Cashing in by Cashing out

SMALL SMILES AND THE CORPORATE PRACTICE OF MEDICINE: A WHITE PAPER

James R. Moriarty
Moriarty Leyendecker
4203 Montrose, Suite 150
Houston, TX 77006
(713) 528-0700
jim@moriarty.com
www.moriarty.com

Jim Moriarty and
Nicole Quintana

July 19, 2011

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INTRODUCTION

Open your browser and go to YouTube.com. Type two words into the search bar: Small Smiles. And try not to cringe. The dozens of videos created about the company, many by news organizations investigating reported abuses by the dental clinics it operates, are punctuated by the screams of children in pain. The practices of Small Smiles are, as the parlance goes, not safe for work.

One video shows a 4-year-old being restrained in a device that markedly resembles a straitjacket. He is screaming in pain; the camera pans to his feet, which are the only parts of him that can move freely. He clenches his feet, toes twisting in pain, while the dental assistant calmly continues probing in his mouth, offering not a single word of reassurance. His mother is nowhere to be found. The news reporter explains, her voice sickened, that this is because his mother has not been allowed to accompany her 4-year-old son to his treatment. She is not there to hold his hand, whisper comforting words, or witness his systematic torture. The next video shows an ex-employee of Small Smiles, her face blurred to disguise her identity, describing children she was forced to continue to treat in the name of "production" – children whose heart rates had climbed to nearly 250 beats per minute in their fear, who were "beet red" and "throwing up," and who were treated regardless of their obvious anguish and the inherent dangers in performing procedures under those conditions.

The videos don't get better. Abuse after abuse stacks up. Crowns placed on baby teeth that are already wiggling and about to fall out. Children strapped to papoose boards systematically and without regard for the fear such practices inflict in small children unable to make sense of why they are being subjected to pain. And parent after parent, dentist after dentist,

and reporter after reporter fearing (and occasionally proving) the worst: that many procedures were performed on children not because they were necessary, but so Small Smiles' corporate owners could recoup a profit on the procedures from Medicaid.

After a few stories, the pattern becomes clear: Small Smiles isn't inflicting pain on these children out of any sort of sadistic enjoyment. Its motivation is as old as time – or, at any rate, as old as trade. The hideously abusive practices are what happen when a dental clinic is run by a private equity firm, purely for profit. The results are two fold: harm to children and extraordinary cost to taxpayers.

Children are strapped down to a papoose board to eliminate the time it takes to calm and reassure them before a procedure. Parents are banned from the clinic rooms because they might want to slow the procedure if their child is fearful or in obvious discomfort. Unnecessary procedures are performed because the corporation gets paid by Medicaid for every procedure performed, not just the necessary ones. And children get rushed, inadequate, and botched dental work because it's faster than taking the time to do each procedure properly.

As the blurred face of the stricken ex-Small Smiles dental assistant explains, it's all about "production, production, production." It's a good mantra for a widget factory. It's a torture sentence in a dental clinic.

How are such practices permitted in this day and age? The simple answer is they aren't – and haven't been for over a hundred years. Unfortunately, the laws that prevent such practices aren't systematically enforced, and private equity firms with desires for outsized profits are taking advantage of that fact. They've discovered a veritable gold mine in the systematic bilking of Medicaid for their corrupted brand of dental "care". By inflating the profit margins of these clinics with shoddy and abusive practices, private equity firms can sell the business at an

extraordinary profit, with the only fallout being traumatized children who are often too poor to seek recourse – or know that any is due to them.

To answer the question about what is going on, first we need to understand two foundation concepts: (1) the legal differences between dentists (or other licensed professionals such as lawyers or doctors) practicing in the form of a professional limited liability company (PLLC) and a general, for-profit corporation and (2) the concept of "capitalization of an income stream" which allows for the multiplication of income that makes these clinics such a profitable private equity firm investment.

