Department of Health and Human Services

OFFICE OF INSPECTOR GENERAL

STATE PROHIBITIONS ON HOSPITAL EMPLOYMENT OF PHYSICIANS

Richard P. Kusserow
INSPECTOR GENERAL

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EXECUTIVE SUMMARY

PURPOSE

The purpose of this study is to assess State laws prohibiting hospital employment of physicians. It responds to a congressional request that the Office of Inspector General study the effect of these laws on the availability of trauma and emergency care services. Our study focuses on (1) the extent to which hospitals across the country are prohibited from hiring physicians; (2) the general impact of these prohibitions on hospital operations; and (3) their more specific impact on hospitals' ability to provide emergency services and comply with the Federal patient transfer law.

BACKGROUND

State prohibitions on hospital employment of physicians derive from laws requiring that individuals must be licensed to practice medicine. In some States, judicial decisions dating to the 1930's have interpreted these laws to preclude hospitals from employing physicians for the purpose of practicing medicine. The rationale for the prohibitions on employment of physicians is based on the potential for conflict between a physician's loyalty to the patient and the financial interests of the corporation. Opponents of the prohibitions contend that the doctrine is a vestige of an earlier era and that in the current health care system hospitals need the authority to control all aspects of health care delivery and personnel within their walls, including medical care.

The Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508) requested that the Office of Inspector General study whether these prohibitions have a particular impact on hospital emergency departments.

Our study uses data from (1) a mail survey of a national random sample of hospital administrators; (2) interviews with a purposive sample of over 50 hospital administrators, medical association and hospital association officials, and other individuals knowledgeable on issues related to the corporate practice of medicine; and (3) a review of legal and policy literature.

FINDINGS

Few States prohibit hospitals from employing physicians.

- Only five States -- California, Colorado, Iowa, Ohio, and Texas -- clearly prohibit hospitals from employing physicians. Even in these States, certain types of hospitals and providers are exempt from these prohibitions.

- In some other States, there is uncertainty over whether State laws defining the practice of medicine preclude hospitals from employing physicians.

State prohibitions on hospital employment of physicians have some adverse impact on hospital operations.

- Thirty-eight percent of hospital administrators responding to the survey from the five States that prohibit hospital employment of physicians indicate that these prohibitions impose legal, recruitment, or administrative costs.

- Forty-one percent respond that the prohibitions make it more difficult to staff medical services.

- Twenty-four percent say that the prohibitions make it more difficult to staff basic emergency services.

- Thirty percent say that the prohibitions make it more difficult to provide specialty emergency services.

However, these prohibitions do not appear to present a major overall problem for hospitals.

- Thirty-three percent of hospital administrators responding to the survey from the five States that prohibit hospital employment of physicians report that they are not even aware that these prohibitions apply in their State.

- Hospital administrators in these five States cite a number of factors other than prohibitions on hospital employment of physicians as more important limitations on their ability to assure specialty coverage in their emergency departments. These factors include a shortage of specialty physicians, low reimbursement rates, fear of increased malpractice liability, and disruption of their private practices.

- When asked about the impact of the Federal patient transfer law on their hospital, none of the administrators responding from the five States identified prohibitions on physician employment as an obstacle to compliance.

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INTRODUCTION

PURPOSE

The purpose of this study is to assess State laws prohibiting hospital employment of physicians. It responds to a provision in the Omnibus Budget Reconciliation Act of 1990[1] requesting that the Office of Inspector General study the effect of these laws on the availability of trauma and emergency care services.

Our study focuses on (1) the extent to which hospitals across the country are prohibited from hiring physicians; (2) the general impact of these prohibitions on hospitals; and (3) their more specific effect on hospitals' ability to provide emergency care services and comply with the Federal patient transfer law.

METHODOLOGY

Our study utilized three primary data-gathering approaches (see appendix A):

(1) We mailed a survey regarding issues related to hospital emergency department coverage to a national random sample of 598 hospital administrators; nationwide, 447 (74.7 percent) responded. This analysis utilizes a subsample of 115 of those hospitals from States that prohibit hospital employment of physicians.

(2) We conducted interviews with a purposive sample of more than 50 hospital administrators, medical society and hospital association officials, and other individuals knowledgeable on issues related to the corporate practice of medicine.

