

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

The Medicine Clinic, LLC, Eye Associates
of New Mexico, Ltd., Premier OBGYN,
LLC, ABQ Health Partners, LLC, Southwest
Medical Associates, Inc., Taos Medical
Group, P.A., and The New Mexico Medical
Society,

Petitioners,

v.

Cause No. _____

Morris J. Chavez, in his official capacity as
Superintendent of the New Mexico
Department of Insurance,

Respondent.

WRIT OF MANDAMUS

TO: Honorable Morris J. Chavez
Superintendent of the New Mexico
Department of Insurance
New Mexico Public Regulation Commission
1120 Paseo de Peralta
Santa Fe, New Mexico 87504

GREETINGS:

RESPONDENT is directed to file and serve a responsive pleading to this WRIT no later than 10 days after service of this WRIT.

You are notified that, unless you so serve and file a responsive pleading or motion, the Petitioners will apply to the Court for the relief demanded in the Petition for Writ of Mandamus.

WITNESS the Honorable _____, District Judge of said Court of the State of New Mexico and the Seal of the District Court of said County, this ____ day of November, 2009.

CLERK OF THE DISTRICT COURT

By: _____
Deputy

WHEREAS, THE PETITIONERS APPLIED to this Court on November 17, 2009, for a writ of mandamus requiring respondent to comply with the provisions of NMSA 1978, Sections 41-5-5(A) and 41-5-25 and to modify his interpretation of those entities who may become qualified health care providers within the provisions of the Medical Malpractice Act to continue to include registered corporations and other registered organizations and to continue to accept proof of financial responsibility documents and patient compensation fund surcharges from these entities providing medical care and professional services to patients through their licensed employee doctors of medicine, doctors of osteopathy, chiropractors, podiatrists, nurse anesthetists or physician's assistants; and a copy of that Petition is attached hereto;

WHEREAS, respondent was given notice of this matter in compliance with Rule 1-065(B)-(D) NMRA of the Rules of Civil Procedure for the District Courts that a petition for writ of mandamus had been filed in the above entitled cause;

WHEREAS, a hearing was requested and set as reflected in the attached request and notice of hearing, but not less than 10 days after issuance of this Writ;

WHEREAS, a copy of the petition for writ of mandamus has been served on respondent in the above entitled cause; and

WHEREAS, this Court FINDS that the pursuant to the provisions of NMSA 1978, Section 41-5-5(A) registered corporations and other registered organizations providing medical care and professional services to patients through their licensed employee doctors of medicine, doctors of osteopathy, chiropractors, podiatrists, nurse anesthetists or physician's assistants may qualify as qualified health care providers within the provisions of the Act's provision by providing the required proof of insurance and paying the applicable surcharge to the Patient Compensation Fund;

NOW, THEREFORE, IT IS ORDERED that respondent hereby is directed to continue to accept proof of insurance and surcharge payments from registered corporations and other registered organizations, INCLUDING BUT NOT LIMITED TO PETITIONERS HEREIN, that are providing medical care and professional services to patients through their licensed employee doctors of medicine, doctors of osteopathy, chiropractors, podiatrists, nurse anesthetists or physician's assistants after December 31, 2009.

IT IS SO ORDERED.

The Honorable _____
District Court Judge

SUBMITTED BY:

Miller Stratvert P.A.



JAMES R. WOOD

DEBORAH A. SOLOVE

Attorneys for Petitioners *The Medicine Clinic, LLC, Eye Associates of New Mexico, Ltd., Premier OBGYN, LLC, ABQ Health Partners, LLC, Southwest Medical Associates, Inc., Taos Medical Group, P.A., and The New Mexico Medical Society*

P.O. Box 25687

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STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

The Medicine Clinic, LLC, Eye Associates
of New Mexico, Ltd., Premier OBGYN,
LLC, ABQ Health Partners, LLC, Southwest
Medical Associates, Inc., Taos Medical
Group, P.A., and The New Mexico Medical
Society,

Petitioners,

v.

Cause No. _____

Morris J. Chavez, in his official capacity as
Superintendent of the New Mexico
Department of Insurance,

Respondent.

EXPEDITED PETITION FOR WRIT OF MANDAMUS

Introduction and Jurisdictional Statement

1. This proceeding presents urgent questions regarding the interpretation and validity of the provisions of the New Mexico Medical Malpractice Act, NMSA 1978, § 41-5-1 et seq. (hereinafter “the Medical Malpractice Act”) affecting the renewal of physician corporations, limited liability companies, and organizations as “qualified health care providers” after December 31, 2009. At issue is the Superintendent of Insurance’s unilateral decision to modify the Department of Insurance’s interpretation of the statute’s definition of a “qualified health care provider” to exclude professional physician corporations, limited liability companies, and other non-individual health care provider organizations. *See* Superintendent’s letter to Business entities covered under the Patient’s Compensation Fund, dated October 28, 2009 and attached hereto as Exhibit A. The Superintendent’s decision is in direct contravention to 32 years of New Mexico court decisions and the Department’s own practices. The Superintendent’s decision will

effectively eliminate the application of the Medical Malpractice Act to all health care providers in New Mexico by eliminating the Act's protections for physician professional corporations and organizations that remain vicariously liable under the doctrine of *respondeat superior* for the medical negligence of their physician owners/employees.

2. The Medical Malpractice Act provides that

To be qualified under the provisions of the Medical Malpractice Act, a health care provider shall: (1) establish its financial responsibility by filing proof with the superintendent that the health care provider is insured by a policy of malpractice liability insurance carried by an authorized insurer in the amount of at least two hundred thousand dollars (\$200,000) per occurrence . . . ; and (2) pay the surcharge assessed on health care providers by the superintendent pursuant to Section 41-5-25 NMSA 1978.

NMSA 1978, § 41-5-5(A). The Act further defines a "health care provider" to be

a person, *corporation, organization*, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant.

NMSA 1978, § 41-5-3(A) (emphasis added). Petitioners have standing to pursue this matter.