PLLC vs. For Profit Corporation

PLLC	For Profit Corporation
Must be owned by dentists	May be owned by anyone
Must be controlled by dentists	May be controlled by anyone
Owes fiduciary duty to patients	No fiduciary duty to customers
Cannot fee split with non-dentists	Can share profit with anyone
Cannot have officers/managers who are non-dentists	Cannot hold professional licenses
May have additional limitations by individual state law	For-profit corporation with legal duty to maximize profit for shareholders

By transforming a profession like dentistry into a for profit-corporate business model, it's possible to dramatically increase the profits on exactly the same stream of income. By manipulating this fact, private equity firms have encouraged licensed medical professionals to routinely violate their obligation to patients so as to allow the private equity firm owners to earn illicit income far higher than the ordinary income stream of honest dentists.

To illustrate how the capitalization of an income stream can transform a dentist's motivation from patient's interest to profit shares, let's take a hypothetical example we'll call Bill. As a dentist with his own practice, Bill may generate $500,000 in a year of legitimate dentistry. Assuming his overhead for the practice is $300,000, Bill nets $200,000 worth of

income for the year. He then pays about $61,000 in various federal taxes, taking home a grand total of $139,000.

If Bill quit his job as a dentist and went into the lucrative field of widget-making, he would create a for-profit corporation. If the company makes the same $500,000 in income as the dental practice did, and subtracts the same $300,000 of overhead, the business nets $200,000 of income. Bill's for-profit business has a market value for which it can be sold, since any new owner can presume that a for-profit business can continue to increase in scope, production, and clientele for years if managed well. The assumption of continued profits means that Bill's for-profit business can command a value of approximately 10 times its net income (EBITDA): $2 million.

Not only has he vastly increased the "value" of the business, but because of the tax treatment of stock ownership, now he only has to pay 15% taxes so at the end of a year, he has $1,700,000 in his pocket.

$1.7 million versus $139,000. It's not difficult math, and many dentists are persuaded to see the financial benefits of going corporate. Unfortunately, while a for-profit corporation making widgets is legal and legitimate, a for-profit corporation not owned by dentists practicing dentistry is neither. Small Smiles, and the private equity firms that own and control much of the Medicaid dental business in the United States, are engaged in flagrantly illegal and immoral activity. Each year billions of dollars of taxpayer money flow into the hands of private equity firm owned dental clinics for perpetuating abusive practices on innocent children who are unable to protect themselves.

Thankfully, we have the ability – and the legal precedent – to stop them.

A. The Corporate Practice of Medicine

Put simply, corporations are prohibited from practicing medicine or dentistry. As set forth below, most states have laws that require an individual with an ownership interest in a medical facility to be a licensed care provider in the state in which the facility is located; further, most states generally require that an individual with an ownership interest actually practice his or her trade at that facility.

Licensed practitioners are not permitted to assist unlicensed persons or entities in the practice of medicine. To prevent such abuses from occurring, licensed practitioners are prohibited from sharing any reimbursement for services rendered with any non-licensed person or entity – a practice known as "fee splitting." As an example, it would be a violation for a corporation to employ licensed professionals and take a share of the fees earned by those professionals. It is also illegal for a licensed professional to pay a fee for administrative or billing services rendered by a non-licensed individual/entity if the fee is based on a percentage of the clinic's revenue.

(1) Background

In 1847, the American Medical Association ("AMA") was founded to launch a medical ethics program, establishing standards for medical education, and improving public health. For the next fifty years, the AMA worked to put these programs and standards in place.

While the AMA was still in its early years, corporate involvement in medicine began to emerge in two forms: (1) "contract practice" where corporations employed physicians to provide medical services to their employees and (2) "corporate practice" where physicians' services were marketed to the public by corporations which either employed physicians or contracted

separately for their services.[1] As corporations were focused mainly on profit sharing and competitive rates for medical treatment, their involvement in the practice of medicine began to lead to lower quality services – and the serious concern of the AMA.

The AMA and other professionals within the medical field raised concerns that "commercialized medicine would ultimately divide a physician's loyalty between profits and the delivery of quality patient care."[2] Medical professionals believed that corporate involvement, driven by profit, in the practice of medicine would lead to commercial exploitation, increased caseloads, and divided loyalty to patient and employer. Most importantly, it would cripple a licensed professional's ability to make treatment decisions uninfluenced by outside parties.

