in a later case may persuade it to a different view.[153] But we cannot believe that the corporate practice rule is so little known to judges that it often escapes their notice, or that such statements of the law as the following, by the Supreme Judicial Court of Massachusetts, are to be attributed to inadvertence:

> When an injured employee under the Compensation Act goes to such a hospital and does not select a physician, the payment to the hospital of its charges includes the expenses of nurses and physicians, and the insurer is not required to pay the physician who is a member of the staff for his services.[154]

So little attention have the courts paid in these cases to the corporate practice rule that many of the opinions do not indicate whether charges for medical services are included in the hospital's claim. We have,

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150 See La. Rev. Stat. § 46:13 (1950).

151 Goldwater v. Citizens Cas. Co., 7 N.Y.S.2d 242 (N.Y. Munic. Ct. 1938), aff'd, 36 N.Y.S.2d 413 (Sup. Ct., App. T. 1939). In this case the court, citing the Woodbury case, said:

> The general rule that a corporation may not practice medicine has its exception in charitable hospital corporations which are organized for that express purpose and are sanctioned by law to treat the sick and injured.

Id. at 247-48.

152 Restatement, Contracts § 600, comment a (1932). To the same effect is Williston, Contracts § 1630A (Rev. ed. 1937).

153 This seems to have happened in South Dakota where, ten years before the decision holding its operations illegal, the Bartron Clinic was permitted, apparently without consideration of the question of legality, to recover from a sheriff for the hospitalization and medical care of a prisoner. Bartron Clinic v. Kallemeyn, 60 S.D. 598, 245 N.W. 393 (1932).

154 Allen's Case, 265 Mass. 490, 493, 164 N.E. 458, 459 (1929). We have been unable to ascertain to what extent administrative practice in workmen's compensation matters follows this pattern throughout the Nation.

therefore, divided the cases into two groups: first, those in which the opinion clearly indicates that such charges are included;[155] and second, those in which it appears likely that they were in fact included.[156] A decision enforcing a hospital's claim for medical services seems to go far toward establishing the legality of the services, even though the question was not raised by the defendant, and to be important enough to warrant counsel in that state, where necessary, in going behind the opinion to the record.

When we turn to cases dealing with the liability of hospitals for malpractice of their physicians, we enter a field in which the law is in a state both of confusion and of flux, and from which, despite the profusion of cases, not much light is shed on the problem of corporate practice. In about half the states nonprofit hospitals are still wholly or

[155] Contractors, Pacific Naval Air Bases v. Pillsbury, 105 F. Supp. 772 (N.D. Cal. 1952); Pate v. Carrollton Clinic, 52 Ga. App. 774, 184 S.E. 780 (1936); Callaway v. Quality Motors, 69 Ga. App. 567, 26 S.E.2d 206 (1943); Southern Surety Co. v. Harrisburg Hosp., Inc., 253 Ill. App. 458 (1929); Allen's Case, supra note 154; Omaha Gen. Hosp. v. Strehlow, 96 Neb. 308, 147 N.W. 846 (1914); Matter of Kocko v. Harris Coal Co., 262 N.Y. 535, 188 N.E. 53 (1933) (rule changed by 1935 statute in workmen's compensation cases); Goldwater v. Fisch, 261 App. Div. 226, 25 N.Y.S.2d 84 (1st Dep't), appeal dismissed, 285 N.Y. 857, 34 N.E.2d 387 (1941); Goldwater v. Citizens Casualty Co., supra note 151; Hughes v. Nelson, 178 Misc. 456, 36 N.Y.S.2d 409 (N.Y. Munic. Ct. 1941); Roosevelt Hosp. v. Begley, 92 N.Y.S.2d 793 (N.Y. City Ct., 1949); Beekman Downtown Hosp. v. Murphy, 203 Misc. 121, 116 N.Y.S.2d 341 (N.Y. Munic. Ct., 1952); Republic Reciprocal Ins. Ass'n v. Colgin Hosp. & Clinic, supra note 106; Commercial Standard Ins. Co. v. City Memorial Hosp., 107 S.W.2d 724 (Tex. Civ. App. 1937). Compare County of Los Angeles v. Ford, supra note 125; County of San Diego v. Gibson, supra note 125.

