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Comment

MEDICAL SERVICE PLANS IN CALIFORNIA

The emergence of voluntary medical service plans in California is a part of the national development of voluntary health insurance within the past fifteen years.¹ Today, the two largest plans in California, California

¹ By the end of 1951, 4.4 million residents of California (of an estimated resident civilian non-institutionalized population of 10,850,000) were covered by some form of voluntary health insurance. THE CALIFORNIA STATE CHAMBER OF COMMERCE, A SURVEY OF VOLUNTARY HEALTH INSURANCE IN CALIFORNIA 2 (1954). This figure (4.4 million) does not include workmen's compensation. *Id.* at xi. Though the term "voluntary health insurance" includes "medical service plans," the terms are not synonymous. In addition to medical service plans, voluntary health insurance encompasses Blue Cross Hospital Service plans, private insurance company plans, industrial health plans and private group clinic plans.

Physicians' Service and Kaiser Foundation Health Plan, have a combined membership of over one million.²

The period of growth of medical service plans has been marked in California by a dearth of authority as to what is lawful in their formation and operation, and in other aspects of the "medical business." With the exception of a 1954 case, *Complete Service Bureau v. San Diego County Medical Society*,³ the major California cases were decided prior to 1940.⁴ The lack of recent authority, and the range of problems presented, make the *Complete Service Bureau* case particularly noteworthy.

In 1939, one David Parmer and two friends, none of whom was licensed to practice medicine, incorporated Complete Service Bureau (CSB) under the general nonprofit corporation law, now section 9200 of the Corporation Code.⁵ The articles of incorporation recited that the main purposes of CSB were to establish a fund by periodic payments on the part of its members to be used to defray the costs of medical and hospital care, and to furnish or procure these services "without profit to any agency."⁶

Immediately after incorporation, Parmer leased a building and made arrangements with several doctors to occupy the premises and render medical services. Parmer was employed as business manager, his compensation consisting of 25% of the monthly dues paid by members, plus 25% of the gross revenue of CSB from any other source.⁷ In 1946 his compensation was reduced to 10% of member dues.

CSB, through salesmen and solicitors paid on a commission basis, sold medical care contracts for \$2.50 monthly dues. The agreements stated that CSB would provide hospitalization and medical services in accordance with a schedule of fees, and certain other benefits. An extensive advertising campaign was carried on.

² The most recently available data show the enrollment in California Physicians' Service to be 660,000. 82 CALIFORNIA MEDICINE (No. 2) 137 (February, 1955). The Kaiser Foundation Health Plan has approximately 475,000 subscribers. Office of the Manager, Northern Division, Kaiser Foundation Health Plan (March, 1955).

³ 43 Cal.2d 201, 272 P.2d 497 (1954), reversing 260 P.2d 1038 (1953).

⁴ See *People v. Pacific Health Corp.*, 12 Cal.2d 156, 82 P.2d 429, 119 A.L.R. 1284 (1938); *Benj. Franklin L. Assur. Co. v. Mitchell*, 14 Cal.App.2d 654, 58 P.2d 984 (1936); *Pacific Employers Ins. Co. v. Carpenter*, 10 Cal.App.2d 592, 52 P.2d 992 (1935); *Painless Parker v. Board of Dental Exam.*, 216 Cal. 285, 14 P.2d 67 (1932); *Messner v. Board of Dental Exms.*, 87 Cal. App. 199, 262 Pac. 58 (1927); *Comments*, 10 So. CALIF. L. REV. 329 (1937), 25 CALIF. L. REV. 91 (1936).

⁵ See note 26 *infra*.

⁶ A more complete statement of facts is given in the district court of appeal decision, 260 P.2d 1038 (1953).

⁷ In addition, he was given an option, coterminous with the contract, to purchase any or all of the property of CSB. In 1940, CSB purchased the leased premises, and in 1946 a reorganization was effected. Parmer and two others organized Group Property (GP), a stock corporation. Parmer then exercised his option under his management contract and purchased the building from CSB for \$31,000, the price payable in GP stock. Immediately thereafter he sold the building to GP for \$102,000, payable in GP stock. Thereupon, Parmer, as president of both GP and CSB, "negotiated" an oral lease, whereby the property was leased to CSB for a rental not exceeding 10% of the latter's gross income. GP spent about \$100,000 in remodeling and fixtures for the building. No salaries were paid by GP and no dividends declared or paid.