The AMA argued that these practices would be "destructive [to] the personal responsibility and relationship which is essential to the best interest of the patient;"[3] would compromise the physician's allegiance to the patient[4], and would threaten physician autonomy.[5] The AMA wanted to ensure that a medical professional's fiduciary duty to his patient remained the professional's top priority. The AMA stated:

> It is unprofessional for a physician to dispose of his professional attainments or services to any lay body, organization, group, or individual . . . under terms or conditions which permit a direct profit from the fees, salary or compensation received to accrue to the lay body or individual employing him. Such a procedure is beneath the dignity of professional practice, is unfair competition with the profession at large, is harmful alike to the profession of medicine and the welfare of the people, and is against sound public policy.[6]

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[1] Adam M. Freiman, The Abandonment of the Antiquated Corporate Practice of Medicine Doctrine: Injecting a Dose of Efficiency into the Modern Health Care Environment, 47 Emory L.J. 697, 701 (1998).
[2] John W. Jones, Corporate Medicine in 21st Century Health Care (Physician's News Digest, June 2007).
[3] Frank D. Campion, The AMA and U.S. Health Policy Since 1940. Chicago Review Press; 1984.
[4] Id.
[5] Jeffrey F. Chase-Lubitz, The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry. Vanderbilt University, Vanderbilt Law Review; March 1987.
[6] AM. MED. ASS'N, PRINCIPLES OF MEDICAL ETHICS, ch. 3, art. 6, sec. 5, reprinted in AM. MED. ASS'N, AMERICAN MEDICAL DIRECTORY 15 (15th ed. 1938).

"The AMA sought to establish the autonomy of medical doctors as independent decision-makers who cared for nothing but the scientific treatment of patients."[7] The AMA addressed these concerns first in 1912 when it declared it "unprofessional" for medical care providers to practice under a corporation, and then again in 1934 when it criticized non-licensed individuals and entities for profiting from the work of medical professionals.[8] The AMA Judicial Council noted:

> It was decided long ago that the practice of law by a corporation was against public policy and the same has been prohibited by law in many states. The relations between patient and physician are more intimate than are those between client and attorney. It is impossible for that intimacy of relationship to exist between and [sic] individual and a corporation and if it is against public policy for a corporation to practice law, how much more so must it be for a corporation to practice medicine. [9]

Prohibiting the corporate practice of medicine is not new. So obvious were the moral, legal, and public safety consequences of allowing non-licensed entities to interfere with the professional judgment of medical professionals that the precedent for prohibiting such interference was established at the turn of the last century.

(2) Justifications for Prohibitions of the Corporate Practice of Medicine

The Corporate Practice of Medicine ("CPOM") doctrine bars a corporation from influencing a professional's practice of medicine. The CPOM doctrine recognizes the inherent conflict between a medical care provider's duty to a patient and a corporation's obligations to its shareholders to maximize profits.[10] Motivated by a desire to maintain profitability and keep

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[7] Adam M. Freiman, Comment, The Abandonment of the Antiquated Corporate Practice of Medicine Doctrine: Injecting a Dose of Efficiency into the Modern Health Care Environment, 47 Emory L.J. 697, 701-03 (1998).
[8] Kevin Reed, Physician Employment and Corporate Practice of Medicine Issues, Health Law Presentation, April 2007.
[9] AM. MED. ASS'N, REPORT OF THE JUDICIAL COUNCIL (interpreting Section 6 of the Principles of Medical Ethics) (1922).
[10] Michael E. Schaff, The Corporate Practice of Medicine Doctrine: Is it Applicable to Your Client? (AHLA Business Law & Governance Newsletter, Vol. 3, Issue 2, May 2010).

costs low, corporations might ask medical professionals to refuse treatment of certain patients; prescribe medications that would benefit the company either financially or professionally; or terminate costly services regardless of the patient's health. The CPOM doctrine seeks to avoid this conflict between fiduciary duty and profit by prohibiting lay people and entities from influencing the decisions of medical care providers.

