

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION
BOARD OF MEDICINE

Final Order No. AHCA-95-00645 Date 4-22-95

FILED

Agency for Health Care Administration
AGENCY CLERK

B.S. Power, Agency Clerk

By: Brandon L. Moore
Deputy Agency Clerk

IN RE: THE PETITION FOR DECLARATORY
STATEMENT OF STEVEN R. COHEN, M.D.

FINAL ORDER

This cause came before the Board of Medicine (hereinafter Board) pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, on April 9, 1995, for the purpose of considering the Petition for Declaratory Statement filed on behalf of Steven R. Cohen, M.D. (hereinafter Petitioner). No person or entity has sought to intervene as a party. Having considered the petition, the arguments of counsel, the applicable law, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions.

FINDINGS OF FACT

1. Petitioner Steven R. Cohen, M.D. is licensed to practice medicine in the State of Florida pursuant to Chapter 458, Florida Statutes.

2. The facts asserted by Petitioner are as follows: Petitioner is a member and president of Suncoast Medical Clinic, P.A. (hereinafter Suncoast), a professional corporation in Florida. Suncoast currently employs all of its approximately 35 shareholder physicians and several additional non-shareholder physicians. All of the employed physicians are licensed to practice medicine in Florida. Suncoast plans to form and become

a member of a limited liability company, as defined under Chapter 608, Florida Statutes, for the purpose of providing medical services through its employed physicians. The limited liability company will be known as Suncoast Medical Clinic, L.C. (hereinafter Suncoast, L.C.). It is intended that a partnership entity known as Cardiology Consultants (hereinafter Consultants) would be the other founding member of Suncoast, L.C. Consultants consists of four (4) professional associations, each of which is owned by and employs a single physician/shareholder. Consultants also employs one or more additional physicians and provides medical services in Florida through these various individual physicians. All of the physicians employed by Consultants and the professional associations that comprise Consultants are licensed to practice medicine in Florida. It is intended that Suncoast, L.C. will employ all of the physicians currently employed by Suncoast, Consultants and the professional associations that comprise Consultants. Suncoast, L.C. will provide medical services in Florida through its employed physicians. Suncoast, L.C.'s employment contracts would all have language insuring that the independent judgment of the employed physicians would not be altered by their participation in Suncoast, L.C. Furthermore all employed physicians would be compensated in a manner that would not violate Chapters 455 and 458, Florida Statutes or the federal anti-kickback and self-referrral statutes.

3. Petitioner requests that the Board of Medicine review the above stated facts and state whether Petitioner's intended

structuring of a limited liability company for the purpose of providing medical services in Florida would be a violation of Section 458.327(1), Florida Statutes.

4. This Petition was noticed by the Board of Medicine in Vol. 21, No. 13, dated March 31, 1995, of the Florida Administrative Weekly (p. 1990).

CONCLUSIONS OF LAW

1. The Board of Medicine has jurisdiction over this matter pursuant to Section 120.565, Florida Statutes, and Rule Chapter 28-4, Florida Administrative Code.

2. The Petition for Declaratory Statement is in substantial compliance with the provisions of Section 120.565, Florida Statutes, and Rule Chapter 28-4, Florida Administrative Code.

3. Chapter 458, Florida Statutes, prohibits the practice of medicine by anyone other than a person licensed to practice medicine in Florida. However, nothing set forth in Chapter 458, Florida Statutes, prohibits the ownership of a medical practice or the employment of a physician by someone other than a licensed physician. In fact, the Board of Medicine has previously stated its position that a licensed physician may be employed by a business entity for the purposes of providing medical services. See, In re: The Petition for Declaratory Statement of Conrad Goulet, M.D., Case No. 89-BOM-01 (1989) and In re: The Petition for Declaratory Statement of John W. Lister, 9 FALR 6299 (1988).

4. The Legislature has established limited liability

companies as acceptable business entities under Chapter 608, Florida Statutes. Nothing therein prohibits such compnies from being formed for the purpose of providing medical services. Although Chapter 608, Florida Statutes, provides for limitations on the corporate liability of limited liability companies (hence their name) nothing therein suggests any limitation on the professional liability of any employee of the limited liability company.

4. In that only licensed physicians may actually practice medicine in Florida (as opposed to business entities) and in that nothing inherent in a limited liability company would directly interfere with the professional liability of any employee of the limited liability company with regard to the professional treatment or care of an individual patient, there is no inherent danger in permitting physicians to practice medicine in the employ of a limited liability company.

5. Petitioner has not requested that the Board of Medicine consider the implications of Section 455.236, Florida Statutes, or any other provision of Chapter 458, Florida Statutes, and therefore nothing in this Final Order should be considered as a statement related to the application of any such statutory provision to the intended plans of Petitioner.

WHEREFORE, the Board of Medicine hereby determines that under the specific facts of the Petition for Declaratory Statement, it is not a violation of Subsection 458.327(1), Florida Statutes, for a physician licensed in Florida to practice medicine in the employ of a limited liability company created pursuant to Chapter 608, Florida Statutes.

This Final Order takes effect upon filing with the Clerk of the Agency for Health Care Administration.

DONE AND ORDERED this 25 day of April, 1995.