The doctors were compensated on a "unit" system.⁸ At the time of trial the CSB staff consisted of ten physicians, among whom members had free choice.

In 1948, CSB and three of the doctors associated with it brought suit against the San Diego County Medical Society and several of its members, alleging a conspiracy in restraint of trade in violation of the Cartwright Act.⁹ Plaintiffs sought damages and an injunction. Defendants cross-complained, alleging primarily that CSB and Parmer were unlawfully engaged in the corporate practice of medicine. Cross-complainants successfully moved to have the equitable issues tried by the court before the issues of law. After commencement of the trial, plaintiffs dismissed with prejudice the equitable issues raised by their complaint, and the cause went to trial on the equitable issues raised by the cross-complaint.

The trial court found: neither CSB nor Parmer were engaged in the unlawful or "corporate" practice of medicine; the manner in which Parmer was compensated did not constitute fee-splitting; the solicitation carried on by CSB was legitimate, and the advertising neither false nor misleading. Cross-complainants appealed from the judgment.¹⁰ Pending the appeal Mr. Parmer died.

The supreme court, two justices dissenting, affirmed the judgment of the trial court.¹¹ Three major questions involved in the judgment will be considered: (1) the corporate practice of medicine; (2) fee-splitting and the problem of profit; (3) the legal permissibility of certain advertising

⁸ Under the usual unit system, each medical or surgical service is assigned a unit value. At the end of the payroll period, the total units rendered by all doctors is divided into the sum of money to be distributed to the doctors, giving a monetary value to each unit. The individual doctor's units are multiplied by this figure to reach his compensation for that period. The arrangement, thus, is a modified fee-for-service. See *California Physicians' Service v. Garrison*, 28 Cal.2d 790, 172 P.2d 4 (1946); Peart & Hassard, *The Organization of California Physicians' Service*, 6 LAW & CONTEMP. PROB. 565, 566 n.6 (1939).

⁹ CAL. BUS. & PROF. CODE §§ 16700-16758. See *The Cartwright Act—California's Sleeping Beauty*, 2 STAN. L. REV. 200 (1949). The specific act of conspiracy alleged was exclusion of CSB doctors from local hospitals. Respondent's Brief, p. 2.

¹⁰ At the conclusion of the trial, cross-complainants unsuccessfully moved for judgment on the pleadings with respect to plaintiff's complaint, contending that with the equitable issues removed it failed to state a cause of action.

Whether a judgment on a cross-complaint is appealable, the issues raised by the complaint not having been disposed of, is questionable. See *Nicholson v. Henderson*, 25 Cal.2d 375, 153 P.2d 945 (1944); cf. *Sjoberg v. Hastorf*, 33 Cal.2d 116, 199 P.2d 668 (1948).

Whatever may have been the right of the medical society originally to maintain the action, the right to prosecute the action in behalf of the physicians was settled by the passage, pending the appeal, of section 2436 of the Business and Professions Code. This section provides that a superior court, on application of ten or more physicians, shall issue an injunction to restrain an unlicensed person from engaging in the practice of medicine. The provisions of the section bound the supreme court, as "... on appeals involving injunction decrees, the law in effect when the appellate court renders its opinion must be applied." *Tulare Dist. v. Lindsay-Strathmore Dist.*, 3 Cal.2d 489, 527-528, 45 P.2d 972, 987 (1935).

¹¹ *Complete Serv. Bur. v. San Diego Med. Soc.*, 43 Cal.2d 201, 272 P.2d 497 (1954). Amicus curiae briefs were filed in support of the medical society by the Southern California State Dental Association and the California State Dental Association, and in support of CSB by Cooperative Health Federation of America and Kaiser Foundation Health Plan.

and solicitation. In addition, the regulation and supervision of voluntary medical service plans will be briefly discussed.