(3) We reviewed and analyzed statutes, case law, and literature on the corporate practice of medicine.

BACKGROUND

Prohibitions on Hospital Employment of Physicians: The Corporate Practice of Medicine

State prohibitions on hospital employment of physicians derive from laws requiring that individuals must be licensed to practice medicine. In some States, these laws have been interpreted to preclude hospitals from employing physicians for the purpose of practicing medicine. While physicians may be employed for nonpatient care duties (*e.g.*, teaching or administration), hospitals may not receive professional fees when physicians treat patients.

Prohibitions on hospital employment of physicians are a subset of a larger issue referred to as the corporate practice of medicine doctrine. This doctrine arouses passionate debate among those versed in its intricacies. Articles discussing the corporate practice of medicine have included such titles as "An Outmoded Theory in Need of Modification,"[2] "An Anachronism in the Modern Health Care Industry,"[3]

"The Growth of the Medical-Industrial Complex May Be Hazardous to Your Health,"[4] and "Pressure to Serve Two Masters."[5] On a more fundamental level, the debate over the corporate practice of medicine doctrine is an argument over who will control the delivery of medical care. This contention focuses on whether physicians should make decisions free of external constraints or whether outside parties (a hospital administrator, for example) should be able to exert control over physician behavior.

Rationale for Corporate Practice Prohibitions

The rationale for prohibiting employment of physicians is described in a number of legal decisions that date to the 1930's. The California Supreme Court in 1932 determined that it is impossible to separate the regulated practice of care from the business practice because "either one may extend into the domain of the other."[6] A 1938 decision in the same State held that letting a corporation hire and control physicians would lead to "divided loyalty and impaired confidence" between the interests of the corporation and the primacy of the patient's needs.[7]

An Illinois case of the same era reiterated that a corporation's "employees must owe their first allegiance to their corporate employer and cannot give the patient anything better than a secondary and divided loyalty."[8]

That court also concluded that "to practice a profession requires something more than the financial ability to hire competent persons to do the actual work. It can be done only by a duly qualified human being, and to qualify something more than mere knowledge or skill is essential. The qualifications include personal characteristics, such as honesty, guided by an upright conscience and a sense of loyalty to clients or patients, even to the extent of sacrificing pecuniary profit, if necessary."[9]

In 1975 a Federal court upheld a Texas ruling that denied a license to a clinic organized to provide health care to low-income patients, because the board of directors did not comprise physicians. The court's opinion summarizes a range of issues related to corporate practice prohibitions: "Who and what criteria govern the selection of medical and paramedical staff members? To whom does the doctor owe his first duty -- the patient or the corporation? Who is to preserve the confidential nature of the doctor-patient relationship? Who is to dictate the medical and administrative procedures to be followed? Where do budget considerations end and patient care begin?"[10]

Opposition to Corporate Practice Prohibitions

Opponents of prohibitions on hospitals' ability to employ physicians maintain that the legal doctrine is a vestige of an earlier time, when health care was "a cottage industry, made up of independent professionals operating as solo practitioners."[11] Today's health care industry differs substantially from the one in which the corporate practice prohibition originated. "Financial pressure on both the individual and system levels is

causing the provision of medical care to be approached quite differently."[12] The emergence of health maintenance organizations, provider networks, and other managed care approaches means that "the fee and the number and type of units of service authorized are increasingly being monitored and controlled, very often by parties outside of the traditional health care provider community."[13]

A former general counsel to the American Hospital Association reported that the corporate practice prohibition adversely affects hospitals in particular. "The ancillary services that contribute to medical treatment of the patient are usually performed by hospital employees. If a hospital may not legally practice medicine, may it practice nursing or pharmacy? How is the hospital to direct and correlate and make them available to the physician when he needs them in the treatment of his patient? It is essential if hospitals are to continue as centers of organized medical care, that their governing boards have authority to exercise the kinds of control over personnel -- including certain professional personnel -- without which the boards cannot discharge their responsibility to make the various services available when they are needed."[14]

Potential Impact on Emergency Services

Prohibitions on hospital employment of physicians might affect emergency care adversely in one of two ways. First, these laws could limit the availability of basic emergency physicians. Second, prohibitions on employing physicians could adversely affect hospitals' ability to have available specialty services (such as neurosurgery, plastic surgery, and orthopaedics) required by traumatized patients or obstetrical services for women who enter the emergency department in active labor.

