

**PROFESSIONS AND OCCUPATIONS: MEDICINE AND OTHER HEALING ARTS —
PHARMACY — DRUG CONTROL ACT - PERMITTING OF PHARMACIES.**

For-profit subsidiary corporations, wholly owned by general hospital operated by nonprofit tax-exempt hospital corporation, will not be engaging in unlawful practice of medicine or in unlawful practice of pharmacy by paying salaries of licensed physicians and pharmacists employed by them, as long as physicians exercise exclusive control over decisions requiring professional medical judgment, and pharmacists exercise independent professional judgment in dispensing drugs.

May 22, 1995

The Honorable Jackie T. Stump
Member, House of Delegates

You ask whether the formation by a nonprofit, tax-exempt hospital corporation of two for-profit subsidiary corporations for the purposes of employing physicians and operating a retail pharmacy would violate any of the provisions of Title 54.1 of the *Code of Virginia* pertaining to the practice of either medicine or pharmacy.

You relate that a nonstock, nonprofit corporation operates a general hospital in Southwest Virginia. The hospital serves counties with widely dispersed populations, and a relatively high percentage of the patients in these counties are indigent or their medical services are paid by government programs. You state that efforts to recruit physicians—in particular, specialists—have been hindered due to the hospital's rural location.

Under the proposed arrangement, the hospital would form a wholly owned for-profit subsidiary corporation ("physician subsidiary") to employ one or more physicians, licensed by the Commonwealth to practice medicine, as full-time members of its medical staff. You state that the physicians would be employees of the physician subsidiary, which would be controlled by a board of directors that may consist of one or more members of the board of directors of the hospital, as well as members from the community at large. The physician subsidiary would bill patients for the physicians' services and would pay the physicians' salaries. If so directed by the board of the physician subsidiary, the hospital would receive dividends from the physician subsidiary should its revenues exceed operating costs.

Physicians employed by the physician subsidiary would exercise their independent professional judgment, and would be solely responsible for the medical care of patients and for the supervision of unlicensed technical employees administering diagnostic treatments and tests ordered by the physicians in accordance with hospital or subsidiary protocols.

You also relate that a separate for-profit subsidiary corporation ("pharmacy subsidiary") would be established to own and operate a retail pharmacy to meet the needs of

both the hospital's patients and the general public. The pharmacy subsidiary would employ a pharmacist or pharmacists, licensed by the Commonwealth, to practice pharmacy. An independent board of directors would be appointed to direct the activities of the pharmacy subsidiary, although one or more of the members also may be members of the hospital's board of directors. I assume the pharmacy subsidiary would bill patients for pharmacy services and would retain all sums collected. If so directed by the board of the pharmacy subsidiary, the hospital would receive dividends from the pharmacy subsidiary should its revenues exceed operating costs.¹

Articles 1 through 6, Chapter 29 of Title 54.1, §§ 54.1-2900 through 54.1-2973, define the practice of medicine and other specialties regulated by the Board of Medicine, and establish eligibility requirements for licensure in the Commonwealth. Generally, "*practice of medicine or osteopathic medicine*" means the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method."² Sections 54.1-2902 and 54.1-2929 make it unlawful to practice medicine without a license. Section 54.1-111(A)(1) also provides that it is "unlawful for any person, partnership, corporation or other entity" to practice "a profession or occupation without holding a valid license as required by statute or regulation."³

Prior opinions of the Attorney General conclude that a nonprofit hospital corporation and a foundation organized as a nonstock, nonprofit corporation that has no members may employ physicians to provide medical care and not be deemed to be practicing medicine unlawfully, as long as the physicians' exercise of professional judgment is not controlled or influenced in any way by the corporations.⁴

You indicate that the proposed employment arrangement between licensed physicians and the physician subsidiary will give the physicians exclusive control over decisions requiring professional medical judgment. Therefore, even though licensed physicians would be employees of the physician subsidiary, it is my opinion that the subsidiary would not be engaging in the unlawful practice of medicine merely by paying the salaries of those physicians.

Chapter 33 of Title 54.1, §§ 54.1-3300 through 54.1-3319, defines the practice of pharmacy, establishes eligibility requirements for licensure in the Commonwealth, and details unprofessional conduct that may subject a licensee of the Board of Pharmacy to discipline. Section 54.1-3300 includes the following definition:

"Practice of pharmacy" means the personal health service that is concerned with the art and science of selecting, procuring, recommending, administering, preparing, compounding, packaging and dispensing of drugs, medicines and devices used in the diagnosis, treatment, or prevention of disease, whether compounded or dispensed on a prescription or otherwise legally dispensed or distributed, and shall include the proper and safe storage and distribution of drugs, the maintenance of proper records and the

responsibility of providing information concerning drugs and medicines and their therapeutic values and uses in the treatment and prevention of disease.

Section 54.1-3310 makes it unlawful to practice pharmacy without a license.

Section 54.1-3432 states that "[e]very pharmacy shall be under the personal supervision of a pharmacist on the premises of the pharmacy." In § 54.1-3434, the General Assembly expressly anticipates that a pharmacist-in-charge may be employed by a pharmacy owned by a legal corporation or partnership.⁶ That section permits such an arrangement, as long as the pharmacist-in-charge applies for a permit, provides requested information and retains authority to exercise professional judgment in the dispensing of drugs.