All states require an individual medical practitioner to be licensed by the state in which he or she practices. Clearly, corporations are not eligible to procure such a license, being incapable as they are of attending medical school, passing the necessary exams, or making ethical and informed judgments about treatment. Early judicial decisions ruling on the legality of the corporate practice of medicine reflect these facts.

II.

THE LAW OF CPOM

Today, many states prohibit the corporate practice of medicine through statute.[16] A few states permit medical professionals to practice under the corporate umbrella, but prohibit the corporation from interfering with the manner in which the medical professional practices.[17] Despite the statutes and case law prohibiting the corporate practice of medicine, states do not frequently regulate or pursue violators. This paper focuses on the development and application of the CPOM doctrine in Texas, New York and Colorado; in particular, statutes regarding the practice of dentistry.

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[16] Ariz. Rev. Stat. § 10-2201, et seq.; Ark. Code § 4-29-301, et seq.; CA Business and Professions Code, Section 2400; Colo. Rev.Stat. § 12-36-134(1)(g)(7) (2005); Ga. Code § 33-18-17; Iowa Code § 147.1101 et seq.; Ky. Rev. Stat. § 65-2801, et seq.; Mich. Comp. Laws § 450.1251 (2006); Mont. Code § 37-3-322; N.J. Admin. Code 13,§ 35-6.16(f) (2006); N.Y. Educ. Law § 6522 (2006); N.D. Cent. Code § 43-17-42; Ohio Rev. Code § 4731 et seq; S.D. Codified Laws Ann. § 36-4-8.1 (2006); Tex. Rev. Civ. Stat. § art. 4495b, §§3.06 - 3.08; Wash. Rev. Code § 18.71.021; W. Va. Code § 30-3-15.

[17] Ind. Code 25- 22.5-1-2(c) (2006); Ohio Rev. Code Ann. § 1701 (2005); Tenn. Code Ann. § 63-6-204(c) (2006).

A. Texas

The Texas Dental Practices Act ("TDPA")[18], regulates any person who holds herself/himself out as someone who can diagnose and treat issues relating to the teeth, gums, and jaw.[19] The Act defines a dentist as anyone who "owns, maintains, or operates an office or place of business in which the person employs or engages under any type of contract another person to practice dentistry," as well as one who "controls, influences, attempts to control or influence, or otherwise interferes" with a dentist's independent professional judgment pertaining to the treatment of a patient.[20] The purpose of setting out such a comprehensive definition of a dentist is to prevent the unlicensed practice of dentistry. A person may not practice dentistry under the TDPA without a valid license issued by the Texas State Board of Dental Examiners.[21] The TDPA also prohibits the aiding and abetting of any unlicensed practice of dentistry and the aforementioned practice of fee splitting.[22]

The Texas Occupational Code sets out what constitutes a violation of the TDPA.[23] It is a violation of the TDPA to allow anyone other than a dentist to:

- Set a maximum or other standardized time for performance of specific dental procedures;
- Place limitations or requirements on treatments, referrals, or consultations, except those based on the professional judgment of a dentist;
- Limit or impose requirements on the type or scope of dental treatment, procedures, or services which may be recommended, prescribed, directed, or performed;
- Limit or impose requirements concerning the supplies, instruments, or equipment deemed reasonably necessary by a dentist to provide diagnoses or treatment to a patient;
- Direct or influence the selection of specific diagnostic examinations and treatment or practices without due regard for those agreed upon between the dentist and patient;

[18] Tex. Occ. Code § 251.001, et seq.
[19] Tex. Occ. Code § 251.003.
[20] Tex. Occ. Code § 251.003(4) & (9).
[21] Tex. Occ. Code § 256.001.
[22] Tex. Occ. Code § 164.052(17) is the statute applicable to general physicians and specifically prohibits "directly or indirectly aid[ing] or abet[ing] the practice of medicine by a person, partnership, association, or corporation that is not licensed to practice medicine by the board."
[23] 22 Tex. Admin. Code §108.70.

- Establish professional standards, protocols, or practice guidelines that conflict with generally accepted standards within the dental profession;
- Place limitations or conditions on communications with a dentist's patients.