Under the Federal patient transfer law[15] hospitals must meet a number of specific requirements regarding examination and treatment of persons with emergency medical conditions and women in labor. Medicare-participating hospitals must provide for an appropriate medical screening examination for any individual who comes to a hospital emergency department. If the person has an emergency medical condition, the hospital must either provide further examination and treatment necessary to stabilize the medical condition or, under narrow circumstances, provide for the appropriate transfer of the individual to another medical facility. This statute defines the term "emergency medical condition" and specifies conditions under which a transfer to another medical facility is appropriate. Subsequent amendments to the statute also include as a condition of participation in Medicare that hospitals maintain a list of physicians who are on call for duty to provide treatment necessary to stabilize an individual with an emergency medical condition.

FINDINGS

FEW STATES PROHIBIT HOSPITALS FROM EMPLOYING PHYSICIANS.

Only five States -- California, Colorado, Iowa, Ohio, and Texas -- clearly prohibit hospitals from employing physicians. Even in these States, certain types of hospitals and providers are exempt from these prohibitions.

With the recent passage of legislation in North Dakota[16] and Montana[17] expressly permitting hospitals to employ physicians, only the five States cited above clearly prohibit the practice. Hospitals in these five States comprise 23 percent of all U.S. hospitals.[18]

Even in these five States, the prohibition on hospital employment of physicians does not apply in all situations, according to those we interviewed and our legal review. The exceptions to the prohibition are based on factors such as hospital auspices, physician specialty, or organizational arrangement. In California, for example, the prohibition does not apply to clinics operated by university medical schools or to public hospitals. In Iowa, Colorado, and Ohio, teaching hospitals may hire faculty as well as residents and interns for purposes of education. In Iowa, pathologists and radiologists are exempt from the provisions. In 1991, Texas enacted legislation permitting public hospitals to employ physicians directly, providing statutory authority for a practice that was already widespread among many rural hospital districts. Health maintenance organizations in each of these five States also are able to hire physicians, either directly or through contracts with physician groups.

In some other States, there is uncertainty over whether State laws defining the practice of medicine preclude hospitals from employing physicians.

In some States the lack of clarity over whether prohibitions on the corporate practice of medicine apply to hospital employment of physicians creates some confusion. Legal literature on the subject reveals that the application to hospitals of general provisions forbidding nonlicensed persons from practicing medicine simply has been ignored or not enforced in recent years.[19]

Two recent State court decisions raise the possibility that hospital employment of physicians might be prohibited, even though the decisions do not address that specific issue. A 1991 Kansas Supreme Court decision[20] and a 1988 judgment from the Washington State Supreme Court[21] strengthened general restrictions on the corporate practice of medicine by ruling that nonphysicians may not be partners in medical practices. These decisions, however, fail to distinguish between general corporations and licensed hospitals. According to individuals we interviewed in these two States, health care providers are concerned that a literal interpretation of the decisions could pose threats to the arrangements that many hospitals use to provide medical staff.

STATE PROHIBITIONS ON HOSPITAL EMPLOYMENT OF PHYSICIANS HAVE SOME ADVERSE IMPACT ON HOSPITAL OPERATIONS.

Thirty-eight percent of hospital administrators responding to the survey from the five States that prohibit hospital employment of physicians indicate that these prohibitions impose legal, recruitment, or administrative costs.

Legal costs can be incurred in two broad areas. First, hospitals must assure that physician-hospital contracts do not violate the State prohibition on corporate practice of medicine. According to administrators and attorneys we interviewed, these contracts are fairly standard and do not pose a major problem.

