

SUMMARY OF FACTS
RELATED TO THE PRACTICE OF PHYSICAL THERAPY BY CORPORATIONS
Issued by: The Physical Therapy Board of California
JULY 20, 2011

This summary is intended to illustrate the actions of the Physical Therapy Board of California (PTBC) regarding the employment of physical therapists by professional medical corporations; and, the 1990 Resolution by PTBC, regarding practice of physical therapy by a corporation not formed as a professional medical corporation, i.e. formed as a General Corporation.

EMPLOYMENT OF PHYSICAL THERAPISTS BY PROFESSIONAL MEDICAL CORPORATIONS

Prior to 2010, PTBC had never taken a position or provided advice regarding the employment of physical therapists by professional medical corporations. The issue arose when a podiatrist, filing corporation documents with the Medical Board of California (MBC), was advised by MBC staff; authority did not exist for a physical therapist to be an employee, shareholder, director or officer in a podiatric corporation, based upon the Moscone-Knox Professional Corporation Act. Legal counsel to the Board of Podiatric Medicine confirmed this.

Subsequently, Assemblyman Pedro Nava, in response to an inquiry by the American Physical Therapy Association, sought a Legislative Counsel Opinion on this matter. On September 29, 2010, the California Legislative Counsel issued a legal opinion, in which it concluded a physical therapist may not be employed by a professional medical corporation formed under Section 13401.5 of the Corporations Code. The opinion stated the only professional corporations which may employ physical therapists are professional physical therapy corporations or naturopathic doctor corporations. It was clear, in the opinion of California Legislative Counsel; the intent of the legislature was to preclude a physical therapist from being a shareholder, director, officer or employee of any other healing arts professional corporation. The Department of Consumer Affairs (DCA) Legal Office subsequently provided an additional opinion on the matter. This opinion concurred with the opinion of the California Legislative Counsel.

The Opinions were not solicited by PTBC, nor did the issue originate with PTBC. While the PTBC is not at the root of the recent opinions, issued by Legislative Counsel and the DCA, the PTBC is compelled to enforce the findings. Any action, which may be taken by PTBC, regarding violations of the Moscone-Knox Professional Corporation Act, will be based on the statute(s) and supported by the Opinions by the California Legislative Counsel and DCA Legal Office.

The California Legislature has considered bills in 2009, 2010, and 2011, and to date has not changed the statute which limits the types of professional corporations of which physical therapists may be employees, shareholders, directors, or officers. The law requires the PTBC to enforce the laws with which it has been charged, until such time as they are changed by enacted legislation or judicial finding has determined the law cannot be enforced. Failure by the PTBC of its obligation to take appropriate enforcement action is in and of itself a violation of law pursuant to Section 1222 of the Government Code, which specifies "Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor." As a result, the PTBC is compelled to accept any complaints received regarding unlawful employment arrangements, to properly investigate each such complaint, and to take appropriate enforcement action to assure compliance with existing laws.

PTBC has needed time, since the release of the Opinions, to determine what action could be taken for violations occurring prior to September 2010. There are a number of options available to the PTBC when it comes to any violation of the Physical Therapy Practice Act and the associated laws, regulating health care providers, which the PTBC is charged with enforcing. However, when taking action to issue citations, which the PTBC feels would be the most appropriate mechanism to obtain compliance under the circumstances, consideration of the good faith of the licensee must be considered. As the understanding of the law related to

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permissible employment of physical therapists, physical therapist assistants, and physical therapy aides, by professional medical corporations was unclear to those within and outside the PTBC as well as the licensing community and employers, the PTBC feels it will be unlikely bad faith could be established, and it would be equally unlikely an administrative Law Judge (ALJ) would sustain a citation for **past** violations of the employment limits contained in Moscone-Knox.

However, the understanding of the law has now been made clear and with the delivery of this information to the licensing population, **future** violators will not, in the opinion of the PTBC, be able to establish good faith.

Investigations will need to determine if a violation is currently occurring. When physical therapists are found to be in violation of the provisions of the Moscone-Knox Professional Corporation Act, voluntary compliance with the law will be sought in the first instance. Since there may be legal ways to provide physical therapy care in a physician's office, the physical therapist will have the opportunity to present a plan of compliance.