The Corporate Practice of Medicine

In California, a corporation may not practice medicine.¹² One reason for this rule is the legalistic notion that a corporation, as an impersonal legal entity, cannot measure up to the standards of licensing statutes which require personal qualifications.¹³ Another is the public policy consideration that the bringing of a third party into the doctor-patient relationship tends to divide the doctor's loyalty between the patient and the corporation.¹⁴

The rule has not been universally followed,¹⁵ and has been criticized.¹⁶ In all the decisions adhering to it, the corporation involved was operated for profit.¹⁷

The first major California case involving the corporate practice rule was *Painless Parker v. Board of Dental Examiners*.¹⁸ Painless (*nee* Edgar Randolph) Parker was suspended for five years from the practice of dentistry by the board of dental examiners for aiding and abetting an unlicensed person (a corporation) to practice dentistry, in violation of statute.¹⁹ Parker claimed a distinction was to be made between the "practice of dentistry" and the "purely business side of the practice." The court refused to recognize any such distinction.²⁰

¹² *People v. Pacific Health Corp.*, 12 Cal.2d 156, 82 P.2d 429, 119 A.L.R. 1284 (1938); *Painless Parker v. Board of Dental Exam.*, 216 Cal. 285, 14 P.2d 67 (1932); 11 OPS. ATT'Y GEN. 236 (1948); Comments, 10 So. CALIF. L. REV. 329 (1937), 25 CALIF. L. REV. 91 (1936). CAL. BUS. & PROF. CODE § 2008 provides: "Corporations and other artificial legal entities have no professional rights, privileges or powers"

¹³ *Painless Parker v. Board of Dental Exam.*, 216 Cal. 285, 14 P.2d 67 (1932). See CAL. BUS. & PROF. CODE § 2141.

¹⁴ *People v. Pacific Health Corp.*, 12 Cal.2d 156, 82 P.2d 429 (1938).

¹⁵ See, e.g., *State Electro-Medical Institute v. State*, 74 Neb. 40, 103 N.W. 1078 (1905); *State v. Brown*, 37 Wash. 97, 79 Pac. 635 (1905); Comment, 10 So. CALIF. L. REV. 329 (1937).

¹⁶ See Hansen, *Legal Problems in the Organization and Operation of Group Health Plans*, 5 VAND. L. REV. 14 (1951); Hansen, *Laws Affecting Group Health Plans*, 35 IOWA L. REV. 209 (1950); Comment, 45 MICH. L. REV. 885 (1947); Note, 52 HARV. L. REV. 809 (1939).

¹⁷ Hansen, *Laws Affecting Group Health Plans*, 35 IOWA L. REV. 209, 216 (1950).

¹⁸ 216 Cal. 285, 14 P.2d 67 (1932).

In the earliest California case treating the issue of corporate practice of medicine, the court said, "There can be no doubt that a corporation may undertake to furnish the services of a competent physician . . ." *Pilger v. City of Paris Dry Goods Co.*, 86 Cal.App. 277, 283, 261 Pac. 328, 330 (1927). The statement was made in reference to a problem involving respondeat superior, was dictum, and was subsequently disapproved. *Pacific Employers Ins. Co. v. Carpenter*, 10 Cal.App.2d 592, 52 P.2d 992 (1935). The supreme court held in 1928 that an unlicensed person could operate a chiropody office if he employed a licensed person to treat the patients. *Renwick v. Phillips*, 204 Cal. 349, 268 Pac. 368 (1928). In *Messner v. Board of Dental Exmrs.*, 87 Cal.App. 199, 262 Pac. 58 (1927), where a lay manager purchased supplies, kept books, prepared advertising and superintended the laboratory, the separability of the business and professional aspects of dentistry was recognized; but the court said that if the "manager" had had power to hire and fire and to exercise control over purely professional activities, a "different question" would arise.

¹⁹ Formerly CAL. GEN. LAWS, act 2048, § 11(5). Today, CAL. BUS. & PROF. CODE § 1625 provides that one is practicing dentistry if he " . . . (e) Manages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed."

²⁰ *Painless Parker v. Board of Dental Exam.*, 216 Cal. 285, 296, 14 P.2d 67, 72 (1932).

The law does not assume to divide the practice of dentistry into such departments. Either one may extend into the domain of the other in respects that would make such a division impractical if not impossible. The subject is best treated as a whole. If the contention of appellant be sound, then the proprietor of the business may be guilty of gross misconduct in its management and violate all standards which a licensed dentist would be required to respect and stand immune from any regulatory supervision whatsoever. His employee, the licensed dentist, would also be immune from discipline upon the ground that he was but a mere employee and was not responsible for his employer's misconduct, whether the employer be a corporation or a natural person. On grounds of public policy such a condition could not be countenanced.