I assume that the proposed employment arrangement between licensed pharmacists and the pharmacy subsidiary will give the pharmacists exclusive control over decisions regarding the dispensing of drugs. As long as licensed pharmacists exercise independent professional judgment in the dispensing of drugs, it is my opinion that the pharmacy subsidiary will not be engaging in the unlawful practice of pharmacy merely by paying the salaries of those pharmacists.

I assume that the factual details are such that the proposed arrangement would not violate the Practitioner Self-Referral Act, §§ 54.1-2410 through 54.1-2414, or applicable provisions of § 54.1-2962.1 (prohibiting solicitation or receipt of remuneration in return for patient referral) and § 54.1-2964 (disclosing interest or ownership in referral facilities and clinical laboratories). For the purposes of this opinion, I also assume that the facts are such that the proposed arrangement would be consistent with the physicians' obligations under § 1877 of the Social Security Act, which became effective for most purposes on January 1, 1995. See 42 U.S.C.A. § 1395nn (West Supp. 1995). This federal statute prohibits a physician who has a financial relationship with an entity from referring Medicare patients to the entity to receive any designated health services. See *id.* § 1395nn(a)(1)(A). A financial relationship may exist as an ownership or investment relationship or in a compensation arrangement with an entity. See *id.* § 1395nn(a)(2). Compensation arrangements exist when there is any arrangement in which payment of any kind, including a salary or consulting fee, passes between a physician or a member of the physician's immediate family and an entity, such as a hospital. See *id.* § 1395nn(h)(1).

²Section 54.1-2900; see also § 54.1-2903.

³Prior opinions of the Attorney General discuss in detail the statutes and court decisions pertaining to the practice of medicine. See Op. Va. Att'y Gen.: 1992 at 147; 1989 at 283.

⁴See Op. Va. Att'y Gen.: 1992, *supra*, at 150; 1989, *supra*, at 285. In Virginia, each health regulatory board has its own basic law and has developed regulations applicable to the professions it regulates. Judicial decisions that pertain to a particular health profession are appropriately based on statutes and regulations pertinent to the profession at issue. Because there are significant differences among the statutes and regulations pertaining to each health profession, judicial decisions based on a particular profession's basic law and regulations are not generalizable across professions. For example, in the case of *Virginia Beach S.P.C.A., Inc. v. South Hampton Roads Veterinary Association, et al.*, the Supreme Court of Virginia relied on specific regulations of the Virginia Board of Veterinary Medicine to conclude that an S.P.C.A.'s operation of a full-service veterinary clinic, despite employment of a fully licensed veterinarian, constituted the unlawful

practice of veterinary medicine. 229 Va. 349, 329 S.E.2d 10 (1985). These regulations prohibited the registration of any animal facility unless the owner, partner or officer of the facility was a licensed veterinarian and, further, characterized as "unprofessional conduct" the forming, entering or being employed by a partnership or corporation to practice veterinary medicine in which any other partner or corporation officer is not a licensed veterinarian. *Id.* at 352-53, 329 S.E.2d at 12. Since there are no similar statutory or regulatory provisions pertaining to the Board of Medicine or the Board of Pharmacy, the Supreme Court decision affects only the Board of Veterinary Medicine. Further, as discussed in detail in a prior opinion, statutes prohibiting physician practice in connection with commercial or mercantile establishments were repealed in 1986. See 1992 Op. Va. Att'y Gen., *supra* note 3, at 151 n.1; see also Ch. 87, 1986 Va. Acts Reg. Sess. 114.

Similarly, the Virginia Supreme Court's decision in *Ritholz v. Commonwealth* was based on statutes pertinent to the practice of optometry, and did not involve the practice of medicine or pharmacy. 184 Va. 339, 35 S.E.2d 210 (1945).

Section 54.1-3434 requires that "[n]o person shall conduct a pharmacy without first obtaining a permit from the Board [of Pharmacy]." This statute requires that the application for the permit be "signed by a pharmacist who will be in full and actual charge of the pharmacy and who will be fully engaged in the practice of pharmacy at the location designated on the application." Further, § 54.1-3434 expressly anticipates that the pharmacy may have a corporate owner and requires that the pharmacist-in-charge be permitted to exercise independent professional judgment, by providing:

"The application shall show the corporate name and trade name and shall list any pharmacist in addition to the pharmacist-in-charge practicing at the location indicated on the application.

"If the owner is other than the pharmacist making the application, the type of ownership shall be indicated and shall list any partner or partners, and, if a corporation, then the corporate officers and directors. Further, if the owner is not a pharmacist, he shall not abridge the authority of the pharmacist-in-charge to exercise professional judgment relating to the dispensing of drugs in accordance with this act and Board regulations.

"The permit shall be issued only to the pharmacist who signs the application as the pharmacist-in-charge and as such assumes the full responsibilities for the legal operation of the pharmacy. This permit and responsibilities shall not be construed to negate any responsibility of any pharmacist or other person.

"Upon termination of practice by the pharmacist-in-charge, or upon any change in partnership composition, or upon the acquisition of the existing corporation by another person, the permit previously issued shall be immediately surrendered to the Board by the pharmacist-in-charge to whom it was issued, or by his legal representative, and an application for a new permit may be made"
