



Compliance TODAY

October 2015

A PUBLICATION OF THE HEALTH CARE COMPLIANCE ASSOCIATION

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Corporate practice doctrines and fee splitting: Are you in compliance?

- » Corporate practice doctrines may prevent corporations from practicing medicine/dentistry.
- » Fee-splitting laws may prohibit management organizations from being compensated based on a percentage of patient revenue.
- » Certain state governments strictly enforce corporate practice doctrines and fee-splitting laws.
- » Management organizations must ensure their operational practices comply with written agreements.
- » Healthcare organizations should carefully review corporate practice doctrines before expanding into new states.

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On June 18, 2015, New York Attorney General (AG) Eric T. Schneiderman announced a settlement¹ with Aspen Dental Management, Inc. (Aspen Dental) in which Aspen Dental agreed to pay \$450,000 in civil penalties and reform its business and

marketing practices to resolve allegations that it violated New York's corporate practice of medicine and dentistry doctrines (corporate practice doctrines) and fee-splitting laws.

The Aspen Dental settlement should serve as a reminder to healthcare companies that the corporate practice doctrine is still actively enforced in New York and other states. Management and support services organizations should review their management and service agreements and ensure that their implementation is in line with the planned structure and the arrangements comply with the applicable corporate practice doctrines and fee-splitting laws of the states in which they operate.



Meier

Summary of corporate practice doctrines and fee-splitting prohibition

The corporate practice doctrines generally arise from a state's professional licensing laws that prohibit the unauthorized practice of medicine, dentistry, or ophthalmology; only licensed individuals can practice medicine or dentistry. Through state statutes, regulations, court opinions, and medical board opinions, the law in many states expressly or implicitly prohibits general corporations or limited liability entities from practicing medicine or dentistry, or employing or contracting with physicians or dentists to practice through such entities, because such entities cannot hold a medical or dental license.

Some states do not recognize, have abolished, or have specifically refused to enforce the corporate practice doctrines. Other states, however, have their own set of corporate practice doctrines. And still others have specific exceptions to the corporate practice doctrines. For example, New York's corporate practice doctrine prevents corporations from practicing medicine or dentistry. Although not directly set forth in statute, New York's corporate practice doctrine finds its source in the New York Education Law,

which makes clear that only natural persons may be licensed to practice medicine,² dentistry,³ or dental hygiene.⁴ Shareholders of professional service corporations must be physicians or dentists who are also licensed to practice within the state.⁵ Significantly, violating the prohibition on the corporate practice of medicine or dentistry is a felony.⁶

In certain states, compensation relationships, based on a concept of net revenues or a percentage of revenues, may expressly violate the corporate practice doctrines through fee-splitting prohibitions. Under New York law, licensed professionals or professional firms are prohibited from splitting or sharing their fees with individuals or entities not licensed to provide healthcare services.⁷

Essentially, a provider cannot split a fee with a non-physician/dentist. This prohibition extends to business corporations and individuals who do not possess a license to provide the relevant healthcare services. The accompanying regulation expressly prohibits compensation arrangements involving fees paid as a percentage of, or even dependent upon, revenue earned by healthcare professionals.⁸ There is also a corporate parallel in New York regulations on the prohibition of fee splitting between medical facilities (including Article 28 and 36 facilities) and individuals or entities which have not been approved as a healthcare establishment by the Department of Health.⁹ The purpose of the prohibition is to limit control by an unregulated and unaccountable entity over a licensed provider and to protect the financial viability of the licensed provider.

A number of New York Department of Health Advisory Opinions further detail and

clarify these prohibitions. Accordingly, unlike the practice in some states, management and support service organizations in New York may not manage a physician's or dentist's practice in return for a percentage of patient revenues, given New York's fee-splitting rules.