The court went on to state the metaphysical justification of the corporate practice rule.²¹

The underlying theory upon which the whole system of dental laws is framed is that the state's licensee shall possess consciousness, learning, skill, and good moral character, all of which are individual characteristics, and none of which is an attribute of an artificial entity.

That "a corporation cannot practice medicine" may be a conceptual truism, but as the dissenting justice in *Painless Parker* pointed out:²²

The terms of the [Dental Practice] [A]ct, in so far as they relate to the licensing of individuals and to the practice of dentistry, show clearly that they were directed to persons as distinguished from corporations "There was no necessity of legislation to prohibit corporations, as such, from practicing medicine The intention of the law is that one who undertakes to judge the nature of a disease or to determine the proper remedy therefor, or to apply the remedy, must have certain personal qualifications; and, if he does these things without having complied with the law, he is subject to its penalties. Making contracts is not practicing medicine. Collecting the compensation therefor is not practicing medicine No professional qualifications are requisite for doing these things." [*State Electro-Medical Institute v. State*, 74 Neb. 40, 103 N.W. 1078 (1905)].

People ex rel. Board of Medical Examiners v. Pacific Health Corporation,²³ a 1938 case, was a quo warranto proceeding against a California

²¹ *Painless Parker v. Board of Dental Exam.*, 216 Cal. 285, 295, 14 P.2d 67, 71 (1932).

²² Langdon, J., dissenting. *Id.* at 306-07, 14 P.2d at 76.

"The flaw in [the reasoning of the corporate practice rule] lies in its anthropomorphism. The law does not attribute the acts of a human being to that legal construct, the corporation. Instead, it imputes the legal consequences of such acts to the corporation." Laufer, *Ethical and Legal Restrictions on Contract and Corporate Practice of Medicine*, 6 LAW & CONTEMP. PROB. 516, 525 (1939).

²³ 12 Cal.2d 156, 82 P.2d 429, 119 A.L.R. 1284 (1938). *Pacific Employer's Ins. Co. v. Carpenter*, 10 Cal.App.2d 592, 52 P.2d 992 (1935) and *Benj. Franklin L. Assur. Co. v. Mitchell*, 14 Cal.App.2d 654, 58 P.2d 984 (1936) involved petitions for writs of mandate seeking to compel the insurance commissioner to approve certain health insurance policy forms. Both petitions were denied, on the ground that their issuance would result in the corporate practice of medicine, in that the policies contained provisions that medical services were to be rendered by doctors selected by the corporation. The policy in the second case had a slight wrinkle—a "Policy-Holders Committee" was to select the doctors. However, since the committee was a company committee, the policy was affected with the same vice as in the former case.

corporation operated for profit. The corporation issued contracts by the terms of which it undertook to pay for medical and hospital services. The court held the corporation to be illegally engaged in the practice of medicine. The corporation's contention that the doctors were independent contractors was rejected.²⁴ Three justices dissented.

The corporation contended that an adverse decision would outlaw all fraternal, religious, labor and similar organizations furnishing medical services to members. The court's answer to this contention contains some perplexing language, and was the occasion of some debate between counsel in the *Complete Service Bureau* case.²⁵

But a most obvious and, to us, a fundamental distinction must be made between defendant and these other institutions. In nearly all of them, the medical service is rendered to a limited and particular group as a result of cooperative association through membership in the fraternal or other association, or as a result of employment by some corporation which has an interest in the health of its employees. The public is not solicited to purchase the medical services of a panel of doctors; and the doctors are not employed or used to make profits for stockholders. In almost every case the institution is organized as a nonprofit corporation or association. Such activities are not comparable to those of private corporations operated for profit and, since the principal evils attendant upon corporate practice of medicine spring from the conflict between the professional standards and obligations of the doctors and the profit motive of the corporation employer, it may well be concluded that the objections of policy do not apply to nonprofit institutions.

Regardless of this dictum, the court in *Complete Service Bureau* could have gone either way on the authority of the *Pacific Health* case, depending on whether it found the operations of CSB to be "profit" or "nonprofit."

CSB was incorporated under the general nonprofit corporation law, section 9200 of the Corporations Code.²⁶ This is the section under which

²⁴ *Contra*, Group Health Ass'n. v. Moor, 24 F. Supp. 445 (D.D.C. 1938), *aff'd sub nom.* Jordan v. Group Health Ass'n., 107 F.2d 239 (D.C. Cir. 1939).