One Texas court outlined the justifications for prohibiting the corporate practice of medicine:[24]

> not only is [a lay] corporation fraught with practical and ethical considerations, but may well represent a backward step in the legislative protections it has taken so long to achieve. Without licensed, professional doctors on Boards of Directors, 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 corporation? Who is to preserve the confidential nature of the doctor-patient relationship? What is to prevent or who is to control a private corporation from engaging in mass media advertising in the exaggerated fashion so familiar to every American? Who is to dictate the medical and administrative procedures to be followed? Where do budget considerations end and patient care begin?

The Texas Board of Medical Examiners can assess penalties for violations of the TDPA, including violations for aiding and abetting others (i.e. improper corporations) in the unlicensed practice of dentistry. The penalties include suspension or revocation of a license, issuance of an injunction and/or fines up to $5,000 per violation (each day representing a separate violation).[25]

The Attorney General may seek civil penalties of $1,000 per violation, as well as recover court costs, attorney's fees, investigative costs and witness fees. A violation of the TDPA constitutes a third degree felony and each day a violation occurs constitutes a separate violation.[26] In addition to any imprisonment or fine that accompanies a conviction, a dentist forfeits all rights and privileges conferred by virtue of her/his license.[27]

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[24] *Garcia v. Texas State Board of Medical Examiners*, 384 F. Supp. 434, 440 (W.D. Tex. 1974).
[25] Tex. Occ. Code § 165.003.
[26] Tex. Occ. Code § 165.152.
[27] Tex. Occ. Code § 165.152.

Furthermore, any persons practicing medicine without a license in such a way as to cause another person (1) physical or psychological harm or (2) financial harm are subject to third degree felony charges or a state jail felony, respectively.[28]

Texas courts have addressed violations of the TDPA concerning the corporate practice of medicine. In *Penny v. Orthalliance, Inc.*, the court assessed the relationship between orthodontic practices and Orthalliance with which they entered into management contracts.[29] The court interpreted the TDPA to prohibit "a dentist's employment or engagement under *any* type of contract at an office owned, maintained, or operated by non-licensed persons."[30] The court went on to state that the contracts between the orthodontic practices and the "management company" relinquished ownership, maintenance and operation to the corporation in violation of the TDPA because Orthalliance retained title to all assets of the orthodontic practices. The corporation also violated the TDPA by controlling the functioning of the facilities through Service Agreements and employing licensed orthodontists.[31] Texas courts have consistently held that such arrangements violate the TDPA in other cases with similar facts.[32]

B. New York

New York law prohibits the corporate practice of medicine,[33] as well as fee sharing and aiding and abetting the unlicensed practice of dentistry.[34] New York law requires a dentist be licensed to practice in the state.[35] New York permits dentists to form professional corporations if

[28] Tex. Occ. Code § 165.153.
[29] *Penny v. Orthalliance, Inc*. 255 F. Supp. 2d 579, 581-83 (N.D. Tex. 2003).
[30] *Id*. at 582 (emphasis in original text).
[31] *Id*. at 582.
[32] *See Packard v. OCA, Inc.*, 2009 WL 334645 (E.D. Tex. 2009); *David Becka, et al. v. OCA, Inc. et al.*, Cause No. 03-CV-80 (E.D. Tex. 2005).
[33] NY Bus. Corp. Art. 15 §1501, et seq.; NY Educ. Art. 133 § 6602.
[34] NY Educ. Art. 131-A § 6531.
[35] NY Educ. Art. 133 §6602.

all owners of the corporation are licensed in the state and practice at the place of business.[36] However, a corporation cannot "practice medicine or dentistry by hiring doctors or dentists to act for it."[37] This policy conforms to New York's "prohibition against lay ownership of shares in medical corporations (and the accompanying potential for fraud)."[38]