The PTBC would not be meeting its mandate if future violations of the law regarding employment are ignored. As a result, appropriate enforcement action, which may include levels beyond citations when warranted, will be taken against those individuals who persist in maintaining impermissible employment relationships.

PHYSICAL THERAPISTS PROVIDING CARE OTHER THAN AS AN EMPLOYEE, OR AS AN EMPLOYEE OF A PHYSICIAN AND SURGEON WHOSE BUSINESS IS A SOLE PROPRIETORSHIP OR PARTNERSHIP

PTBC has not identified a prohibition related to the provision of physical therapy by a physical therapist in a physician's office, where the physical therapist is not an employee. In addition, no prohibitions were found regarding the employment of a physical therapist by a physician whose business is organized as a sole proprietorship or partnership. However, physicians and physical therapists should be in compliance with any requirements regarding disclosure of financial interests.

The physical therapist must also comply with the requirements of the Physical Therapy Practice Act to perform an independent evaluation and to establish a physical therapy plan of care. While consultation with other professionals involved in the patient care is in the best interest of the patient, **the physical therapist must be the person responsible** for the physical therapy care and the supervision of assistive personnel providing care.

Physician and surgeons and physical therapists should direct any questions regarding the legal provision of physical therapy in these situations to their legal counsel.

PRACTICE OF PHYSICAL THERAPY BY A GENERAL CORPORATION; I.E. A CORPORATION NOT FORMED AS A PROFESSIONAL MEDICAL CORPORATION

In 1990, the Physical Therapy Examining Committee (later renamed Physical Therapy Board of California) passed a resolution, authorizing a provision of physical therapy services by a general corporation. The resolution was prepared and adoption recommended by legal counsel provided by DCA. The resolution was consistent with the understanding of the law at that time.

In 2010, the resolution was challenged by the American Physical Therapy Association (APTA) and the California Physical Therapy Association (CPTA). The basis of the challenge stated the resolution conflicted with provisions of the Moscone-Knox Professional Corporation Act, which requires a corporation formed for the purpose of providing health care must be a professional corporation. In addition, APTA and CPTA contended the resolution had not been adopted as a regulation. Consequently, it was an underground regulation; and

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therefore, unenforceable. Based on advice from legal counsel, PTBC determined the resolution was an underground regulation and a violation of Government Code section 11340.5(a). Furthermore, PTBC was advised the resolution was in conflict with the provisions of the Moscone-Knox Professional Corporation Act. Based on the advice of legal counsel, PTBC voted to rescind the 1990 Resolution, on November 3, 2010.

The PTBC has now made clear to the licensed population that all corporations providing physical therapy must come into compliance with the provisions of Moscone-Knox (California Corporations code section 13400 et seq.) and those provisions of the Physical Therapy Practice Act which pertain to the corporate practice of physical therapy Business and Professions Code section 2690 et seq.). Failure to comply with the provisions of Moscone-Knox is unprofessional conduct for licensees and can constitute aiding and abetting (section 2691).

Regardless of when the corporation was formed, any corporation presently holding itself out as a physical therapy corporation (or a general corporation offering physical therapy services) must come into compliance with, and remain in compliance with, all applicable provisions of Moscone-Knox. Failure to remain in compliance with Moscone-Knox is a violation of the Physical Therapy Practice Act.

Therefore, if you are an employee of a "general corporation" holding itself out as a physical therapy corporation and the corporation is not in compliance with Moscone-Knox (i.e. there are lay owners, directors, or officers, or the name of the corporation is non-compliant, or licensed professionals not subject to the Physical Therapy Practice Act are employed) you are advised to review sections 2690 through 2696 of the Business and Professions Code, Article 9 of Division 13.2 of Title 16 of the California Code of Regulations pertaining to Physical Therapy Corporations, and the Moscone-Knox Professional Corporation Act, sections 13400-13410 of the California Corporations Code.

As with employees of professional medical corporations, voluntary compliance with the law is always the PTBC's goal. There may be lawful ways in which physical therapists can provide physical therapy services at these non-compliant corporations, just not as employees. However, complaints regarding such employees will be investigated, and if current violations are documented, appropriate enforcement and or disciplinary action will be taken against both the licensee and the corporation.