²⁵ The quotation is from *People v. Pacific Health Corp.*, 12 Cal.2d 156, 160, 82 P.2d 429, 431 (1938). Counsel for Complete Service Bureau quoted the case for the proposition that "objections of policy do not apply to *non-profit* institutions" while counsel for the medical society correctly pointed out that the court was speaking of a "cooperative association" by which "[t]he public is *not solicited* to purchase the services of a panel of doctors; and the doctors are not employed or used to make *profits* for stockholders . . ." Cf. *County of Los Angeles v. Ford*, 121 Cal.App.2d 407, 263 P.2d 638 (1953); *Rice v. California Lutheran Hospital*, 27 Cal.2d 296, 163 P.2d 860 (1945); *Guilliams v. Hollywood Hospital*, 18 Cal.2d 97, 114 P.2d 1 (1941); *Benj. Franklin L. Assur. Co. v. Mitchell*, 14 Cal.App.2d 654, 58 P.2d 984 (1936).

²⁶ CAL. CORP. CODE § 9200 provides: "A nonprofit corporation may be formed by three or more persons for any lawful purposes which do not contemplate the distribution of gains, profits, or dividends to the members thereof and for which individuals lawfully may associate themselves, such as religious, charitable, social, educational, or cemetery purposes, or for rendering services, subject to laws and regulations applicable to particular classes of nonprofit corporations or lines of activity. Carrying on business at a profit as an incident to the main purposes of the corporation and the distribution of assets to members on dissolution are not forbidden to nonprofit corporations, but no corporation formed or existing under this part shall distribute any gains, profits, or dividends to any of its members as such except upon dissolution or winding up."

California Physicians' Service (CPS), a medical society sponsored plan, was first incorporated.²⁷ In 1941 the legislature passed what is now section 9201 of the Corporations Code. CPS now operates under this section, which was sponsored by the California Medical Association.²⁸ It provides that a nonprofit corporation may be formed for the purpose of defraying or assuming the cost of professional services of licentiates of the healing arts.

It was the contention of the medical society that the passage of section 9201 was a manifestation of legislative intent that section 9201 should be the exclusive section under which medical service plans could incorporate. This contention was rejected.²⁹ The court was not unmindful of the fact that requisite to incorporation under section 9201 is satisfaction of the requirement that "... (a) At least one-fourth of all licentiates of the particular profession become members."

Apparently Kaiser Foundation Health Plan, amicus curiae, and many fraternal and beneficial organizations which provide medical services to their members are incorporated under section 9200. These organizations, and particularly CSB, which was incorporated under section 9200 prior to the enactment of section 9201, entered into contracts with subscribers and other persons to effectuate their purposes In addition, the evidence in this case shows that CPS is sponsored by the California Medical Association and all of the county medical societies. If section 9201 should be held to be the only section under which a nonprofit medical service corporation may incorporate CPS might exercise a monopoly in that field³⁰

Advertising and Solicitation

The Boards of Medical³¹ and Dental³² Examiners may suspend or revoke licenses of practitioners for unprofessional conduct.³³ The Practice Acts proscribe, among other things, certain kinds of advertising and solicitation,³⁴ and define means by which the professions may regulate advertis-

²⁷ Complete Serv. Bur. v. San Diego Med. Soc., 43 Cal.2d 201, 272 P.2d 497 (1954); Peart and Hassard, *The Organization of California Physicians' Service*, 6 LAW & CONTEMP. PROB. 565, 567 n.11 (1939).

²⁸ Interview with Mr. John Hunton, Executive Secretary, California Medical Association (March, 1955).

²⁹ The court disapproved a contrary dictum in *Maloney v. American I. M. & H. Ass'n.*, 119 Cal.App.2d 319, 259 P.2d 503 (1953). In that case, a company was found to be actually transacting an insurance business for profit, and the fact of incorporation under CAL. CORP. CODE § 9200 did not preclude an action against the corporation for violation of provisions of the Insurance Code.

³⁰ Complete Serv. Bur. v. San Diego Med. Soc., 43 Cal.2d 201, 209-210, 272 P.2d 497, 502 (1954).

³¹ The Medical Practice Act is found in CAL. BUS. & PROF. CODE §§ 2000-2497.