In re Co-Operative Law Co. explains New York's ban on the corporate practice of medicine[39] (the case involved the corporate practice of law, but the discussion as to the reason for the rule applies to other professionals, including dentists). The relationship between a doctor and patient involves the highest trust and confidence. The relationship cannot exist between one employed by a corporation and a patient, "for he would be subject to the directions of the corporation, and not to the directions of the [patient]."[40] Since the corporation would control the profit and determine whether and how much the medical practitioner would be paid, the medical practitioner would consequently be responsible to the corporation only. "His master would not be the [patient] but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of [dental treatment]."[41] The corporate practice of medicine allows for "no guide except the sordid purpose to earn money for stockholders," cautioning that "evil results might follow."[42]

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[36] NY LLC Law §§ 1203, 1207; NY Bus. Corp. Art. 15 §1501, et seq. (Note: New York courts have applied the Business Corporation Act sham owner cases to Limited Liability Company Law cases, as both have the same underlying objective. *See Multiquest, PLLC v. Allstate Insurance Co.*, 844 N.Y.S.2d 565 (Sup. Ct. App. Term, 2d and 11th Judicial Districts 2007).
[37] *In re Co-Operative Law Co.*, 198 N.Y. 479 (1910).
[38] *State Farm Mutual Automobile Ins. Co. v. Mallela*, 4 N.Y.3d 313, 321 (N.Y. App. 2005).
[39] See note 37, *supra*.
[40] See note 37, *supra* at 484.
[41] *Id*.
[42] *Id*.

The state board for dentistry may suspend, revoke or annul a dentist's license if he/she commits professional malpractice or any other prohibited practice.[44] The board may also impose a fine of up to $10,000 for each guilty finding or impose community service.[45]

Furthermore, anyone who engages in the unauthorized practice of medicine or offers to provide services is guilty of a class E felony.[47] There is no tiered or "three strikes and you're out" approach. Anyone who knowingly aids and abets three or more persons in the unlicensed practice of a medical profession is also guilty of a class E felony.[48]

New York courts interpret the statutes to mean that an individual cannot "practice" a medical profession without the necessary licensing.[49] One court extended the prohibition to a corporation and its principals who engaged in the illegal practice of medicine.[50] The corporation in question brokered medical services by selecting and hiring doctors to conduct medical examinations without obtaining the appropriate agency licenses, and then split the fees with those physicians.[51]

New York courts have deemed the corporate practice of medicine to exist when unlicensed professionals enter into licensing agreements with medical professionals for the supply of accounting, billing, personnel and other management services, where fees are paid in relation to those licensing agreements.[52] These arrangements are prohibited because they give an unlicensed individual or entity some control over aspects of the medical facility, from which it is

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[44] NY Educ. Sub. Art. 3 § 6511.
[45] NY Educ. Art. 130, § 6509-a.
[47] NY Educ. Sub. Art. 4 § 6512, et seq.
[48] NY Educ. Sub. Art. 3 § 6512(2).
[49] *See One Beacon Ins. Group, LLC v. Midland Medical Care, P.C.*, 54 A.D.3d 738, 863 N.Y.S.2d 728 (2d Dep't 2008).
[50] *Accident Claims Determination Corp. v. Durst*, 224 A.D.2d 343, 343 (N.Y.A.D. 1996).
[51] *Accident Claims Determination Corp. v. Durst*, 224 A.D.2d 343, 343 (N.Y.A.D. 1996).
[52] *Necula v. Glass, 647 N.Y.S.2d 501, 501 (N.Y.A.D. 1996); Pomerantz v. New York State Dept. of Social Service, 644 N.Y.S.2d 24, 25 (N.Y.A.D. 1996).*

possible to infer that any interference, absolute or partial, by non-licensed individuals over licensed individuals is prohibited.

New York courts also deem it a violation to put a "nominal" owner in place, when in fact a management company operates and receives the profit from the company.[53] Use of a nominal owner equates to a "fraudulently licensed medical corporation" and is "behavior tantamount to fraud."[54]

Some of the factors weighed to determine whether an individual is a sham owner are whether (1) the "owner" made any monetary investment, (2) the profit went to the "owner," or there was a lease agreement by which the bulk of the profits were "channeled" to a non-physician, (3) the "owner" had any dealings with the employees, (4) the "owner" practiced at the facility, (5) the money flowed into and out of the bank accounts, (6) the professional services corporation was the named tenant on the premises leases, and (7) the real owners asserted the Fifth.[55]

