

# HEALTH LAW

## Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

## Tennessee Attorney General Issues Opinion of Non-Physician Practitioners to Own and Operate Professional Medical Practices

August 23, 2007

On August 8, 2007, the Tennessee Attorney General issued an opinion addressing the ability of non-physician practitioners, such as certified nurse practitioners, registered nurses, advanced practice nurses, licensed practical nurses, and physician assistants (Non-Physician Practitioners), to own and operate professional practices providing medical services (the Opinion).<sup>1</sup> This Opinion, which was requested by Dr. Mitchell Mutter, President of the Tennessee Board of Medical Examiners, comes in the midst of a growing trend to shift the delivery of primary care services to retail-based clinics and other settings that are often staffed by Non-Physician Practitioners. The Opinion addresses two specific questions relating to the professional practice of Non-Physician Practitioners, each of which is briefly summarized below.

### **Is it lawful for a Non-Physician Practitioner to own and operate a professional practice wherein medical services are provided?**

The Opinion states that, as a general rule, no Non-Physician Practitioner may own and operate a medical professional corporation (MPC) or a medical professional limited liability company (MPLLC) for the provision of medical services.<sup>2</sup> However, there are certain statutory exceptions for a physician assistant (but no other type of Non-Physician Practitioner) to own *part* of an MPC or an MPLLC in combination with certain licensed physicians or physician entities.

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<sup>1</sup> See TN Atty. Gen., Opinion No. 07-116 (August 8, 2007). The full text of this Opinion No. 07-116 is available at <http://www.attorneygeneral.state.tn.us/op/2007/OP/OP116.pdf>.

<sup>2</sup> The Opinion states: “We use the term ‘provision of medical services’ in light of the definition of ‘professional service’ contained in Tenn. Code Ann. § 48-249-1102(6): ‘a service that may be lawfully rendered only by a person licensed or otherwise authorized by a licensing authority in this state to render the service,’ as well as the similar definition of that term at Tenn. Code Ann. § 48-101-603(7), which adds: ‘... and that may not be lawfully rendered by a corporation under the Tennessee Business Corporation Act, compiled in chapters 11 – 27 of this title.’”

To support this conclusion, the Attorney General cites Tennessee’s corporate practice of medicine doctrine and states that, with the exception of the limited statutory ability for a physician assistant to own part of an MPC or M PLLC, “[n]o statute countenances such ownership by non-physicians of a professional practice that includes the provision of medical services.” However, the Opinion leaves open the possibility that under certain circumstances, a nurse practitioner, advanced practice nurse, or physician assistant (but not a registered nurse or a licensed practical nurse) could own and operate a practice that provides medical services, as long as such services are provided under the “supervision, control and responsibility” of a licensed physician. The Attorney General does not provide any clarification or guidance as to when such a situation would be permissible or how such a practice should be structured. The Opinion does not define “supervision, control and responsibility” other than to say that they are the types of supervision, control, and responsibility required by Tenn. Code Ann. § 63-6-204(b).<sup>3</sup>

**Is it lawful for a physician to be an employee or independent contractor of a Non-Physician Practitioner for the sole purpose of providing the supervision, responsibility, and control required by law for medical services provided by Non-Physician Practitioners at their remote practice sites?**

The Opinion concludes that a physician may not be an employee of a Non-Physician Practitioner for the sole purpose of providing supervision, responsibility, and control for such Non-Physician Practitioner at his or her remote practice site. However, the Attorney General distinguishes that a physician *may* be an independent contractor of a certified nurse practitioner, advanced practice nurse, or physician assistant for such sole purpose.

In the Attorney General’s view, the critical distinction between employee status and independent contractor status turns on the following analysis. First, the Attorney General states that based on its analysis of the corporate practice of medicine doctrine described above, it is not lawful for a licensed physician to be employed by a non-physician unless a specific statutory exception applies. Second, the nature of the employer-employee relationship requires the employer to exercise supervision and control over the employee, a relationship which would run afoul of the statutory requirement that a physician exercise supervision, control, and responsibility over the Non-Physician Practitioner’s provision of medical services – if the Non-Physician Practitioner is in fact the employer.

According to the Attorney General, the physician, as independent contractor, would have more control over the performance of his or her work. Moreover, existing requirements that the Non-Physician Practitioner and supervising physician jointly develop a written protocol setting forth the terms of their relationship and standards for the care to be provided is akin to an independent contractor arrangement.

From a policy perspective, without the opportunity for physicians to contract independently with certain Non-Physician Practitioners at sites remote from the physician’s practice site, a gap in access to care for rural or underserved populations might result. Given these considerations and certain other safeguards, the Attorney General finds that a physician in active clinical practice may enter into independent contractor relationships with certified nurse practitioners, advanced practice nurses, or

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<sup>3</sup> Tenn Code Ann. §63-6-204(b) states: “Nothing in this chapter shall be so construed to prohibit service rendered by a physician assistant, registered nurse, or a licensed practice nurse if such service is rendered under the supervision, control and responsibility of a licensed physician, . . . .”

physician assistants for the sole purpose of providing any supervision, responsibility, and control required by applicable statutes and rules over such Non-Physician Practitioners' provision of medical services at remote practice sites.

### **Conclusion**

This Opinion helps to clarify the scope of permissible arrangements for delivery of care by Non-Physician Practitioners. Although it prohibits ownership by Non-Physician Practitioners of MPCs or MPLLCs (with certain statutory exceptions for physician assistants), the Opinion (without providing any guidance) appears to permit advanced practice nurses, certified nurse practitioners, and physician assistants to own and operate practices (presumably such as a sole proprietorship) so long as they are under the "supervision, control and responsibility" of an independent contractor physician. Please contact one of our attorneys in the Healthcare Practice Area listed on the following page if you have any questions or would like additional information.

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