Similarly, courts have dealt with contracts for care in homes for the aged, in which a promise of medical care has been a part of the consideration, without any suggestion that a corporate undertaking to provide such care is illegal. Inderkum v. German Old People's Home, 23 Cal. App. 2d 733, 74 P.2d 83 (1937); Sisters of Third Order of St. Francis v. Estate of Frances Guillaume, 222 Ill. App. 543 (1921); Old Peoples Home v. Miltner, 149 Kan. 847, 89 P.2d 874 (1939); Jernberg v. Evangelical Lutheran Bethany Home, 156 Kan. 167, 131 P.2d 691 (1942); German Aged People's Home v. Hammerbacker, 64 Md. 595, 3 Atl. 678 (1886); Old Men's Home v. Lee's Estate, 191 Miss. 669, 4 So. 2d 235 (1941); Dalton v. Florence Home, 154 Neb. 735, 49 N.W.2d 595 (1951); Home and Hosp. of Daughters of Israel v. President and Directors, 128 N.Y.S.2d 56 (Sup. Ct. 1953), aff'd, 285 App. Div. 1135, 141 N.Y.S.2d 911 (1st Dep't 1955); Bruner v. Oregon Baptist Retirement Home, 208 Ore. 502, 302 P.2d 558 (1956).

[156] Polk County Memorial Hosp. v. Johnson, 224 Ark. 917, 278 S.W.2d 640 (1955); Union Hosp. v. S.P. Brown & Co., 104 Ind. App. 430, 11 N.E.2d 520 (1937); Saginaw Gen. Hosp. v. Ocean Acc. & Guar. Corp., 270 Mich. 550, 259 N.W. 323 (1935); St. Barnabas Hosp. v. Minneapolis Int'l Elec. Co., 68 Minn. 254, 70 N.W. 1126 (1897); Rabinowitz v. Massachusetts Bonding & Ins. Co., 119 N.J.L. 552, 197 Atl. 44 (1938); Piggee v. Mercy Hosp., 199 Okla. 411, 186 P.2d 817 (1947); Rhode Island Hosp. v. Lewis, 51 R.I. 73, 150 Atl. 762 (1930); Weakley County Hosp. v. Kentucky-Tennessee Light & Power Co., 171 Tenn. 662, 107 S.W.2d 226 (1937); St. Mary's Hosp. v. Atlas Warehouse & Cold Storage Co., 226 Wis. 568, 277 N.W. 144 (1938). Compare State Hosp. v. Lehigh Valley Coal Co., 267 Pa. 474, 110 Atl. 255 (1920).

Similarly, there are cases involving old people's homes in which the record would probably disclose that a promise to supply medical services formed a part of the consideration. Christenson v. Board of Charities, 253 Ill. App. 380 (1929); Stoddard v. Gabriel, 234 Iowa 1366, 14 N.W.2d 737 (1944); First Nat'l Bank v. Methodist Home, 181 Kan. 100, 309 P.2d 389 (1957); Newburyport Soc'y for Relief v. Noyes, 287 Mass. 530, 192 N.E. 54 (1934); Dodge v. New Hampshire Centennial Home, 95 N.H. 472, 67 A.2d 10 (1949); Fidelity Union Trust Co. v. Reeves, 96 N.J. Eq. 490, 125 Atl. 582 (1924), aff'd, 98 N.J. Eq. 412, 129 Atl. 922 (1925).

largely immune from tort liability, and in these states the legality of hospital-physician relations can hardly be drawn in question in malpractice cases. In other states, moreover, a hospital that undertakes to provide medical services will usually not be heard, in an action of this sort, to plead that its undertaking was illegal. There is no occasion in tort cases, as there is in those based on contract, for the court to raise on its own motion the question of legality.