Second, and more importantly, legal issues may arise when a hospital wishes to change its organizational structure, either to take advantage of new business opportunities or to address financial pressures. State prohibitions on the corporate practice of medicine make the legal requirements governing organizational arrangements more complex and cumbersome. For example, prohibitions on hospital employment of physicians mean that a hospital may not own a medical practice. In California, hospitals may form medical foundations, as a way of controlling medical practices, although the specifications for such an arrangement are detailed and specific.[22] Similarly, in Ohio we discovered some rather complicated arrangements that hospitals undertake to manage medical practices.[23]

State prohibitions on hospital employment of physicians can make recruitment more difficult by limiting medical staffing options that are available in States that permit hospitals to employ physicians. Prohibitions on employment do not allow hospitals to offer financial guarantees to physicians. These guarantees could be used to alleviate medical school debts or expenses associated with establishing a new practice.[24] Several people we interviewed noted that the prohibition on employing physicians presents a particular difficulty for hospitals attempting to recruit physicians in rural areas, where including financial guarantees in a recruitment package would make the offer more attractive to physicians.

In locations where competition with health maintenance organizations (HMOs) is vigorous, the prohibition on hospital employment of physicians may limit hospitals' ability to compete for physicians. Because HMOs are able to offer salaries, income guarantees, and regular working hours to physicians, hospital administrators with whom we spoke believe that these organizations have a competitive advantage in recruitment efforts.

Finally, hospital administrators contend that the prohibition on hospital employment of physicians can impose administrative costs by limiting their leverage over members of their medical staff. Administrators assert that these costs are incurred not only in staffing services but, more important, by limiting their ability to control the practice patterns and costs of individual physicians. The prohibition on a hospital's ability to receive any part of the physician fee means that hospitals are not able to develop risk-

sharing arrangements directly with physicians. Administrators contend that such arrangements would improve their ability to control costs by giving physicians a stake in the hospital's cost containment efforts.

Forty-one percent of hospital administrators responding to our survey from the five States indicate that these prohibitions make it more difficult to staff medical services.

State prohibitions on hospital employment of physicians deprive hospitals of one option they believe could help them provide medical staff in their facilities. In four areas of operations -- inpatient services, outpatient clinics, basic emergency care, and specialty emergency care -- administrators indicate that being able to employ physicians would help meet some of their needs.

One particular problem cited by administrators we interviewed was difficulty in developing outpatient clinics owing to a lack of physician coverage. Because they believe that clinic patients are not covered by insurance, physicians fear that they will not be paid for medical services provided to them. If a hospital were able to use salaried physicians, it could establish a hospital-owned group practice based in the outpatient department. One official said that if hospitals were able to hire physicians, it would be easier to develop a hospital-based perinatal practice focusing on primary care for newborns, or an obstetrical practice for low income women. Another administrator advocated the establishment of a hospital-based pediatric practice that could also provide coverage for the emergency room.

Twenty-four percent of hospital administrators responding to our survey from the five States say that the prohibitions make it more difficult to staff basic emergency services.

Basic emergency medical services are provided to patients when they present at the hospital emergency department. These services include identification, evaluation, and assessment of the patient's condition; treatment and administration of medical care; and stabilization of the patient's condition. In recent years, emergency medicine has been recognized as a distinct medical specialty,[25] with over 13,000 practitioners.

In States where hospital employment of physicians is permitted, our survey data show that some administrators do take advantage of the employment option available to them. Twenty-six percent of respondents from the States that permit employment said that they employ physicians for provision of basic emergency services.

In the five States that prohibit hospital employment of physicians, 89 percent of administrators report that they contract for services with either one physician group, individual physicians, or emergency department management companies to provide basic coverage. These arrangements are used by 76 percent of hospitals in States that permit hospitals to employ physicians.[26]

Thirty percent of hospital administrators responding to our survey from the five States say that the prohibitions on hospital employment of physicians make it more difficult to provide specialty emergency services.

Notwithstanding the responses of the administrators from these five States, our data suggest that being able to employ physicians for specialty emergency care may not make a difference. Even in those States where the option of physician employment is available, hospitals are no more likely to hire physicians to provide specialty emergency services. Ninety-three percent of administrators responding to our survey from States that permit hospitals to employ physicians use on-call members of their active medical staff, rather than directly employed staff, to provide specialty coverage in the emergency department, as do 95 percent of those administrators responding from States that prohibit employment of physicians.

HOWEVER, STATE PROHIBITIONS ON HOSPITAL EMPLOYMENT OF PHYSICIANS DO NOT APPEAR TO PRESENT A MAJOR OVERALL PROBLEM FOR HOSPITALS.

Thirty-three percent of hospital administrators responding to the survey from the five States that prohibit hospital employment of physicians report that they are not even aware that these prohibitions apply in their State.