They are physician professional *corporations* and *organizations* (limited liability companies) within the provisions of the Act seeking to continue and maintain their qualified status and their benefits and protections under the provisions of the Act, and the New Mexico Medical Society, the representative organization for physicians in New Mexico. *See* Public Regulation Commission information pages, attached hereto as Exhibit B (<http://www.nmprc.state.nm.us/cii.htm>); NMSA 1978, § 61-6-2 (recognizing the New Mexico Medical Society as the organization representing physicians in the state for appointments to the medical board). These professional corporations and limited liability companies are licensed by the Public Regulation Commission to conduct business under the provisions of the Professional Corporations Act, NMSA 1978, § 53-6-1 et seq. and the Limited Liability Company Act, NMSA 1978, § 53-19-1 et seq., to provide the same

professional services to the public for which individuals are required by law to be licensed, including “the personal services rendered by . . . chiropractors, . . . osteopaths, podiatrists, . . . doctors of medicine, [and] physicians and surgeons.” NMSA 1978, §§ 53-6-1, 53-6-3(A), 53-19-6.

3. The Superintendent of Insurance is a position created by New Mexico statute. NMSA 1978, § 59A-1-12. The Superintendent is obligated to organize and manage the Insurance Department and execute the duties of the Insurance Code . . . and such additional . . . duties as may be provided by other laws of this state.” NMSA 1978, § 59A-2-8. The Medical Malpractice Act specifies that “the ‘superintendent’ means the superintendent of insurance of this state.” NMSA 1978, § 41-5-3(C). It requires the superintendent to accept proof of financial responsibility and surcharge payments from health care providers so that they may qualify under the act. NMSA 1978, § 41-5-5(A). There is no provision in the Act for the superintendent to refuse to accept the proof of financial responsibility and surcharge payment from any health care provider, and he therefore has no authority to do so.

4. This Court has original jurisdiction to issue writs of mandamus against all state officers. N.M. Const. art. VI, § 13; NMSA 1978, § 44-2-3 (the district court has exclusive original jurisdiction in all cases of mandamus); *Piedra, Inc. v. N.M. Transp. Comm’n*, 2008-NMCA-089 ¶ 38, 144 N.M. 382, 188 P.3d 106 (recognizing that district courts have authority to issue writs of mandamus where state officials act in excess of their authority). Mandamus is an appropriate means to compel official action that is legally required or to prevent a public official from acting unlawfully. *State ex rel. Clark v. Johnson*, 1995-NMSC-051, 120 N.M. 562, 569-70, 904 P.2d 11, 18-19 (1995). Petitioners have appropriately invoked the court’s jurisdiction because this is a matter of great public concern, the material facts are sufficiently developed

leaving only questions of law for determination, and an immediate determination of the issues is necessary. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 17, 125 N.M. 343, 961 P.2d 768. Venue is proper because Petitioner American Medical Group, Inc. is a domestic professional corporation with its principal place of business in Hobbs, New Mexico.

Grounds for Relief

5. Physician corporations fall within the Medical Malpractice Act's definition of health care providers. In *Otero v. Zouhar*, the New Mexico Supreme Court specifically recognized and affirmed the Court of Appeals' determination that a physician-owned corporation, Albuquerque Anesthesia Services, Ltd., was a qualified health care provider within the provisions of Medical Malpractice Act. 102 N.M. 482, 484, 697 P.2d 482, 484 (1985), *overruled on other grounds*, *Grantland v. Lea Regional Hosp., Inc.*, 110 N.M. 378, 796 P.2d 599 (1990). In all of the amendments to the Act since that decision, the New Mexico Legislature has never amended the Act to counteract the New Mexico Supreme Court decision determining that such a corporation is a qualified entity under the provisions of the Act. *Aguilera v. Bd. of Educ. of Hatch Valley Schools*, 2006-NMSC-015, ¶ 24, 139 N.M. 330, 132 P.3d 587 (Court presumes that the Legislature, when modifying or enacting statutes, is aware of existing law, including case law of the appellate courts, and in absence of a clear legislative directive, the courts continue to apply it). No New Mexico appellate decision has ever found that a corporation was precluded from being a qualified health care provider under the provisions of the Medical Malpractice Act. In fact, since that time, the New Mexico Supreme Court continues to recognize that corporations that comply with the Act are qualified health care providers under its provisions. *Cummings v. X-Ray Associates of New Mexico, P.C.*, 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321 (1996) (upholding the constitutionality of the protections of the Medical Malpractice Act as applied to a physician-owned corporation, X-Ray Associates of New Mexico, P.C.).

6. In 1977, immediately after the Medical Malpractice Act was enacted by the legislature, the then Superintendent of Insurance Kenneth C. Moore asked the Office of the Attorney General for an opinion "whether a group of physicians incorporated as one corporate entity can qualify under" the MMA by following the procedures set forth in the statute. See Opinion dated Sept. 20, 1977, attached hereto as Exhibit C. The Attorney General responded that such a corporation may obtain the benefit of the provisions of the Act by complying with those procedures. Since the issuance of this opinion, all of New Mexico's Superintendents of Insurance have followed it by accepting proof of the required financial responsibility and the appropriate surcharge to the patient compensation fund allowing those corporate entities to qualify under the Act. Similarly, since that time, Petitioners here have relied on that determination in organizing their corporate entities and complying with the provisions of the Act.

7. In 1987, the Attorney General addressed whether a corporation was practicing medicine without a license when it provided medical care to the public through licensed physician employees. *NM AG OP 87-39*, attached hereto as Exhibit D. In that opinion, the Attorney General specifically recognized that the Professional Corporation Act was designed to allow physicians and groups of physicians to incorporate to practice medicine as a group. It said:

The Professional Corporation Act, sections 53-6-1 to 53-6-14 NMSA 1978, provides at section 53-6-1 NMSA 1978: "The purpose of this Act is to provide for the incorporation of an individual, or group of individuals, to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization." Section 53-6-3(A) NMSA 1978, defines "professional service" to include the services of medical doctors, which services "prior to the passage of the Professional Corporation Act and by reason of law, could not be performed by a corporation." The Professional Corporation Act restricts the ability of the corporation to engage in more than one professional service; requires that only licensed officers and employees render professional services; preserves the legal relationships between persons providing professional services and their clients or patients; and restricts the ability of the professional corporation to issue and transfer its shares. Sections 53-6-5, 53-6-7, 53-6-8, and 53-6-9 NMSA 1978. The thrust of the Professional Corporation Act is to permit, with

restrictions, the formation of for-profit corporations to provide professional services to the public that, before the Act, could not lawfully be incorporated.

