

The Corporate Practice Prohibition in New York: What We Can Learn From the ADMI Settlement

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One of the most frequently asked questions posed to healthcare lawyers is whether State X has a prohibition on the corporate practice of medicine, nursing or other profession, and if so, whether the prohibition is enforced. As demonstrated by last month's well-publicized settlement between Aspen Dental Management, Inc. (ADMI) and the New York State Attorney General's Office (AG), the answer to that question in New York is a resounding "yes."

Although most states with corporate practice and fee-splitting prohibitions focus on medicine, some, like New York, have broad prohibitions that encompass virtually all of the licensed professions, including nursing, clinical social work, and dentistry. While there are professionals who may run afoul of the corporate practice prohibition because they inadvertently render services through a business corporation rather than a professional corporation, more significant risks arise when third party vendors are hired to manage a professional's back-office matters, and the line between ownership and management becomes blurred. In the case of ADMI, the AG believed that line was crossed.

Background

ADMI is a dental practice management company that provides business support and administrative services to independently owned dental practices throughout New York State. After receiving hundreds of complaints concerning, among other things, the quality of care, billing practices and advertising at ADMI-managed dental practices, the Attorney General's Health Care Bureau launched an investigation of the company. According to the Attorney General, the investigation revealed that ADMI "did not merely provide arms-length, back-end business and administrative support to independent dental practices. Rather, Aspen Dental Management has developed what amounts to a chain of dental practices technically owned by individual dentists but which, in violation of New York law, were subject to extensive control by Aspen Dental Management." Such "undue control" was evidenced by a compensation arrangement based on a percentage of the practices' revenue, control over bank accounts, false and misleading advertising, and decisions involving patient care, treatment plans, and the hiring of clinical staff, all of which must be reserved to the licensed owners.

Pursuant to an Assurance of Discontinuance, ADMI agreed to pay \$450,000 in civil penalties, cease exercising control over the practices' clinical decision-making (including the hiring of clinical staff), maintain separate bank accounts and not share in the dental practices' fees for professional services rendered. ADMI also agreed to change its marketing practices to make it clear to consumers that ADMI only provides management support to dental practices owned by licensed professionals, and is not itself a dental practice.

Lessons Learned

The ADMI settlement shines a light on the pitfalls of entering into a management contract that is not carefully crafted to comply with state laws and regulations.

1. It's All About Control

It is well settled that management fees based on a percentage of revenue violate New York law. But the line between the provision of arms-length administrative services and the corporate practice of the professions can be more nebulous. The AG believed ADMI crossed the line due in part to the "insufficient financial independence" of the dental practices. Specifically, "ADMI used a single consolidated banking account for most of the Dental Practices and retained sole control over the account." As a result, the AG voided and rendered unenforceable "any contractual provisions or agreements with ADMI that prevent the Practice Owners from having full and complete control over their revenues, profits, incomes, disbursements, bank accounts, and other financial matters and decisions."

The AG also took issue with the non-compete provisions in the services agreements: If a service agreement were to terminate, or if one of the dental practice owners wanted to sell his practice, the dentist had the choice of practicing outside of a restricted area or transferring the patients' records to a successor practice that also has a contract with ADMI. The settlement states that ADMI is prohibited from restricting dentists from owning other practices for any period of time and in any geographic location, and also, interestingly, from *managing* a dental practice for any period of time and in any geographic location. Thus, there is no question that, from the AG's perspective, a non-compete between a manager and professional practice crosses a line.

The settlement also prohibits ADMI from restricting a practice's ability to retain patient charts and records after its contract with the practice terminates. Note that this limitation does not speak to stock transfer restrictions, only records retention. (In New York, patient records belong to the practice, not to the treating physician or licensee.)

2. The Fees - Renegotiate with Caution

Not surprisingly, the AG voided all compensation arrangements that constituted a percentage of a dental practice's earnings. However, the settlement permits ADMI and the practices to renegotiate fixed fees on a quarterly basis during the first four years of any services agreement, and on a semi-annual basis thereafter. This is interesting because the Federal Anti-Kickback Statute's safe harbor for service arrangements has a one year term requirement, which has been interpreted to prohibit the renegotiation of fees prior to the end of the first year term. It may be the case that the AG was aware of this risk and therefore limited the fee renegotiation provisions to certain commercially reasonable and well-defined contingencies unrelated to referrals. That said, professionals and management companies should be aware that the fee renegotiation terms of the settlement do not give them license to adopt the same provisions without the attendant safeguards.

3. Quality of Care Matters

The ADMI investigation was launched by the AG "after receiving over 300 consumer complaints since 2005 concerning consumers' experiences at 'Aspen Dental' dental offices." These complaints involved "concerns regarding quality of care, billing practices, misleading advertising, 'upselling' of medical services and products the consumers feel are unnecessary, and unclear or incomplete terms for the financing of dental care."

The settlement makes clear that (i) under no circumstances should a manager exercise any control whatsoever over patient care decisions, and (ii) when patient care is compromised, regulatory agencies take notice – not just of the licensed professional's qualifications, but also of how the business is being operated.

Best Practices

In light of the ADMI settlement, consider the following safeguards:

- Compensation to the manager should be a fixed fee, based on the services provided and unrelated to the earnings of the practice.
- The manager should not have any say over the hiring and firing of licensed professionals.
- All salaries should be paid by the practice, not the manager, and all income earned by the practice should be controlled by the practice.
- All fees for clinical services should be established by the licensed professionals.
- Under no circumstances should a manager exercise control over patient care decisions.
- A management contract should not include any restrictive covenants that limit the licensee's ability to practice within a certain geographical area after the agreement terminates.

Authors