It is possible that for administrators who are unaware of the prohibitions on employing physicians, these prohibitions have become a part of day-to-day operations and do not merit separate consideration. Perhaps they have not dealt recently with the prohibitions on hospital employment of physicians, or they may consider these issues to fall within the domain of some other department of the hospital, such as legal affairs or medical staffing services.

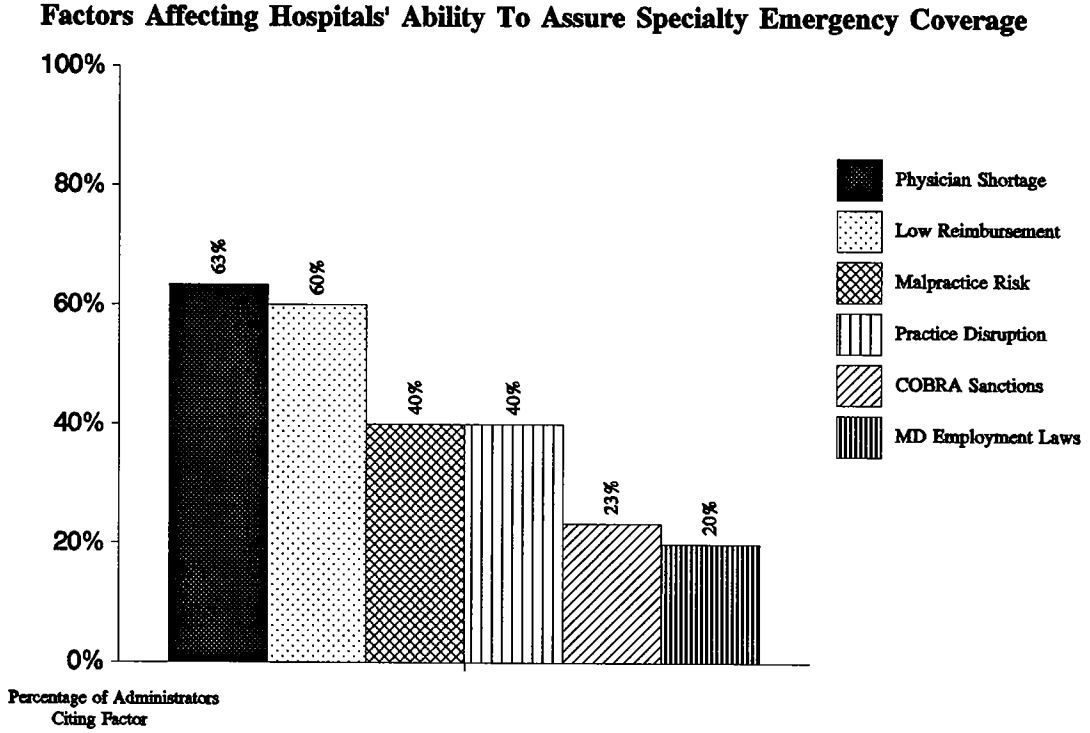
We found no recent cases in which hospitals had been prosecuted or had faced disciplinary actions for employing physicians in these States. Nevertheless, these institutions run a risk if they do not consider or are not aware of the prohibitions on hospital employment of physicians when they undertake such efforts as restructuring operations or recruiting physicians.

Hospital administrators in these five States cite a number of factors other than prohibitions on hospital employment of physicians as more important limitations on their ability to assure specialty coverage in their emergency departments. These factors include a shortage of specialty physicians, low reimbursement rates, fear of increased malpractice liability, and disruption of their private practices.

Only 20 percent of hospital administrators responding in these five States cite State prohibitions on hospital employment as a factor limiting their ability to assure specialty coverage. Sixty-three percent of the administrators indicate that a general shortage of specialty physicians causes problems in assuring specialty coverage in the emergency

department, and sixty percent respond that low reimbursement rates are an obstacle to getting physicians to serve on specialty on-call panels. Other factors that administrators cite more frequently than prohibitions on hospital employment of physicians are physician fears that their exposure to malpractice liability will increase, physician concerns about disrupting their private practices, and fear of sanctions under the Federal patient transfer law (COBRA).