³² The Dental Practice Act is found in CAL. BUS. & PROF. CODE §§ 1600-1752.

³³ Physicians: CAL. BUS. & PROF. CODE § 2360. Dentists: CAL. BUS. & PROF. CODE § 1680.

³⁴ See, e.g., CAL. BUS. & PROF. CODE §§ 1680, 2380, 2380.5, 2393, 2399.

"The legislature was not dealing with traders in commodities, but with the vital interests of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency of individual practitioners, but with protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief.

ing and solicitation by individual members. However, when it is a corporation which is advertising, the problem is a different one. Sanctions which may be imposed on individuals are either lacking or less effective. The threat of license suspension or revocation acts as a powerful deterrent to the individual practitioner tempted to advertise his services, but a corporation has no license to revoke.

Provision for remedy is found in the Practice Acts. The Dental Practice Act provides that a superior court, on application of the board, shall issue an injunction to restrain an unlicensed person from engaging in the practice of dentistry.³⁵ Section 2436 of the Medical Practice Act contains substantially the same provisions.³⁶

In *Complete Service Bureau v. San Diego County Medical Society*,³⁷ the medical society claimed that the advertising and solicitation of CSB violated various provisions of the Medical Practice Act; viz., the employment of "cappers" or "steerers" in procuring practice for a practitioner;³⁸ advertising of the medical business without stating the names of the practitioners;³⁹ and advertising of the medical business in a manner having a tendency to deceive the public or impose upon credulous or ignorant persons.⁴⁰ Counsel for CSB answered, with some reason and justification, that California Physicians' Service, a medical society sponsored plan, engaged in approximately the same type of advertising. The medical society attempted to distinguish the activities of CPS from those of CSB on the ground that CPS employs no physicians, and thus advertises for no particular doctor or group of doctors, while CSB's advertising was aimed solely at procuring business for a particular panel of ten doctors.

The court held that all the soliciting and advertising activities of CSB were lawful, and that the statutory provisions⁴¹ regarding advertising

And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards . . . The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement." *Semler v. Dental Examiners*, 294 U.S. 608, 612-613 (1935). *But see* Carter, J., dissenting, in *Webster v. Board of Dental Examiners*, 17 Cal.2d 534, 545, 110 P.2d 992, 998 (1941): "No reason has been suggested, and none has occurred to me, why an advertisement in a newspaper depicting in a fair and truthful manner the character or quality of service which a member of a profession offers to the public should be prohibited."

³⁵ CAL. BUS. & PROF. CODE § 1705.

³⁶ See *Complete Serv. Bur. v. San Diego Med. Soc.*, 43 Cal.2d 201, 272 P.2d 497. About thirty members of the San Diego County Medical Society maintained the action. See note 10 *supra*.

³⁷ 43 Cal.2d 201, 272 P.2d 497 (1954).

³⁸ CAL. BUS. & PROF. CODE § 2399. A "capper" has been defined as "a decoy or lure, for the purpose of swindling," and a "steerer" as "one who gains the confidence of the person to be fleeced." *Barron v. Board of Dental Examiners*, 109 Cal.App. 382, 385, 293 Pac. 144, 145 (1930).

³⁹ CAL. BUS. & PROF. CODE § 2380.5.

⁴⁰ CAL. BUS. & PROF. CODE § 2380.

⁴¹ CAL. BUS. & PROF. CODE §§ 2380.5 and 2399.

without using the practitioner's name, and solicitation, were not applicable to nonprofit medical service corporations, regardless of whether the medical service plan is open or closed panel.

Though the court held for CSB on the merits,⁴² it rejected the contention that the code section defining deceitful advertising⁴³ is applicable only to members of the medical profession and not to nonprofit medical service corporations. As the court pointed out, the statutory language "all advertising of medical business" is sufficient to include nonprofit medical service corporations.

The determination of the court as to what rules should obtain regarding advertising and solicitation for medical service corporations would seem correct. There is a distinction between advertising medical care and advertising a method of obtaining and paying for medical care.⁴⁴ Advertising and solicitation are legitimate means of securing members for such plans.

The distinction which the medical society would draw between "open-panel" and "closed-panel" plans is too fine a line. Were this distinction accepted, CPS would be put in a preferential class by itself. Being medical society sponsored and controlled, CPS, as a practical matter, is the only medical service plan which could measure up to such a criterion.