BOARD OF MEDICINE


GARY E. WINCHESTER
CHAIRMAN

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS MAY BE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE CLERK OF THE AGENCY FOR HEALTH CARE ADMINISTRATION AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES REQUIRED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to Steven R. Cohen, M.D. c/o Thomas B. Smith, Attorney at Law, 150 Second Avenue North, St. Petersburg, Florida 33701, this _____ day of _____, 1995.

PETITION FOR DECLARATORY STATEMENT

Petitioner, Suncoast Medical Clinic, P.A. seeks a declaratory statement pursuant to Section 120.565, Florida Statutes (1993) and Section 61F6-18.003 of the Florida Administrative Code and states:

1. Name of Petitioner. The name of Petitioner is Suncoast Medical Clinic, P.A. ("Suncoast P.A.")

2. Address of Petitioner. The address of Petitioner is 700 6th Street South, St. Petersburg, FL.

3. Name of Agency. The name of the agency affected is the Florida Board of Medicine.

4. Statutory Provision. The statutory provision on which a declaratory statement is requested is the Medical Practice Act, Section 458, Florida Statutes (1993) (the "Act"). Specifically, the portion of the Act at issue is Section 458.327(1)(a) regarding the prohibition of the practice of medicine without a license.

5. Issue. The Petitioner seeks a declaratory statement by the Florida Board of Medicine regarding whether, under the facts set out below, a limited liability company (as defined under Section 608, Florida Statutes (1993)) formed by the Petitioner for the purpose of rendering medical services will be deemed to be practicing medicine without a license in violation of the Act.

6. Facts.

Suncoast P.A. is a professional corporation that renders medical services in Florida. Currently, it employs all of its approximately 35 shareholder/physicians, as well as several additional non-shareholder/physicians. All of the employee/physicians are licensed to practice medicine in Florida. Suncoast P.A. plans to form and become a member of a limited liability company, as defined under the Section 608 of the Florida Statutes, for the purpose of rendering medical services through its employed physicians. The limited liability company would be known as Suncoast Medical Clinic, L.C. ("Suncoast L.C.").

Suncoast P.A. further plans that a partnership known as Cardiology Consultants would be the other founding member of the limited liability company. Cardiology Consultants also renders medical services in Florida. That partnership consists of 4 professional associations, each of which is owned by and employs a single physician/shareholder. The partnership employs one or more additional physicians. All of the physicians employed either by Cardiology Consultants or by its partners are licensed to practice medicine in Florida.

Suncoast P.A. plans to have Suncoast L.C. employ all of the physicians that are presently employed by Suncoast P.A., Cardiology Consultants or the partners of Cardiology Consultants. Only the

limited liability company employee/physicians, all of whom will be licensed in Florida, will engage in the diagnosis, treatment, operation or prescription for any human disease, pain, injury or other physical or mental condition.

The limited liability company's employment agreements would all have language insuring that the independent judgment of the physicians would not be altered by their participation in the limited liability company. Furthermore, all employee/physicians would be compensated in a manner that would avoid violation of the Patient Self-Referral Act of 1992 and the federal anti-kickback and self-referral statutes.

7. Legal Analysis.

Two decisions of the Board of Medicine have determined that it is permissible to practice medicine through a business entity such as a corporation or partnership. See, In re: The Petition for Declaratory Statement of Conrad Goulet, M.D., Case no 89-BOM-01 (1989); In re: The Petition for Declaratory Statement of John W. Lister, M.D., 9 FALR 6299 (1988).

The decision in Lister was based specifically on a finding that nothing in the Florida Statutes, including Section 458.327(1)(a), prohibits such practice. The Board of Medicine in the Goulet case more definitively concluded that Section 458.327(1)(a) does not prohibit the practice of medicine by a duly licensed medical doctor as an employee of a corporation or a partnership even if all the shareholders or partners are not physicians. Similarly, since nothing in the Florida Statutes expressly prohibits the practice of medicine through a limited liability company, it follows from these earlier decisions of the Board of Medicine that the practice of medicine through limited liability companies must be permissible.

If the absence of statutory prohibitions is insufficient to convince the Board of Medicine to affirmatively declare that the practice of medicine should be permitted through limited liability companies, the Board should consider that limited liability companies operate just like corporations with respect to all essential elements, including the issue of member liability. In both corporations and limited liability companies, the shareholders/members are liable for their own errors and omissions, but other members and the entity are shielded from personal liability beyond the entity's assets. The only substantive difference between corporations and limited liability companies involves federal taxation. Corporations are subject to an entity level federal tax. In contrast, a carefully structured limited liability company will allow "pass-through taxation" with federal tax results that are generally similar to partnerships.

Since corporations and limited liability companies are essentially similar except for certain tax consequences that have no bearing on the practice of medicine, the Board of Medicine

should treat both types of entities in the same way. Accordingly, if corporations may employ physicians to practice medicine and may do so without violating Section 458.327(1)(a), then a limited liability company should also be permitted to employ physicians licensed by the Board of Medicine and do so without violating Section 458.327(1)(a).

Suncoast Medical Clinic, P.A.



Steven R. Cohen, M.D., Ph.D.,
President