There is one group of cases, however, in which courts in imposing tort liability upon hospitals have followed a course of reasoning that is directly pertinent to the corporate practice issue. We have already noted the remark of the New York Court of Appeals, in abandoning its partial immunity rule, that the patient "expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility."[157] Some other courts also have gone beyond the statement that what a hospital in fact undertakes to do it must do carefully, and have indicated that a hospital is legally required to furnish medical services under certain circumstances to paying as well as nonpaying patients. Thus, the Court of Appeals of the District of Columbia has said:

> In general, it is the duty of a private hospital to give a patient such reasonable care and attention as the patient's known condition requires.[158]

That this duty of the hospital includes, in appropriate situations, the rendition of medical services was made clear:

> It is generally true that a patient enters a maternity hospital not only that she may receive constant nursing care, but also that she may have the services of a doctor, when required, during the absence of her private physician and until he can respond to the hospital's summons. Garfield Hospital recognized those objectives and undertook to perform such services. It employed four physicians in its maternity ward, two of whom were constantly on duty.[159]

Under present-day conditions a general hospital holds out to its prospective patients a promise that, in the absence of the attending physician,

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[157] See p. 460 supra.

[158] Garfield Memorial Hosp. v. Marshall, 204 F.2d 721, 725 (D.C. Cir. 1953). To a similar effect are Valentin v. La Societe Francaise, 76 Cal. App. 2d 1, 172 P.2d 359 (1946); Moeller v. Hauser, 237 Minn. 368, 54 N.W.2d 639 (1952); Sepaugh v. Methodist Hosp., 30 Tenn. App. 25, 202 S.W.2d 985 (1947). Compare Stuart Circle Hosp. Corp. v. Curry, 173 Va. 136, 3 S.E.2d 153 (1939). But see Frost v. Des Moines Still College, 248 Iowa 294, 79 N.W.2d 306 (1956); Christensen v. Des Moines Still College, 248 Iowa 741, 82 N.W.2d 810 (1957).

The line is a narrow one between saying, on the one hand, that a hospital which in fact renders medical service must render it with due care, and saying, on the other, that because a hospital holds itself out to render medical service in certain situations it is under a legal duty to do so. But the former statement is consistent, while the latter is inconsistent, with argument that rendition of the service is in violation of law.

[159] 204 F.2d at 725-26.

it will provide medical service in an emergency. That implied promise creates a legal duty to provide "such reasonable care and attention as the patient's known condition requires." The promise could not create a legal duty if it were a promise to perform an illegal act. The Court of Appeals, thoroughly familiar as it is with the corporate practice rule, has taken an approach to the problem of hospital tort liability which cannot be reconciled with the view that employment of physicians by hospitals is illegal.

One other aspect of the tort cases should be mentioned, in that in nonimmunity states they frequently involve the issue whether a physician is an employee of the hospital or an independent contractor.[160] If he is found to be an independent contractor and his acts are thus not attributed to the corporation for tort purposes, it would seem to follow that the corporation is not, by reason of his acts, engaged in the practice of medicine,[161] and any question of legality is one of public policy rather than of corporate practice in the strict sense of the term. But the converse does not necessarily hold true. We have seen that lay control is the one element of the employment relationship which bears directly upon the policies of the medical practice acts, and courts which do not insist upon control as a prerequisite to tort liability may still require a finding of control as an essential element in the corporate practice of medicine.[162]

Malpractice cases would seem, on the surface, to afford a fruitful source of authority on the question whether a corporation is or is not practicing medicine. In fact, it is the unusual malpractice case that throws light on this question. Only as courts have found an affirmative corporate duty to provide medical service, on the one hand, or have divorced the activities of the physician from those of the corporation, on the other, do these cases contribute significantly to the solution of

[160] We have pointed out pp. 450-53 supra, that there is much conflict of decision on what constitutes an employment relation, that different tests may be applied for purposes of different statutes or rules of law, and that the employment of physicians raises peculiar problems because of the importance of a right to control the details of the work as an element of employment.

The New York Court of Appeals, until 1957 the chief exponent of the view that physicians in hospitals were ipso facto independent contractors, has now abandoned that view. Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (1957). That court will now presumably apply to such physicians the same tests of employment it applies in other tort liability cases.