It is also important to note that the corporate practice doctrines in various states may differ in severity between the corporate practice of medicine, dentistry, ophthalmology, and others. For example, New Jersey's corporate

practice of dentistry doctrine is actually more strict than its corporate practice of medicine doctrine. The New Jersey Board of Medicine and the New Jersey Board of Dentistry generally prohibit corporations from employing physicians

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or dentists to provide professional services, with certain exceptions.¹⁰ However, the Board of Dentistry has an even broader prohibition limiting the types of services that can be provided by business entities, such as dental service organizations.¹¹ Moreover, unlike its medical counterpart, the Board of Dentistry also prohibits fee-splitting between a professional dental practice and non-licensed individuals or entities where fees would be paid based in any way (such as a fixed percentage) on the revenue of the dental practice.¹²

Notably, in 2013, the New Jersey Dental Association had proposed regulations constraining the corporate practice of dentistry even further in New Jersey.¹³ The proposed regulations would have prohibited non-licensees from making decisions "relating to compensation, hiring, firing, financing, borrowing, leasing, purchasing, claim submissions, billing, advertising, office policies and procedures,

participation in and/or termination of all dental plans including Medicaid, and the establishment of patient fees and modification or waiver thereof.”¹⁴ However, on February 3, 2015, the New Jersey Dental Association withdrew its petition for rulemaking, so the proposed restrictions were never passed.¹⁵

AG’s investigation of Aspen Dental

The AG’s Office reported that it began its investigation in 2013 after having received more than 300 consumer complaints over the past 10 years regarding Aspen Dental’s quality of care, billing practices, misleading advertising, upselling of unnecessary dental services and products, and dental care financing.

The AG’s Office claimed that rather than provide arms-length, back-end business and administrative support to independent dental practices, Aspen Dental developed a chain of dental practices technically owned by the individual dentists, but subject to extensive control by Aspen Dental, in violation of New York’s corporate practice doctrine.

Aspen Dental’s extensive control was allegedly demonstrated by Aspen Dental sharing in the individual clinic profits and marketing by Aspen Dental under Aspen Dental’s trade name. Furthermore, the AG alleged that, through an array of business practices, Aspen Dental routinely made decisions that impacted clinical care and dictated the dental practices’ care of patients, including incentivizing sales of services and products, implementation of revenue-oriented patient scheduling systems, and hiring and oversight of clinical staff. Aspen

Dental is also accused of barring its individual locations in a region from competing against each other for patients.

The AG also alleged that Aspen Dental exercised undue control over the dental practices’ finances by utilizing a single consolidated bank account for all of the dental practices and to which the dental practice owners did not have access. Additionally, the AG noted that New York fee-splitting laws prohibit a healthcare management company from being compensated based on the profits of the clinics it manages. The New York AG’s Office specifically claimed that Aspen Dental took a pre-set percentage of each dental office’s monthly gross profit.

Notably, the settlement agreement¹⁶ between Aspen Dental and New York State indicates that

Aspen Dental and the dental practices had contracts in place that set forth an annual flat fee for the management services, in addition to payments for expenses. However, the dental practices’ financial statements purportedly reflect that Aspen Dental was not paid a flat fee for its services. Rather,

Aspen Dental received an agreed-upon percentage of each office’s gross profits on a monthly basis, which typically was 45% or 50% of an office’s gross profits.

Aspen Dental management’s response to AG’s press release

In response to the AG Office’s press release concerning the settlement, Aspen Dental defended its business practices and accused the AG’s Office of mischaracterizing the nature of the settlement agreement.¹⁷ Aspen Dental claimed

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that it has never made decisions about clinical care for the 1.2 million patients seen at the independent practices in New York State over the past 10 years. Furthermore, Aspen Dental characterized the AG's statement that the dentists only "technically" owned the dental practices as a gross misstatement of fact, because the owners are in their offices every day, "treating patients and exercising complete control over all clinical decisions." Finally, Aspen Dental explained that it has never employed clinical staff nor exercised any control over clinical care.