FIGURE 1



Note: N = 115 hospital administrators from California, Colorado, Iowa, Ohio, and Texas responding to OIG/OEI mail survey, May 1991. Total exceeds 100% because of multiple responses.

Our interviews supported the survey findings that the prohibition on hospital employment of physicians is a relatively unimportant factor in providing emergency coverage. As one administrator said, "If all of a sudden we were allowed to hire doctors, it wouldn't make a difference. It's not an emergency room issue." Another indicated that even if laws prohibiting employment of physicians were repealed, any impact would be "evolutionary, not revolutionary."

Hospitals in all States confront a number of problems related to emergency department coverage, in addition to those identified here. Forty eight percent of administrators responding to our survey from the five States report that their ability to

assure specialty coverage in the emergency department has become more difficult over the past two years. Other recent studies have cited financial problems associated with trauma centers[27], use of emergency rooms for primary care services[28], and overcrowding[29] as important problems confronting emergency care. A forthcoming OEI report will examine problems associated with the availability of specialty coverage in hospital emergency departments in more detail.

When asked about the impact of the Federal patient transfer law on their hospital, none of the administrators responding to the survey from these five States identified prohibitions on physician employment as an obstacle to compliance.

In the five States that prohibit hospital employment of physicians, 49 of the 115 survey respondents reported actions their hospital had taken in response to the patient transfer law, and 62 administrators commented on the impact of the law on their hospital. We analyzed these responses, and found that none of the comments related to a hospital's inability to employ physicians as a problem in their ability to comply with the patient transfer requirements.

Attorneys we interviewed corroborated these findings. One attorney noted that prohibitions on hospital employment of physicians have never been raised as a defense in any patient transfer case. Other individuals we spoke with raised a number of issues related to the patient transfer law, yet no one was able to relate these concerns to State laws that prohibit hospitals from employing physicians.

SUMMARY AND CONCLUSION

Our study has found that State prohibitions on hospital employment of physicians are not a major national problem. Only five States continue to prohibit hospitals from employing physicians, and even in those States numerous exceptions apply, based on hospital auspices, physician specialty, or organizational arrangement. Only a minority of hospital administrators responding to our survey from the five States believe that these prohibitions present a problem; one-third of administrators in those States are not aware that these provisions apply.

Even among the administrators citing difficulties caused by the prohibitions, its relative importance is minor. With respect to emergency services, for example, those we surveyed cite factors such as a shortage of specialty physicians, low reimbursement rates, malpractice liability, and disruption of practice as more important limitations on their ability to provide specialty coverage than are State prohibitions on hospital employment of physicians.

Other administrators consider State prohibitions on hospital employment of physicians to be only one factor influencing hospital-medical staff relations. One California hospital administrator's comment summarizes the remarks of others, "Most of us are able to accommodate through other mechanisms what repeal would accomplish."

APPENDIX A

METHODOLOGY

Legal Analysis

We reviewed statutory language and court decisions from the States that prohibit hospitals from employing physicians. The prohibitions are based on the following statutes:

California Business and Professions Code, Section 2400;
Colorado Revised Statues, Sections 12-36-129;
Iowa Code Annotated, Sections 147.2 and 148.13;
Ohio Revised Code, Sections 4731.22, 4731.41, and 1701.03;
Texas Revised Civil Statutes, Article 4495b.

We also reviewed case law on decisions interpreting the corporate practice of medicine, as well as legal and policy literature. Relevant decisions and articles are identified in appendix B.

Sample Selection and National Survey

This study uses data from a survey of a random national sample of hospital administrators on issues related to emergency room care. The sample universe consisted of all acute short-term hospitals that had an emergency department from the Health Care Financing Administration Provider of Service file. The sample was selected using stratified simple random sampling with six strata:

Small rural hospitals (fewer than 100 beds)
Small urban hospitals
Medium rural hospitals (100 - 299 beds)
Medium urban hospitals
Large rural hospitals (300 or more beds)
Large urban hospitals

Due to prior knowledge that California prohibits hospital employment of physicians, hospitals in that state were sampled at a higher rate than the remaining States. Six strata were defined for California and also for the remaining States, for a total of 12 strata. Originally, 637 hospitals were selected for the survey, but due to mergers and closures, the sample size was decreased to 598.