That Attorney General Opinion also acknowledged that neither the Business Corporation Act, NMSA 1978, § 53-11-1 et seq., nor the Medical Practice Act, NMSA 1978, § 61-6-1 et seq., contain any prohibition precluding a corporation from providing medical care through licensed physician employees. *Id.* It is evident that the certification of a corporation by the NM Public Regulation Commission provides the certification required to meet the Medical Malpractice Act's definition.

8. Moreover, failure to recognize physician-owner corporations as qualified healthcare providers would defeat the purpose of the Medical Malpractice Act. The purpose of the Medical Malpractice Act is to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico. NMSA 1978, § 41-5-2; *Cummings*, 1996-NMSC-035, ¶¶ 28-30; *Roberts v. Southwest Community Health Services*, 114 N.M. 248, 251-252, 837 P.2d 442, 445-446 (1992). If a physician-owned corporation cannot be a health care provider as defined in the Act such that it is precluded from qualifying under the Act, all medical malpractice plaintiffs would simply sue the corporation to avoid application of the Medical Malpractice Act, thereby effectively eliminating all of the protections of the Act and creating the very situation that the Legislature sought to avoid. Further, it would bankrupt the Patient Compensation Fund because no physician would choose to participate in the Act if he or she could not obtain any benefits from doing so and had to purchase additional insurance to insure its physician-owned corporation. These physicians would simply choose to insure themselves and their corporation outside the provisions of the Act because it is less expensive to do so.

9. The Superintendent's new interpretation of the Act will result in an absurd result. New Mexico appellate courts have held that they will not interpret the Medical Malpractice Act in a manner that undermines its purpose: "While courts normally are bound to follow legislative definitions, they are not bound when a definition would result in an unreasonable classification." *Wilschinsky v. Medina*, 108 N.M. 511, 517, 775 P.2d 713, 719 (1989); *Roberts*, 114 N.M. at 251-252, 837 P.2d at 445-446 ("Statutes should be construed so as to facilitate their operation and the achievement of the goals as specified by the legislature . . . and by interpreting one part of a statute so as not to render another part of statute superfluous"). The Superintendent's new interpretation of the statute would completely eliminate "corporations" from the definition of a health care provider despite the statute's explicit recognition of "corporations" and "organizations." Refusing to include physician corporations within the definition of a health care provider because the corporation itself is not "licensed or registered" to provide health care services would undermine the purposes of the Act.

10. The Superintendent's new interpretation creates a separation-of-powers conflict between the Insurance Department and the legislature by attempting to go beyond the existing New Mexico statutes and case law to create new law on its own. *State ex rel. Sandel v. N. M. Public Util. Comm'n*, 1999-NMSC-019 ¶ 12, 127 N.M. 272, 278-279, 980 P.2d 55, 61-62. "[W]hile courts ordinarily afford a degree of deference to an agency's interpretation of a statute the agency is charged with administering, such deference does not give the [agency] the authority to 'pour any meaning it desires into the statute.'" *Id* at ¶ 17 (citations omitted). "Statutory construction itself is not a matter within the purview of the [agency's] expertise." *N.M. Indus. Energy Consumers v. PRC*, 2007-NMSC-053 ¶ 19, 142 N.M. 533, 539-40, 168 P.3d

105, 111-12. This new interpretation is not based on any special expertise of the agency and is contrary to existing law and previous practice. It should be afforded no deference. *Id.*

11. A more reasonable interpretation of the definition of a health care provider is that taken by the Attorney General in 1977 and followed for the last 32 years. A corporation can only act through its agents and employees, and the agents and employees, in this case the physicians, are licensed to practice medicine. Moreover, had the legislature intended to exclude physician corporations in the definition of a health care provider, it would not have included "corporation" or "organization" in the definition. Finally, had the legislature intended to exclude physician corporations, one would expect that it would have amended the statute to make it clear, at some point during the past 32 years, that the courts had been misinterpreting it as including physician corporations. The legislature's silence indicates that the Attorney General was correct that the definition of health care provider includes professional corporations.

Conclusion and Relief Sought

12. The Superintendent of Insurance has a mandatory, non-discretionary duty to accept proof of financial responsibility documents and patient compensation fund surcharge payments from qualified health care providers. *See supra*, ¶ 3. By unilaterally choosing to no longer accept these documents and payments from physician-owned corporations, the Superintendent's erroneous interpretation of the Act improperly precludes physician-owned corporations from becoming qualified health care providers under the Act as they are entitled to do under New Mexico Statute. In doing so, the Superintendent is failing to properly fulfill his duties.

13. Consequently, this Court in the exercise of its original jurisdiction in mandamus over state officers in this matter of great public concern should issue a writ of mandamus directing the Superintendent of Insurance to continue to accept proof of financial responsibility documents and patient compensation fund surcharges from corporations providing medical care and

professional services to patients through their employee doctors of medicine, doctors of osteopathy, chiropractors, podiatrists, nurse anesthetists or physician's assistants.

Respectfully submitted,

Miller Stratvert P.A.