[161] It would, of course, be possible to apply, for purposes of finding the corporate practice of medicine, a broader test of the employment relation than is applied in tort cases. We know of no reason for so doing, especially since an objectionable corporate relationship to medical practice can always be struck down on grounds of policy without finding that the corporation itself is practicing. Nor have we found any opinion suggesting such a differentiation, though the Indiana cases dealing with profit-making corporations may perhaps have that effect. See note 58 supra.

[162] This seems to be the result of decisions in the District of Columbia and in California. See note 58 supra.

the problem of corporate practice. But considering the number of cases that have come before appellate courts involving the relation of physicians to community or public hospitals, it is not unreasonable to suppose that if the typical and accepted relationships were grounded in illegality, that fact would have emerged before now.

2. Decisions Relating to Profit-Making Corporations

We have already seen that profit-making corporations which undertake to provide medical or dental services to the general public are usually held to be engaged in an illegal activity.[163] We have noted that the grounds of decision are often obscure, but that there are ample reasons of public policy to hold such practice illegal even though it is not reached by the specific terms of the medical practice act.

When we turn to those medical activities which for one reason or another are considered appropriate to commercial corporations[164] we find a strikingly different picture. Despite the multitude of reported cases involving the provision of medical services by employers to employees or their dependents, there is almost nothing in the courts' opinions to suggest judicial disapproval of the practice. This is true whether the physician is held to be an independent contractor and the corporation therefore not liable for his derelictions,[165] or whether—as is increasingly often the case—the rule of *respondeat superior* is applied.[166] Industrial medicine, in one form or another, has been in existence for nearly one hundred years virtually unmolested by the corporate practice rule. Even when courts have intimated a doubt of its legality,[167] the processes of the law have not, so far as we can learn, been invoked to halt it; we doubt that the courts of any state would sustain a criminal prosecution of an employer for providing health services, through any of the usual means, to his employees or their dependents. Here again, when the evils associated with corporate practice are not present, the rule is either disregarded or found to be inapplicable.

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163 See notes 7, 8, 16, 17, 24-27 supra.

164 See p. 464 supra.

165 Metzger v. Western Md. Ry., 30 F.2d 50 (4th Cir. 1929); Virginia Iron, Coal & Coke Co. v. Odle's Adm'r, 128 Va. 280, 105 S.E. 107 (1920).

A similar position has been taken with respect to proprietary hospitals. Iterman v. Baker, 214 Ind. 308, 15 N.E.2d 365 (1938); Huber v. Protestant Deaconess Hosp., 127 Ind. App. 565, 133 N.E.2d 864 (1956); Penland v. French Broad Hosp., 199 N.C. 314, 154 S.E. 406 (1930). See also cases cited in note 59 supra. Compare Brown v. Moore, 247 F.2d 711 (3d Cir.), cert. denied, 355 U.S. 882 (1957), suggesting that a physician may be an independent contractor in relationship to the partners operating a private sanitarium, but its employee for tort purposes.

166 Knox v. Ingalls Shipbuilding Corp., 158 F.2d 973 (5th Cir. 1947); O'Donnell v. Pennsylvania R.R., 122 F. Supp. 899 (S.D.N.Y. 1954).

167 See, e.g., Rannard v. Lockheed Aircraft Corp., 26 Cal. 2d 149, 157 P.2d 1 (1945).

CONCLUSION

In dealing with the corporate practice of medicine we are faced by two facts which are exceedingly difficult to reconcile. The first is that courts have said over and over again that the corporate practice of medicine, dentistry and the like is illegal. The second is that, with the knowledge and acquiescence of all concerned, there are corporations in every state of the Union which are hiring physicians to practice medicine and which are furnishing, through physicians, a considerable portion of the medical care of the American people.[168]

It is hardly possible that these two facts can continue indefinitely to co-exist. Either there must be an upheaval in the organization of medical care, or the law must be restated in better harmony with the organization of care as it exists today. If the law is to change, one obvious route is through state legislation, and this would indeed be the only route if legislatures had really fixed the rules governing the corporate employment of physicians. But this, for the most part, legislatures have not done. The rules as they have been pronounced are in the main judicial extrapolation from a very small statutory base—guided, no doubt, by the underlying policies of medical practice acts as applied to quackery and commercialization, but quite inappropriate to community hospitals and other essential elements in the provision of medical care. These institutions on the one hand, and their staff physicians on the other, are so dedicated to a common objective and must collaborate so intimately in its attainment that the erection of legal barriers between them not only is not required but could be seriously detrimental to the public interest.