Surveys were distributed on May 10, 1991, to these 598 hospitals, with a follow-up mailing to nonrespondents on May 31. Responses were received from 447 hospitals, a response rate of 74.7 percent. Of these 447 hospitals, 115 (25.7 percent) responded from the five States that prohibit hospital employment of physicians, forming the data

base for the analysis in this study. A sample size of 115 hospitals provides estimates within ± ten percent of the true value at the 95 percent confidence level. Except where identified specifically as coming from the full national sample, all percentages in the text refer to the 115 hospitals in the five States.

The survey contained questions to determine whether hospital administrators believe that their State prohibits hospitals from employing physicians. In some States, some administrators indicated that their States did have such a prohibition. Follow-up telephone calls to State hospital associations to verify the applicability of the prohibition, however, revealed that the State had either repealed the prohibition, or that the provisions were substantially ignored. Based on the survey results and these discussions, California, Colorado, Iowa, Ohio, and Texas were identified as having and enforcing State prohibitions on hospital employment of physicians. Table A-1 displays the sample and response size for each of these States.

TABLE A-1

Distribution of Surveyed Hospitals and Respondents by State

STATE	NUMBER OF HOSPITALS SURVEYED (% of Total)	NUMBER OF HOSPITALS RESPONDING (% of Total)
California	81 (51.9%)	54 (47.0%)
Colorado	8 (5.2%)	8 (7.0%)
Iowa	12 (7.7%)	11 (9.6%)
Ohio	16 (10.3%)	15 (13.0%)
Texas	39 (25.0%)	27 (23.5%)
TOTAL	**156 (100.0%)**	**115 (100.0%)**

Interviews

Our interviews included telephone and in-person discussions with ten hospital administrators from California and three administrators from Massachusetts. We focused our interviews on California, because that State had been identified previously as prohibiting hospital employment of physicians.

We also interviewed by telephone or in person, officials with state hospital associations in Arizona, California, Colorado, Georgia, Illinois, Iowa, Kansas, Massachusetts, Mississippi, Montana, Ohio, Texas, and Washington, and representatives of regional hospital associations in California. We interviewed State medical society officials in California, Iowa, Massachusetts, and Texas. (In some cases, interviews were conducted with more than one member of these groups.)

Our interviews also included representatives of the American Medical Association, American Hospital Association, and American College of Emergency Physicians. We also interviewed seven attorneys identified to us as familiar with issues related to the corporate practice of medicine.

APPENDIX B

ENDNOTES

1. P.L. 101-508, Section 4008(c).

2. John Wiorek, "The Corporate Practice of Medicine Doctrine: An Outmoded Theory in Need of Modification," *Journal of Legal Medicine*, 8, no. 3 (1987), pp. 465-492.

3. Jeffrey F. Chase-Lubitz, "The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry," *Vanderbilt Law Review*, 44 (1987), pp. 445-488.

4. Stanley Wohl, "Is Corporate Medicine Healthy for America? The Growth of the Medical-Industrial Complex May Be Hazardous to Your Health," *Business and Society Review*, (Fall 1984), pp. 16-20.

5. Donald P. "Rocky" Wilcox, "Medicine and the Law: Pressure to Serve Two Masters," *Texas Medicine*, 82 (June, 1986), pp. 67-69.

6. *Painless Parker* v. *Board of Dental Examiners*, 216 Cal. 285, 14 P.2d 67 (1932).

7. *State Board of Medical Examiners* v. *Pacific Health Corp.*, 12 Cal. 2d 156 82 P.2d 429 (1938).

8. *Dr. Allison, Dentist, Inc.* v. *Allison*, 360 Ill. 638, 196 NE 799 (1935).

9. Ibid.

10. *Garcia* v. *Texas State Board of Medical Examiners*, 284 F. Suppl. 434, W.D. Texas (1974).

11. Arnold J. Rosoff, "The Business of Medicine: Problems with the Corporate Practice Doctrine," *Cumberland Law Review*, 17 (1987), pp. 485-503.

12. Ibid.

13. Ibid.

14. Alanson W. Willcox, "Hospitals and the Corporate Practice of Medicine," *Cornell Law Review*, 45 (1960), pp. 432-487.

15. 42 U.S.C. sections 1395cc and 1395dd.