JAMES R. WOOD

DEBORAH A. SOLOVE

Attorneys for Petitioners *The Medicine Clinic, LLC, Eye Associates of New Mexico, Ltd., Premier OBGYN, LLC, ABQ Health Partners, LLC, Southwest Medical Associates, Inc., Taos Medical Group, P.A., and The New Mexico Medical Society*

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NEW MEXICO PUBLIC REGULATION COMMISSION

COMMISSIONERS

DISTRICT 1 JASON MARKS
DISTRICT 2 DAVID W. KING, VICE CHAIRMAN
DISTRICT 3 JEROME D. BLOCK
DISTRICT 4 CAROL K. SLOAN
DISTRICT 5 SANDY JONES, CHAIRMAN



INSURANCE DIVISION
1120 Paseo de Peralta / P.O. Box 1269
Santa Fe, NM 87504-1269
(505) 827-4601
fax (505) 827-4734

Morris J. Chavez, Superintendent of Insurance
(505) 827-4299

CHIEF OF STAFF
Daniel "Danny" Mayfield

DATE October 28, 2009

TO: Business entities covered under the Patients Compensation Fund, and Medical Malpractice Insurers Writing or Intending to Write Policies to Qualify Non-Individual Health Care Providers under the New Mexico Medical Malpractice Act

Re: Coverage of business entities by the NM Patients Compensation Fund (PCF)

As you may know, "health care providers" may qualify under the NM Medical Malpractice Act for coverage by the NMPCF by obtaining the appropriate insurance policy and paying the appropriate surcharge to the NMPCF. The definition of "health care provider" contained in Section 41-5-3 of the Act specifies who may qualify:

"As used in the Medical Malpractice Act:

A. "health care provider" means a person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant; ..."

As is clearly stated, a license or certification by the State of New Mexico is required for each health care provider seeking to qualify. Questions have been raised recently about the propriety of the PCF accepting surcharges from providers (individuals or business entities) without verification by the PCF of the licensure or certification of the provider as one the types of providers listed in the definition above. Numerous questions regarding the legal consequences of accepting surcharge from unlicensed or uncertified providers have arisen.

Questions have also been raised about the propriety of accepting surcharges from any business entities other than hospitals or outpatient health care facilities that are licensed or certified by the State of New Mexico. Note that hospitals and outpatient health care facilities are the only non-individual categories of provider listed in the definition of "health care provider." Also note that MD licenses, for example, are granted by the New Mexico Medical Board only to individuals, and are not granted to corporations or other business entities. Also note that certification by a Federal agency may or may not qualify as certification by the State of New Mexico.

Despite the remedial nature of the Medical Malpractice Act, despite the provisions of the Professional Corporation Act, and despite over thirty years of liberally construing the provisions of the Act quoted above, we have no rulemaking authority to clarify or interpret the law, and we are aware of no statutory provision or case law clarifying the quoted section of the law. Because the legislature has provided no guidance, and because the courts may decide to strictly read and apply the quoted definition to apply only to business entities that are licensed by this state in the name of the entity, we feel that it is incumbent upon us to notify insurers, providers that have previously qualified, and potential qualified health care providers, that the law is unclear in this regard, and that providers that do not meet the specific terms of the above-quoted definition may ultimately be determined by the courts to be ineligible to qualify under the Act for the protections afforded by the Act, and may apply this ruling to unlicensed business entities that have paid surcharges to the PCF for the purpose of qualifying under the Act in such a manner as to determine that the protections of the limitation on damages are not available to those entities.

1 888 4 ASK PRC
www.nmprc.state.nm.us

EXHIBIT A

PRC

Working for You!

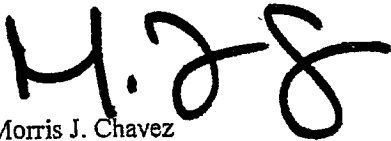
For this reason, after December 31, 2009, we will no longer accept surcharges from, and will no longer accept new or renewal submissions for coverage by the New Mexico Patients Compensation Fund from, any health care provider, whether an individual or an entity, that does not provide a valid license or certificate number from an appropriate agency of the State of New Mexico issued in the name of the qualifying health care provider for a class of license listed in the definition of "health care provider" quoted above. We hope that this provides sufficient time for those providers with imminent renewals to make alternative coverage arrangements.

Existing PCF coverage will not be terminated by the PCF, but may or may not be affected by future court decisions, as noted above. Upon the expiration of the existing term of coverage, any renewal after December 31, 2009, will be subject to the requirement of a valid license issued by this state in the name of the provider.

Licensed or certified hospitals and outpatient health care facilities seeking to qualify need to be aware of the special rating provisions of Section 41-5-5(B) NMSA 1978, and the need for an assessment of the risk characteristics of each such entity in order for the Superintendent to determine the surcharge for PCF coverage, and that such assessments may take time to be accomplished prior to the determination and submission of the surcharge, which may delay the date of qualification under the Act.

I hereby direct insurers writing coverage for qualified health care providers to promptly notify each of their insureds that may be affected by this action of the need to make other insurance arrangements, as appropriate to their circumstances. Such notice shall include a copy of this document. The insurers shall also assure that all future filings with the PCF contain accurate license information for the providers seeking to qualify under the Act, which licenses correspond to one of the categories listed in the definition of "health care provider" quoted above.

Sincerely,



Morris J. Chavez
Superintendent of Insurance

New Search

THE MEDICINE CLINIC, LLC

SCC Number: 2178333
Tax & Revenue Number:
Organization Date: JUNE 27, 2001, in NEW MEXICO
Organization Type: DOMESTIC LIMITED LIABILITY
Organization Status: EXEMPT
Good Standing:
Purpose: NOT REQUIRED

ORGANIZATION DATES

Taxable Year End Date:
Filing Date:
Expiration Date:

SUPPLEMENTAL POST MARK DATES

Supplemental:
Name Change:
Purpose Change:
Agent Resigned:

MAILING ADDRESS

5419 N. LOVINGTON HWY./SUITE 22 HOBBS , NEW MEXICO 88240

PRINCIPAL ADDRESS

PRINCIPAL ADDRESS (Outside New Mexico)

REGISTERED AGENT

JESUS J. FONSECA

5419 N. LOVINGTON HWY./SUITE 22 HOBBS NEW MEXICO 88240

EXHIBIT B

Agent Designated:

COOP LICENSE INFORMATION

Number:

Type:

Expiration Year:

ORGANIZERS

FONSECA, JESUS J.