New York has statutes that criminalize the corporate practice of medicine through other counts, such as enterprise corruption, insurance fraud, grand larceny, and falsifying records.[56] Civilly, the following actions can occur: (1) a cease and desist order, (2) an injunction, (3) penalty of $5,000 per violation may be assessed against the violating party, or (4) restitution of property (i.e. money) acquired as a result of the violation.[57]

C. Colorado

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[53] *See* note 37, *supra*; *see also Universal Acupuncture Pain Services, P.C. v. State Farm Mutual Automobile Ins. Co.*, 196 F. Supp.2d 378 (S.D.N.Y. 2002).
[54] *State Farm Mutual Automobile Ins. Co. v. Mallela*, 4 N.Y.3d 313, 321-22 (2005).
[55] *See In the Matter of Andrew Carothers, M.D., P.C. v. Ins. Companies Represented By Bruno, Gerbino, & Soriano, et al.*, 888 N.Y.S.2d 372 (Civ. Ct., City of New York, Richmond County, 2009).
[56] *See People v. Pustilnik*, 2007 WL 674116, 10 (N.Y. Sup. 2007).
[57] NY Educ. Sub. Art. 4 § 6516.

Colorado, through its Dental Practice Act, prohibits a licensed dentist from practicing or partnering with anyone who is not licensed in dentistry or from practicing in joint venture with any partnership, association, or corporation.[58] It also prohibits fee sharing in either of these capacities. Colorado permits the formation of professional service corporations; however, any shareholder in a professional corporation must be actively practicing in the offices of that corporation.[59] Even more, shareholders in a professional corporation practicing dentistry are jointly and severally liable for the acts, errors, and omissions of all employees of the practice, unless an employee is covered by a separate professional liability policy.[60]

Colorado courts have set forth the following public policy justifications for prohibiting the corporate practice of medicine: "(1) lay control over professional judgment; (2) commercial exploitation of the medical practice; and (3) division of the physician's loyalty between patient and employer."[61]

In addition to potential civil liability, the Colorado dental board has the ability to deny, suspend, or revoke a license for violations of the Dental Practice Act.[62] Any person or entity that practices or attempts to practice dentistry without a license may be convicted of a class 2 misdemeanor for the first offense and a class 6 felony for any offense thereafter.[63] Conviction of a class 6 felony may include imprisonment or probation, as well as a fine from $1,000 to $100,000 in lieu of or in addition to the imprisonment or probation.[64]

Despite the laws, there is little case law in Colorado wherein the courts have found a corporation improperly practiced medicine. One court, however, found an agreement between a

[58] C.R.S. § 12-25-129.
[59] C.R.S. § 12-35-116.
[60] C.R.S. § 12-36-134(g).
[61] *Hall v. Frankel*, 190 P.3d 852, 861 (Colo.App. 2008) (internal citations omitted).
[62] C.R.S. § 12-35-129(1).
[63] C.R.S. § 12-35-135.
[64] C.R.S. § 18-1.3-401.

"management services" company and a dentist violated the Dental Practice Act because the management company: (i) calculated its fees as a percentage of the dentist's monthly profits and (ii) leased dental equipment to the dentist, thereby rendering the company a "proprietor[65]" of a dental practice without a license.[66] Due to these violations, the court ruled that the agreement was void.[67]

D. Unique Remedy Available to Government

The government could put private equity firm owned companies who flagrantly and illegally practice dentistry out of business overnight. Because PLLCs require state registration and certification that the PLLC is owned and controlled by licensed professionals, private equity firms have set up sham "owners" who, for a modest monthly stipend, will falsely certify to the states that they own and control the PLLC.[68] There are few, if any, PLLC "owners" who have actually purchased the clinics, fund the clinics, and control the clinics and fewer yet who actually work in the clinics. They are bound by contract with the private equity firm owners to sell the clinic and its management contracts to any buyer the private equity firms desire, for any price the private equity firms are willing to accept.

A single district attorney, either state or federal, convening a grand jury could easily expose these sham ownerships by requiring the sham owner to appear and testify truthfully regarding who actually owns and controls these clinics.