Under these circumstances we believe that it is not only within the province of the courts, but is their duty, to re-examine the rules and to adapt or modify them so that they will cease to be a threat to those forms of practice which are generally accepted as legitimate and proper. While there may be differences of opinion about particular uses of the corporate mechanism in connection with medical practice, it can hardly be contended that undiscriminating condemnation of all salaried corporate pratice represents either a reasonable rule of law or (unless in a very few states) a rule consciously laid down by the legislature.

Several routes are open to the courts to achieve a more reasonable

168 This occurs in the main, we venture to believe, not through any conscious winking at the law either by the participants or by law enforcement authorities, but from a genuine if unanalytical belief that these accepted practices are not illegal. Truly, if the corporate practice rule is as broad as its usual formulations, it would be difficult to find a rule of law more widely honored in its breach.

result.[169] In some states they can find that statutes providing for the incorporation or the licensure of hospitals have created special rules for corporations of this kind, or for such of them as are organized not for profit. In most states the courts can recognize that the policies underlying the medical practice acts are controlling, rather than any specific statutory language; that there is no rigid rule which they are commanded to enforce; and that the result in any given case should depend upon the presence or absence of the evils which the legislature has sought to end. Finally, in all states, the courts can find that in the absence of control over the manner and means of performance of a physician's duties there is no corporate act and so no corporate practice of medicine. Each of these solutions has important judicial support. Each of them leads to results in harmony with practices widely accepted throughout the Nation.

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[169] The first essential, of course, is to persuade a court that it ought, in the public interest, to sustain the hospital-physician relation in question. As experience with attorneys general demonstrates, this point of view is not always readily accepted. If the arrangement appears to constitute corporate practice, the burden of persuasion in most states will rest on the proponent of the arrangement. Both on the facts and on the law he will need to make a thorough exposition if he is to overcome the initial advantage which oft-repeated generalizations about corporate practice will give to his opponent.

Because it has not been possible to cover the subject fully in this paper, we venture the following suggestions:

Counsel concerned with a problem of alleged corporate practice will need to make an intensive study of the statutory law of the state. The history of the medical practice act and its amendments, for example, may reveal a legislative intention to permit or forbid particular forms of practice. Similarities and dissimilarities to other licensure statutes may also be significant.

If it is possible to show the existence of certain patterns of medical practice at the time of passage or of major amendment of the medical practice act, this fact might in some circumstances be highly persuasive to a court. Thus, if a railway hospital was employing physicians on salary or if it was a common practice of employers to provide staff medical service to their employees, a court might be more hesitant to construe ambiguous statutory language as intended to ban such practices.

All cases in the state dealing with corporate practice of any profession should be examined to determine what acts and relationships constitute practice by the corporation, whether condemnation of such practice rests on the terms of a statute or on public policy or both, and whether the underlying reasons for any adverse decisions are such as to be applicable to nonprofit hospitals.

While we have made extensive search for cases involving the collection by a corporation of charges for medical services, there are doubtless other reported cases of this kind which we have failed to discover. Inquiry should also be made into administrative practice in workmen's compensation cases, to determine whether it regularly includes procedures—e.g., where the employee fails to select his own physician—under which hospitals are paid by the employer or insurer for medical services.

Tort cases should also be examined, at least to the extent of determining whether the courts of the state tend to hold physicians to be independent contractors. Tort cases, moreover, even those upholding the immunity of nonprofit hospitals, may throw some light on the legality of particular hospital-physician relationships.

Finally, it would be well to ascertain, as far as possible, the extent of salaried medical practice and similar arrangements in the hospitals of the state, both public and private, in any medical schools, in student health programs in colleges and schools, and in industry. The longer these practices have been in existence, of course, the more persuasive they are likely to be.