DIRECTORS

Date of Election of Directors:

New Search

EYE ASSOCIATES OF NEW MEXICO, LTD.

SCC Number: 0895268
Tax & Revenue Number: 01838411000
Incorporation Date: OCTOBER13, 1976, in NEW MEXICO
Corporation Type: DOMESTIC PROFESSIONAL
Corporation Status: ACTIVE
Good Standing: In GOOD STANDING through 3/15/2011
Purpose: MEDICAL SERVICES

CORPORATION DATES

Taxable Year End Date: 12/31/08
Filing Date: 05/12/09
Expiration Date:

SUPPLEMENTAL POST MARK DATES

Supplemental: 02/25/94
Name Change: 12/04/00
Purpose Change:
Agent Resigned:

MAILING ADDRESS

8801 HORIZON BLVD, STE 360 ALBUQUERQUE , NEW MEXICO 87113

PRINCIPAL ADDRESS

8801 HORIZON BLVD NE ALBUQUERQUE NEW MEXICO 87113

PRINCIPAL ADDRESS (Outside New Mexico)

REGISTERED AGENT

ARTHUR WEINSTEIN

900 AMHERST SE ALBUQUERQUE NEW MEXICO 87106

Agent Designated:

COOP LICENSE INFORMATION

Number:

Type:

Expiration Year:

OFFICERS

President: **ROBERT REIDY**

Vice President: **MARK T. CHIU**

Secretary: **ARTHUR J. WEINSTEIN**

Treasurer: **FRANK MARES**

DIRECTORS

Date of Election of Directors:

REIDY , ROBERT

New Search

PREMIER OBGYN, LLC

SCC Number: 2604072
Tax & Revenue Number:
Organization Date: JULY 12, 2005, in NEW MEXICO
Organization Type: DOMESTIC LIMITED LIABILITY
Organization Status: EXEMPT
Good Standing:
Purpose: NONE REQUIRED

ORGANIZATION DATES

Taxable Year End Date:
Filing Date:
Expiration Date:

SUPPLEMENTAL POST MARK DATES

Supplemental:
Name Change:
Purpose Change:
Agent Resigned:

MAILING ADDRESS

1218 WEST TAOS HOBBS , NEW MEXICO 88240

PRINCIPAL ADDRESS

1218 WEST TAOS HOBBS NEW MEXICO 88240

PRINCIPAL ADDRESS (Outside New Mexico)

REGISTERED AGENT

CHRISTOPHER DRISKILL

1218 WEST TAOS HOBBS NEW MEXICO 88240

Agent Designated:

COOP LICENSE INFORMATION

Number:

Type:

Expiration Year:

ORGANIZERS

DRISKILL, CHRISTOPHER

DIRECTORS

Date of Election of Directors:

New Search

ABQ HEALTH PARTNERS, LLC

(DELAWARE Corporation)

SCC Number: **2738896**
Tax & Revenue Number:
Organization Date: **JUNE 08, 2006, in NEW MEXICO**
Organization Type: **FOREIGN LIMITED LIABILITY**
Organization Status: **EXEMPT**
Good Standing:
Purpose: **NOT REQUIRED**

ORGANIZATION DATES

Taxable Year End Date:
Filing Date:
Expiration Date:

SUPPLEMENTAL POST MARK DATES

Supplemental:
Name Change:
Purpose Change:
Agent Resigned:

MAILING ADDRESS

5400 GIBSON BLVD., SE ALBUQUERQUE , NEW MEXICO 87108

PRINCIPAL ADDRESS

PRINCIPAL ADDRESS (Outside New Mexico)

1 BURTON HILLS BLVD. STE. 250 NASHVILLE TENNESSEE 37215

REGISTERED AGENT

CORPORATION SERVICE COMPANY

125 LINCOLN AVE. STE. 223 SANTA FE NEW MEXICO 87501

Agent Designated:

COOP LICENSE INFORMATION

Number:

Type:

Expiration Year:

ORGANIZERS

AHS OKLAHOMA PHYSICIAN GROUP L

DIRECTORS

Date of Election of Directors:

SOUTHWEST MEDICAL ASSOCIATES, INC.

SCC Number: 1038413
Tax & Revenue Number: 01889789004
Incorporation Date: NOVEMBER 26, 1979, in NEW MEXICO
Corporation Type: DOMESTIC PROFESSIONAL
Corporation Status: ACTIVE
Good Standing: In GOOD STANDING through 3/15/2010
Purpose: MEDICAL SERVICE

CORPORATION DATES

Taxable Year End Date: 12/31/07
Filing Date: 01/18/08
Expiration Date:

SUPPLEMENTAL POST MARK DATES

Supplemental: 08/12/96
Name Change: 08/12/96
Purpose Change:
Agent Resigned:

MAILING ADDRESS

6100 PAN AMERICAN FWY NE STE. 100 ALBUQUERQUE , NEW MEXICO 87109

PRINCIPAL ADDRESS

6100 PAN AMERICAN FWY NE STE. 100 ALBUQUERQUE NEW MEXICO 87109

PRINCIPAL ADDRESS (Outside New Mexico)

REGISTERED AGENT

DENNIS COX

6100 PAN AMERICAN FWY NE STE. 100 ALBUQUERQUE NEW MEXICO 87109

Agent Designated:

COOP LICENSE INFORMATION

Number:

Type:

Expiration Year:

OFFICERS

President: **JACY JACOBI**

Vice President: **THOMAS GROSS**

Secretary: **JOHN EASTER**

Treasurer: **JOHN PANEK**

DIRECTORS

Date of Election of Directors: 12/31/08

BARRETT , DOUGLAS

New Search

TAOS MEDICAL GROUP, P.A.