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[65] The Dental Practice Act defines "proprietor" as one who "places in possession of a dentist . . . such dental material or equipment as may be necessary for the management of a dental office on the basis of a lease . . . ." C.R.S. § 12-35-103(14)(b).

[66] *Mason v. Orthodontic Centers of Colorado, Inc.*, 516 F. Supp. 2d 1205, 1219 (D. Colo. 2007); *see also Shaver v. Orthodontic Centers of Colorado, Inc.*, 2007 WL 2870992 (D. Colo. 2007).

[67] *Id.*

[68] Gloria King, the dentist who certified to the state of Texas that she is "president" of all Texas Small Smiles clinics, and is presumably the sole owner, actually works full time as a dentist in New Mexico-for the federal government.

III.

SMALL SMILES' UNLAWFUL CORPORATE PRACTICE OF MEDICINE

Small Smiles' original owners implemented many of the corporate practices that are discussed below prior to selling the company. Most, if not all, of those practices were carried on after the sale of the company. Many of these actions came to light through newspaper articles and newscasts, particularly following the Medicaid settlement last year for $24 million dollars.

The examples below highlight how Small Smiles violates the public policy considerations behind the corporate practice of medicine prohibition.

- Hiring dentists to work as de facto employees of a for-profit corporation.
- Requiring dentists to assign their fee income indirectly to for-profit corporations.
- Setting and enforcing daily income quotas for dentists and other clinic staff members.
- Basing personnel decisions on ability to meet corporate income and expense quotas.
- Interfering with the independent professional judgment of the dentists.
- Directly and indirectly encouraging over treatment and unnecessary treatment.
- Rigidly controlling the scheduling of treatment, not based on individual needs of patients or the professional judgment of the dentists but rather on the financial concerns of the private equity firm owners.
- Setting limits on medical supplies and equipment purchases, not related to proper patient care.
- Systematically discouraging parents from observing their child's care so as to allow mistreatment and abuse.
- Setting up bonus programs solely based on income quotas or reduction of expenses.
- Establishing and tolerating a culture of corruption within the entire company.

- Intentionally hiring dental and non-dental personnel so as to maximize corporate control over every aspect of operation, i.e. seeking foreign-born personnel, young, inexperienced dentists, and dentists with significant educational debt.

- Intentionally rushing treatment for patients.

- Establishing a policy of "conversion" where all employees were encouraged to "up-sell" unnecessary treatment to patients.

- Having "sham" owners so as to maintain the pretense of a legal and legitimate dental practice.

IV.

CONCLUSION

There is substantial evidence that the Small Smiles facilities have been and continue to be controlled by their parent corporation in nearly every facet of the practice. Despite statutory authority and case law supporting the regulation of the corporate practice of medicine, states do not seem to actively pursue violators. As a result, these facilities continue to treat patients with no regard for a dentist's fiduciary duty to the patient and with every regard for profit margins and bonuses.

Small Smiles is not the only private equity firm owned and controlled Medicaid mill, nor even the largest. Many others, seeing the hundreds of millions of dollars that flowed to the now disbarred DeRoses, have adopted the business model and are creating their own staggeringly immense, illegal and illicit wealth at taxpayer expense. One orthodontist who bases his practice on the treatment of Medicaid patients, managed to make such incredible profits that he could live

in a $14,000,000 home, drive a Bentley and fly a $10,000,000 jet.[69] This largess was paid for with Medicaid dollars – and the egregiously unnecessary or inappropriate treatment of children.

The failure of medical boards, attorney generals, and dental groups to bring to light the existence of these unlicensed practices has resulted in private equity firms encouraging dentists to over-treat and unnecessarily traumatize thousands of under-represented patients—namely children who have no opportunity to defend themselves. The abuses forced on the young victims of Small Smiles' practices provide inarguable reasons that the corporate practice of medicine doctrine is just as important today as it was at its inception. It is time to put an end to these atrocities.

[69] See http://www.wfaa.com/news/investigates/Dental-Dollars-Go-to-Hedge-Funds-123497004.html