Fee-Splitting and the Problem of Profit

In the *Complete Service Bureau* case, one of the issues, and the major ground of Justice Edmonds' dissent, was the manner in which Parmer was compensated. Under his management contract, he received ten per cent of the membership dues, and his average annual income 1939-1951 was \$8,300.

The court held this arrangement lawful. The finding of reasonableness in amount of Parmer's compensation was supported by the testimony of Dr. Clifford Loos of the Ross-Loos Medical Group. The result may be correct, but the court was somewhat vague on the precise issue of just why these arrangements were not "fee-splitting."⁴⁵

⁴² The determination of the trial court was quoted with approval: "The phrase 'prepaid medical plan' is employed by both CSB and CPS in their advertising. Neither one really offers what might be called a fully prepaid medical plan—a plan which entitles a member to full medical service on prepayment of his dues. The member understands that the prepayment of his dues entitles him to participate in the plan. He knows that for certain types of care and treatment he will have to pay the scheduled fee . . . No one is deceived, no one is misled." *Complete Serv. Bur. v. San Diego Med. Soc.*, 43 Cal.2d 201, 214, 272 P.2d 497, 505 (1954).

⁴³ CAL. BUS. & PROF. CODE § 2380.

⁴⁴ A contrary view was expressed by Dr. Clifford Loos, Ross-Loos Medical Group, Appellants' Opening Brief, p. 76. "[A] number of individuals practicing medicine gathered into a group should not have any prerogatives or privileges that the individual practitioner of medicine does not have. I feel that every group of doctors practicing as a group should not engage in those practices that individual physicians do not engage in." Query: Is advertisement and solicitation by a medical service corporation the same as advertisement and solicitation by a "group of doctors"?

⁴⁵ "Fee-splitting agreements between professional men and laymen as a reward for procuring employment tend to commercialize the profession, are contrary to public policy and are void." Edmonds, J., dissenting, *Complete Serv. Bur. v. San Diego Med. Soc.*, 43 Cal.2d 201,

It is customary for medical groups to pay rent, employ business managers, and compensate members on a unit basis . . . There is substantial evidence to support the trial court's finding and conclusion that: "No one of cross-defendant physicians and surgeons has ever engaged in splitting fees with unlicensed persons not entitled to practice medicine or surgery in the State of California."⁴⁶

Exactly what this means is not entirely clear. The court clearly indicates that "fee-splitting" is bad, but that in this particular case the arrangements were legitimate because "customary." However, the paying of rent and employment of a business manager by a medical group is something quite different from allowing a particular individual to cream a fixed percentage off the top of the gross intake.

The court would have been both more candid and clear had it held simply that compensation of laymen for performing non-medical tasks is lawful, whether the lay-performed services are for one or more doctors, or for a medical service plan. A medical service plan with thousands or hundreds of thousands of subscribers must of necessity have skilled administrative talent, and it should make no difference whether the layman is compensated on a salary or percentage basis. If the crucial consideration is that money paid in by the public should not go for excessive administrative salaries, such object may be achieved as well by a standard of reasonableness as by outlawing compensation on a percentage basis. Perhaps this is what the writer of the majority opinion had in mind when he said *Parmer's* contract was not unlawful because the amounts actually received were reasonable.

The practice of medicine has its business aspects—office space must be acquired, patients must be billed, and the bills collected. That a good doctor is also a good businessman is a proposition substantially lacking in factual foundation. What objection is there, legal, medical, or ethical, to a layman's acting as business manager for a doctor, provided he performs no non-medical activity which the doctor himself could not perform, such as advertising in a deceitful manner.

If there is to be a rule against "fee-splitting," it should be applied to the employment of "cappers" or "steerers"⁴⁷ and like activities; not to the everyday business tasks incident to the practice of medicine. That only a doctor should practice medicine is true; but that only a doctor should perform the non-medical duties relating to that practice is nonsense.

In the instant case, however, all questions of "fee-splitting" had become

219, 272 P.2d 497, 508 (1954). The law on the subject is apparently slight. The only authority cited by Justice Edmonds for the above quoted proposition is an American Law Reports annotation concerning attorneys (86 A.L.R. 195). For arrangements held not to be fee-splitting, see *Linden v. Moore*, 68 Cal.App.2d 501, 157 P.2d 15 (1945); *Rossiter v. Thompson*, 66 Cal.App. 491, 226 Pac. 806 (1924).