SCC Number: 1347418
Tax & Revenue Number: 02014450001
Incorporation Date: MARCH 27, 1987, in NEW MEXICO
Corporation Type: DOMESTIC PROFIT
Corporation Status: ACTIVE
Good Standing: In GOOD STANDING through 6/15/2010
Purpose: MEDICAL PRACTICE

CORPORATION DATES

Taxable Year End Date: 03/31/08
Filing Date: 07/17/08
Expiration Date:

SUPPLEMENTAL POST MARK DATES

Supplemental:
Name Change:
Purpose Change:
Agent Resigned:

MAILING ADDRESS

NDCBU BOX 5775, WEIMER RD TAOS , NEW MEXICO 87571

PRINCIPAL ADDRESS

NDCBU BOX 5775, WEIMER RD TAOS NEW MEXICO 87571

PRINCIPAL ADDRESS (Outside New Mexico)

REGISTERED AGENT

MICHAEL KAUFMAN

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Agent Designated:

COOP LICENSE INFORMATION

Number:

Type:

Expiration Year:

OFFICERS

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Secretary: **WHITE, ROBERT B.**

Treasurer: **WHITE, ROBERT B.**

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Date of Election of Directors: 02/10/09

VASQUEZ , LORRAINE



STATE OF NEW MEXICO

Office of the Attorney General

DEPARTMENT OF JUSTICE

P.O. Drawer 1508

Santa Fe, N. M. 87501

TONEY ANAYA
ATTORNEY GENERAL

SE - ELEY SCARAFIOTTI
DIRECTOR OF ADMINISTRATION

September 20, 1977

Mr. Kenneth C. Moore
Superintendent of Insurance
PERA Building
Santa Fe, New Mexico 87503

Dear Mr. Moore:

This letter is in response to your inquiry concerning the Medical Malpractice Act. In particular, you have referred to us for response certain questions posed to you by the New Mexico Physicians Mutual Liability Company. The first question is whether a group of physicians incorporated as one corporate entity can qualify under the Medical Malpractice Act by submitting a \$100,000 cash deposit with your office. Section 58-33-5, NMSA 1953 Comp. (1976 Interim Supp.) provides:

A. To be qualified under the provisions of the Medical Malpractice Act [58-33-1 to 58-33-28], a health care provider shall:

(1) establish its financial responsibility by filing proof with the superintendent that the health care provider is insured by a policy of malpractice liability insurance in the amount of at least one hundred thousand dollars (\$100,000) per occurrence or by having continuously on deposit the sum of one hundred thousand dollars (\$100,000) in cash with the superintendent or such other like deposit as the superintendent may allow by rule or regulation; and

(2) pay the surcharge assessed on health care providers by the superintendent pursuant to section 25 [58-33-25] of the Medical Malpractice Act.

B. Health care providers not qualifying hereunder shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of malpractice claims against them.

EXHIBIT C

Mr. Kenneth C. Moore
September 20, 1977
Page 2.

The term "health care provider" is defined in Section 58-33-3, NMSA 1953 Comp. (1976 Interim Supp.) as amended by Chapter 284 New Mexico Laws of 1977 as follows:

A. "health care provider" means a person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant; (Emphasis supplied).

A corporation licensed to provide professional services as specified in Subsection A is a health care provider and may obtain the benefit of the provisions of the Medical Malpractice Act by depositing one hundred thousand dollars (\$100,000) in cash with the superintendent. This does not, however, eliminate the need for the individual doctor to qualify as specified in Section 58-33-5, supra, in order to obtain the benefit of the provisions of the Medical Malpractice Act.

The second question posed is whether each physician will be required to submit a one hundred thousand dollar (\$100,000) cash deposit. A doctor licensed to provide the services as specified in Section 58-33-3(A), supra, is a health care provider. Accordingly, he must qualify as specified in Section 58-33-5, supra, in order to obtain the benefit of the provisions of the Medical Malpractice Act.

The third question is whether the cost for defending a claim against the corporation or individuals of the corporation would be provided by the one hundred thousand dollar (\$100,000) cash deposit. The Medical Malpractice Act does not so provide. Accordingly, the cost for such defense would be born by the defendant.

The fourth question posed requests specification of the responsibilities of the physician's corporation regarding the reporting of claims to the Insurance Superintendent. Section 58-33-25, NMSA 1953 Comp. (1976 Interim Supp.) as amended by Chapter 284 New Mexico Laws of 1977, provides, in part;

A. ...The Superintendent, as custodian of the patient's compensation fund shall be notified by the health care provider or his insurer within

Mr. Kenneth C. Moore
September 20, 1977
Page 3.

30 days of service on the health care provider of a complaint asserting a malpractice claim brought in a court in this state against the health care provider.

The fifth question posed requests explanation of the anticipated methods by which claims will be handled by the Insurance Department in case of a claim against the physicians' corporation. Chapter 284 of the New Mexico Laws of 1977 deleted that part of Section 58-33-25, *supra*, which provided that the Superintendent of Insurance would be an indispensable party to any malpractice claim brought in the courts of this state against a health care provider. Accordingly, the defense in court of any malpractice claim would be by the defendant or his insurance carrier. This does not preclude the possibility that the Superintendent of Insurance might seek to intervene in any action alleging damages beyond one hundred thousand dollars, inasmuch as a judgment beyond one hundred thousand dollars would be born by the patient's compensation fund, the custodian of which is the Superintendent of Insurance. With respect to settlements beyond one hundred thousand dollars, (\$100,000) Section 30 of Chapter 2, Laws 1976, provides at subsection B that malpractice claims to be settled for more than one hundred thousand dollars shall be void to the extent that they exceed one hundred thousand dollars absent the written approval of the superintendent. Accordingly, proposed settlements beyond one hundred thousand dollars would require the written approval of the superintendent before payment could be made from the patient's compensation fund.

Sincerely,



ANDREA BUZZARD
Assistant Attorney General

AB/po

ATTORNEY GENERAL

HAL STRATTON Attorney General

Opinion No. 87-39

July 30, 1987

OPINION OF: HAL STRATTON, Attorney General**BY:** Andrea R. Buzzard, Assistant Attorney General**TO:** Dr. Gerald P. Rodriguez, Secretary-Treasurer, New Mexico Board of Medical Examiners, P.O. Drawer 1388, Santa Fe, New Mexico 87504-1388**QUESTIONS**

May a corporation, organized and controlled by non-physicians, provide medical services to the general public through employed physicians?