Settlement agreement with Aspen Dental management

When entering into the settlement agreement, Aspen Dental neither admitted nor denied the AG's findings, but agreed to make certain changes to its business and marketing practices with respect to the dental practices located in New York to which Aspen Dental provides its administrative and support services, including:

- ▶ Not controlling the dental practices' clinical decision-making;
- ▶ Not communicating directly with clinical staff concerning how to provide care or sell services or products, or the amount of revenue generated by services or products;
- ▶ Not employing the practices' clinical staff;
- ▶ Not splitting fees with the practices for professional services rendered;
- ▶ Keeping the practices' finances separate from its own;
- ▶ Allowing each practice to have full and complete control over its own revenues, profits, incomes, disbursements, bank accounts, and other financial matters and decisions;
- ▶ Making clear on its website for consumers that Aspen Dental only provides administrative and business support services to independently owned and operated dental practices; and

- ▶ Ensuring that each dental practice posts its own legal name, so it is easily visible to patients who enter those premises.

Finally, Aspen Dental also agreed to pay a \$450,000 civil penalty and to also pay for an independent monitor who will oversee the implementation of the settlement over a three-year period. It is important to note that the settlement agreement only pertains to Aspen Dental's operations in New York.

Lessons learned

The Aspen Dental settlement should serve as a reminder to management and support service organizations in all states to be wary of the continued focus on practice management structures and the heightened enforcement of fraud and abuse in the industry. Management and support services organizations should review their agreements for compliance with applicable corporate practice doctrines and other state laws, and to ensure that their day-to-day operations are in line with the planned structure set forth in the agreements. ☑

1. New York Office of the Attorney General, press release: Attorney General Schneiderman Announces Settlement With Aspen Dental Management That Bars Company From Making Decisions About Patient Care In New York Clinics. June 18, 2015. Available at <http://on.ny.gov/1K3ZusU>
2. N.Y. Educ. Law § 6522. Available at <http://bit.ly/1WCncT>
3. N.Y. Educ. Law § 6602. Available at <http://bit.ly/1UR1Pe8>
4. N.Y. Educ. Law § 6607. Available at <http://bit.ly/1UR1Pe8>
5. See N.Y. Bus. Corp. Law §§ 1501, 1503(a), 1507. Available at <http://bit.ly/1fnbnNK>
6. N.Y. Educ. Law § 6512. Available at <http://bit.ly/1Pk4M32>
7. N.Y. Educ. Law § 6509-a. Available at <http://bit.ly/1HU4Vot>
8. New York State, Office of the Professions: Rules of the Board of Regents, Part 29: Unprofessional Conduct. 8 NYCRR 29.1(b)(4). Available at <http://bit.ly/1Pk4RUx>
9. New York Codes, Rules and Regulations: 10 NYCRR 600.9(c). Available at <http://bit.ly/1Jfj9kq>
10. New Jersey Administrative Code: N.J.A.C. 13:35-6.16. Available at <http://bit.ly/1JozuKb>. See also New Jersey Statutes Annotated: N.J.S.A. 45:6-12. Available at <http://bit.ly/1Jfjh3g>
11. New Jersey Statutes Annotated: N.J.S.A. 45:6-19. Available at <http://bit.ly/1Jfjh3g>
12. New Jersey Administrative Code: N.J.A.C. 13:30-8.13. Available at <http://bit.ly/1Jau3w1k>
13. New Jersey Register: 45 N.J.R. 2406(B). Nov. 13, 2013. Available at <http://bit.ly/1h1Q1k11>
14. Id.
15. New Jersey Register: 47 N.J.R. 557. March 2, 2015. Available at <http://bit.ly/1J1FUJQ>
16. Assurance of Discontinuance, In the Matter of Aspen Dental Management, Inc. Available at <http://bit.ly/1HU5851>
17. Aspen Dental Management, Inc. Statement, June 18, 2015. Available at <http://bit.ly/1K40Q7a>