16. North Dakota House Bill No. 1426, approved March 21, 1991, provides that:

> It is permissible for a hospital incorporated as a nonprofit corporation to employ a physician provided that the employment relationship between the physician and hospital is evidenced by a written contract containing language to the effect that the hospital's employment relationship with the physician may not affect the exercise of the physician's independent judgment in the practice of medicine, and the physician's independent judgment of medicine is in fact unaffected by the physician's employment relationship with the hospital. Under this section a hospital may not be deemed to be engaged in the practice of medicine.

17. Montana Senate Bill No. 146, effective October 1, 1991, permits:

> practicing medicine as the partner, agent, or employee of or in joint venture with a hospital, medical assistance facility, or other licensed health care provider. However:
>
> > (I) The partnership, agency, employment, or joint venture must be evidenced by a written agreement containing language to the effect that the relationship created by the agreement may not affect the exercise of the physician's independent judgment in the practice of medicine;
> > (II) The physician's independent judgment in the practice of medicine must in fact be unaffected by the relationship; and
> > (III) The physician may not be required to refer any patient to a particular provider or supplier or take any other action the physician determines not to be in the patient's best interest.

18. The Resource Information Center at the American Hospital Association informed us that in 1989 there were 6,720 hospitals in the United States. The number of hospitals in each of the five States examined here were:

California -- 560 (8.3%)
Colorado -- 88 (1.3%)
Iowa -- 135 (2.0%)
Ohio -- 226 (3.4%)
Texas -- 538 (8.0%)
Subtotal, five States -- 1,547 (23.0%)

19. Morgan J. Ordman, "The Corporate Practice of Medicine," *Illinois Bar Journal*, April 1988, pp. 464-465; John Wiorek, "The Corporate Practice of Medicine Doctrine: An Outmoded Theory in Need of Modification," *Journal of Legal Medicine*, 8, no. 3 (1987), pp. 465-492; Alanson W. Willcox, "Hospitals and the Corporate Practice of Medicine," *Cornell Law Quarterly*, 45 (1960), pp. 432-487.

20. *Early Detection Center, Inc.* v. *Wilson et al*, Kansas Supreme Court, No. 65,328 (May 1991).

21. *Morrelli* v. *Ehsan*, 110 Wn. 2d 555, 756 P.2d 129 (June 1988).

22. The clinic must conduct medical research and health education, and must provide health care through a group of 40 or more physicians; the physicians and surgeons must be independent contracts representing at least 10 board-certified specialties; and no less than two-thirds of the physicians must practice on a full-time basis at the clinic.

23. One example provided was that a hospital enters into a trust agreement, with the hospital (which provides the capital to fund the venture) as beneficiary and a physician serving as trustee at the pleasure of the hospital. The physician trustee also serves as majority shareholder in a professional corporation, with shares purchased by the hospital-physician trust. The professional corporation owns and operates the practice and distributes net revenues back to the trust as dividends. The trust then can distribute this trust income back to the hospital as beneficiary.

24. According to one source, employment would ensure that physician referrals to the employing hospital are not subject to fraud and abuse laws. Contracts that require repayment of some value, in order to avoid IRS proscriptions on inurement to a physician from a tax-exempt hospital, run the risk of violating Medicare-Medicaid kickback provisions. See "Finally, Positive Thinking on Physician Recruitment," *Action Kit for Hospital Law*, July, 1990.

25. See "Definition of Emergency Medicine and the Emergency Physician," *Annals of Emergency Medicine*, 15, no. 10, (October 1986), for a full discussion of the emergency medicine specialty.

26. The totals exceed 100 percent because some administrators indicated that they use more than one approach to staffing basic emergency services.

27. U.S. General Accounting Office, *Trauma Care: Lifesaving System Threatened by Unreimbursed Costs and Other Factors*, May 1991, Report No. GAO/HRD-91-57.

28. *Use of Emergency Rooms by Medicaid Recipients*, OEI-06-90-00180.

29. Andrew S. Bindman, Kevin Grumback, Dennis Keane, Loren Rauch, and John Luce, "Consequences of Queuing for Care at a Public Hospital Emergency Department," *JAMA*, 266, no. 8 (August 28, 1991), pp. 1091-1096.