CONCLUSIONS

Yes, unless prohibited by statute or it exercises lay control of medical judgment or engages in lay exploitation of the medical profession in a manner prohibited by public policy.

ANALYSIS

The medicine and surgery statutes pertaining to licensure of physicians, sections 61-6-1 to 61-6-32 NMSA 1978, do not address this question. Other professional licensure statutes do, however. See, e.g., section 61-5-17 NMSA 1978 of the Dental Act; section 61-8-14 (A) NMSA 1978 of the Podiatry Act; section 61-9-16 (B) NMSA 1978 of the Professional Psychologist Act; section 61-23-22(C) NMSA 1978 of the Engineering and Land Surveying Practice Act.

The Business Corporation Act, sections 53-11-1 through 53-18-12 NMSA 1978, which pertains to for-profit corporations, provides at section 53-11-3 NMSA 1978; "Corporations may be organized under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] for any

lawful purpose or purposes, except banking, insurance, credit unions, savings and loan associations, railroads and waterworks organized under the Laws of 1887, Chapter 12." The Professional Corporation Act, sections 53-6-1 to 53-6-14 NMSA 1978, provides at section 53-6-1 NMSA 1978: "The purpose of this Act is to provide for the incorporation of an individual, or group of individuals, to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization." Section 53-6-3(A) NMSA 1978 defines "professional service" to include the services of medical doctors, which services "prior to the passage of the Professional Corporation Act and by reason of law, could not be performed by a corporation." The Professional Corporation Act restricts the ability of the corporation to engage in more than one professional service; requires that only licensed officers and employees render professional services; preserves the legal relationships between persons providing professional services and their clients or patients; and restricts the ability of the professional corporation to issue and transfer its shares. Sections 53-6-5, 53-6-7, 53-6-8, and 53-6-9 NMSA 1978. The thrust of the Professional Corporation Act is to permit, with restrictions, the formation of for-profit corporations to provide professional services to the public that, before the Act, could not lawfully be incorporated. Because the legislature chose to expressly prohibit the corporate practice, apart from professional corporations, in the case of dentists and podiatrists, and chose to expressly permit, with limitation, other forms of corporate practice in the case of psychologists and engineers, it may be inferred from the legislature's silence in the case of medical doctors that a corporation may be formed to provide medical services subject to the limitations discussed below. Further, the legislature has sanctioned forms of health care delivery other than by a sole practitioner or professional corporation. The legislature expressly has authorized health maintenance organizations (H.M.O.'s), which may be corporations, to provide health care services through employed providers. See section 59-46-5 NMSA 1978. Pursuant to section 59A-46-24(C) NMSA 1978 HMO's "shall not be deemed to be practicing medicine and shall be exempt from the provisions of laws relating to the practice of medicine." Non-profit health care plans may, on behalf of subscribers, pay a physician directly for services provided to a subscriber. Sections 59A-47-1 to 59A-47-35 NMSA 1978.

In any event, any categorical denunciation of the corporate practice of medicine is not warranted. Hospitals, which may be non-profit or for-profit corporations, regularly employ physicians on a salaried basis. The negligence of those physicians may be imputed to the hospital under respondeat superior principles applicable to employer-employee relationships. See **Reynolds v. Swigert**, 102 N.M. 504, 697 P.2d 504 (Ct. App. 1984); **Cooper v. Curry**, 92 N.M. 417, 589 P.2d 201 (Ct. App. 1978). In holding that a hospital may be liable for the tortious acts of its employed physicians, New Mexico courts implicitly sanction the relationship, notwithstanding that "a hospital as an entity cannot practice medicine, diagnose an illness or prescribe a course of treatment." **Reynolds v. Swigert**, 102 N.M. at 508, 697 P.2d at 508. See, also, **Bing v. Thunig**, 2 N.Y.2d 656, 666, 143 N.E.2d 3, 8 (1957), recognizing that hospitals, "regularly employ on a salary basis a large staff of physicians, nurses and interns, 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." See, also, **Rush v. City of St.**

Petersburg, 205 So.2d 11 (D. Ct. App. Fla. 1985) (holding that a hospital does not engage in the unauthorized practice of medicine merely because it contracts with a physician to provide radiology services provided the proper doctor-patient relationship is preserved). As noted by Mr. Alanson W. Willcox, general counsel of the American Hospital Association, in *Hospitals And The Corporate Practice Of Medicine*, 45 Cornell L.Q. 432, 461 (1960), 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, and the Mayo Clinic.

Courts have consistently rejected challenges to faculty medical practice where the medical college shares in the fees generated by physicians who are faculty members. **Albany Medical College v. McShane**, 66 N.Y.2d 982, 489 N.E.2d 982, 499 N.Y.S.2d 376 (1985). In addition, the employment of physicians by industrial and commercial corporations to provide necessary medical care to employees is, according to Alanson Willcox, "widely if not universally accepted as legitimate and proper."

Courts also have sustained consistently the legality of the operations of non-profit health care corporations. In **People ex rel. State Board of Medical Examiners v. Pacific Health Corp.**, 12 Cal. 2d 156, 160, 82 P.2d 429, 430, cert. denied, 306 U.S. 633 (1938), the Supreme Court of California distinguished between for-profit corporations and various benevolent organizations furnishing medical services to its members. In discussing benevolent organizations, the Court stated:

In nearly all of them, the medical service is rendered to a limited and particular group...; and the doctors are not employed or used to make profits for stockholders. In almost every case the institution is organized as a non-profit corporation or association. Such activities are not comparable to those of private corporations operated for profit and, since the principle evils attendant upon the corporate practice of medicine spring from the conflict between the professional standards and obligations of doctors and the profit motive of the corporation employer, it may well be concluded that the objections of policy do not apply to non-profit institutions.

In **Complete Services Bureau v. San Diego County Medical Society**, 43 Cal.2d 201, 272 P.2d 497 (1954), the Supreme Court of California held that a non-profit corporation providing medical services to subscribers was not engaged in the unlawful practice of medicine. The Court concluded that the public policy prohibiting middlemen from profiting in establishing professional relationships between doctors and members of the public was not contravened by permitting a group to form a non-profit corporation to secure for themselves medical services at low cost.

In *United State v. American Medical Association*, 110 F.2d 703, 714 (D.C. Cir.), cert. denied, 308 U.S. 599 (1939) an anti-trust prosecution of the American Medical Association ("A.M.A.") for its interference with Group Health, a non-profit association, A.M.A. alleged that Group Health was engaged in the unlawful practice of medicine by reason of employing physicians for a salary to provide medical services to subscribers, who were members of an

employee group. The court disagreed and distinguished the numerous cases involving illegal activities of for-profit corporations, stating that it was the "profit object" which condemned the other medical practice corporations. In **American Medical Ass'n v. F.T.C.**, 638 F.2d 443, 453 (2d Cir.), affd, 455 U.S. 676 (1981), the appellate court ordered the A.M.A. to cease and desist from, among other conduct: "Restricting...or interfering with the consideration offered or provided to any physician **in any contract with any entity that offers physicians' services to the public...**" (emphasis supplied in original.)

Courts have on occasion condemned for-profit corporations providing medical services to the public through employed physicians in order to protect the public against possible abuses stemming from commercial exploitation by laymen of the practice of medicine and from control by laymen of the professional activities and judgments of physicians. **Los Angeles County v. Ford**, 121 C.A. 2d 407, 263 P.2d 638 (1953); **Willcox, supra**, at 442, 443, 446, 447 (1960). In the context of a clinic operated for profit providing medical services to the county's indigent, where services were performed by employed, salaried doctors, the court held that public policy was violated, because such corporate practice tends to allow commercialization and debasement of the profession. **Bartron v. Codington County**, 68 S.D. 309, 2 N.W.2d 337 (1947). See, also, **Worlton v. Davis**, 73 Ida. 217, 249 P.2d 810 (1952) (concluding that a physician's contract of employment with a co-partnership involving a lay partner was void as contravening public policy where the doctor agreed to practice medicine under the direction of co-partners); **People by Kerner v. United Medical Services, Inc.**, 362 Ill. 442, 200 N.E. 157 (1936) (concluding that the Business Corporation Act of Illinois did not permit formation of for-profit corporations to provide medical services through physicians); **United Calendar Mfg. Corp. v. Huang**, 94 A.D.2d 161, 463 N.Y.S. 2d 497 (1983) (refusing to enforce a contract between a corporation and previously employed doctors where the corporation, which received 30% of patient fees, contended that the patients "belonged" to the corporation and not to the doctors.)

In **Flynn Bros. Inc. v. The First Medical Associates**, 715 S.W. 2d 782 (Tex. Civ. App. 1986), the court considered the legality of a management agreement between a lay person and a doctor under which the lay person received 66.67% of the net profits of the doctor's medical practice derived from contracts that the lay person secured from hospitals desiring contractual medical services. The lay person was the doctor's "exclusive management agent." The court stated:

In effect, Dr. Adcock allowed FBI to use his license to get contracts to provide emergency medical care and staff for hospital employers in exchange for which FBI received the majority of the profits made through Dr. Adcock's practice of medicine, thereby indirectly allowing FBI to practice medicine without a license.... The design, effect, and purposes of the management agreement contravene the Medical Practices Act...

Id. at 785. The medicine and surgery statutes of New Mexico at section 61-6-14 NMSA 1978 prohibit aiding or abetting the practice of medicine by an unlicensed person and allowing a person to use a medical doctor's license. An entity, such as a clinic, hospital or other similar

corporate entity employing physicians, therefore may not engage in conduct amounting to the practice of medicine by exerting lay control of professional medical judgments. Prohibited "fee splitting", however, is expressly defined and is limited to conduct in the nature of referral fees. Section 61-6-14(C) NMSA 1978.

Apart from "exploitation" by lay persons of the medical practice, courts have rejected certain forms of corporate medicine because of the dangers of lay control. In **Garcia v. Texas State Board of Medical Examiners**, 384 F. Supp. 434 (W.D. Tex.), aff'd, 421 U.S. 995 (1975), the district court held that a health maintenance association could not practice medicine by providing services through employed physicians where it was not organized as permitted by Texas statutes, which required that the directors of non-profit corporations organized to deliver health care be physicians. The court found that the statutes had a rational basis in that the legislature sought to preserve the doctor-patient relationship and to prevent possible abuses resulting from lay control of a corporation employing licensed doctors on a salaried basis. See, also, **Virginia Beach S.P.C.A., Inc. v. South Hampton Roads Veterinary Association**, 229 Va. 349, 329 S.E. 2d 10 (1985) (holding that a contract between a non-profit corporation and its employed veterinarian was illegal because the veterinarian was subject to the corporation's direction and substantial control, and the clinic received all fees in accordance with an established fee schedule).

Many of the earlier decisions in this area may not be germane to the health care environment today. A market demand for integrated health care delivery has emerged in recent years. Such systems have been termed "brokered" arrangements and include H.M.O.'s or preferred provider organizations ("P.P.O.'s"), which "are fueled both by demand, from businesses and governments as major purchasers of health care services seeking to control and/or reduce their health care expenses...and by supply, from health care providers seeking to protect and/or increase their market share of patients...". **Reazin v. Blue Cross and Blue Shield of Kansas, Inc.**, 635 F. Supp. 1287, 1299 (D. Kan. 1986). These market forces may rebound to the benefit of consumers of health care, and restraints on the commercial practice of physicians that inhibit their "affiliating with non-physicians or engaging in other novel arrangements which may provide more convenient or accessible health care service to the public" may invite the scrutiny of the Federal Trade Commission. See, Remarks of Acting F.T.C. Chairman, Terry Calvani, 5 Trade Reg. Rep. (CCH) /P50,479, at 56,279 (Feb. 20, 1986).

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

ATTORNEY GENERAL