⁴⁶ *Complete Serv. Bur. v. San Diego Med. Soc.*, 43 Cal.2d 201, 213, 272 P.2d 497, 504 (1954).

⁴⁷ See note 38 *supra*.

moot at the time of the decision. Mr. Parmer had died, his management contract had been terminated, and his stock in GP was owned by CSB. These facts undoubtedly took some of the sting out of the medical society's argument. The society contended that CSB and Parmer were practicing medicine: that since Parmer was the true and beneficial owner of CSB, CSB was the "alter ego" of Parmer, and the acts of CSB were his acts, and those acts consisted of selling the services of physicians, and physicians practice medicine. *Ergo*, Parmer was practicing medicine. *Q.E.D.*⁴⁸

The logic is precarious. If the fundamental difference between medical care and a method of paying for medical care is once recognized, the difficulties generated by conceptually blending them into one largely disappear. Practicing medicine is something quite different from the non-medical activity of contracting with licensed physicians to treat people on a full or partial prepayment basis.

So much for the method of operation. A further consideration is the profit or nonprofit character of the plan. The word "profit" has "been generally held to convey the meaning of operated or conducted for the *purpose* of making a profit."⁴⁹ Whether the operations of CSB were nonprofit in the sense contemplated by language in the *Pacific Health*⁵⁰ case or section 9200 of the Corporations Code is subject to dispute. Even the dissenting justices in the *Complete Service Bureau* case apparently have no legal objections to the formation of a true nonprofit corporation for the purpose of obtaining medical service for its members. But Justice Spence, dissenting, saw in the operations of CSB something other than the legitimate activities of a nonprofit corporation.⁵¹

[T]he majority opinion . . . affirms a judgment which places the stamp of approval upon a plan whereby Parmer and certain lay associates developed a commercial venture for profit, in which venture Parmer and his lay associates solicited patients for a limited panel of doctors selected by them and split the medical fees and other income derived from these activities Parmer, acting individually and through Group Property, a profit corpora-

⁴⁸ Appellants said in their closing brief, p. 36-7: "The activities of CSB, moreover, necessarily involve competition with other doctors, and, if successful, as no one denies they are, result in injury to them. The finding to the contrary is not supported by the evidence. *The only real question is whether the injury is lawful or not.* Respondent's argument that CSB furnishes its patients good medical care, is, therefore, beside the point. We made no attempt at the trial to prove that CSB does not sell good medical care, because it is immaterial whether the care it sells is good or bad It is utterly immaterial whether in a particular case, a *lay person* who hires doctors to practice medicine for him, and sells their services to the general public hires good doctors or bad doctors. It is utterly immaterial whether he tells them how to treat their patients or whether he leaves that up to their judgment. It is immaterial whether a *corporation* which hires doctors and sells their services to the public, hires good or bad doctors, or whether or not it tells them how to treat their patients. Under our statutes, it is simply unlawful for either the corporation or the lay individual to employ the doctors and sell their services at all."

⁴⁹ *Sutter Hospital v. City of Sacramento*, 39 Cal.2d 33, 37, 244 P.2d 390, 392 (1952). See *Stonaker v. Big Sisters Hospital*, 116 Cal.App. 375, 2 P.2d 520 (1931).

⁵⁰ *People v. Pacific Health Corp.*, 12 Cal.2d 156, 82 P.2d 429 (1938).

⁵¹ 43 Cal.2d 201, 217, 272 P.2d 497, 506 (1954).

tion which he controlled, was intervening as a "middleman" for profit in establishing the professional relationships between a group of approximately ten doctors and members of the public. Arrangements of this type have been consistently condemned.

Justice Spence went on to say that as the incorporators as individuals could not have developed the plan, it "could not be made lawful by the mere device of forming a so-called nonprofit corporation . . ."⁵²

What the *Complete Service Bureau* case means in terms of future judicial or legislative action is difficult to say. Certainly it is clear that the separation of the "business" from the "practice" side of the profession is currently judicially recognized, in marked contrast to the steadfast refusal of the court to recognize any such dichotomy in *Painless Parker v. Board of Medical Examiners*.⁵³ This is a valid and socially desirable distinction.

Generally, the case law prior to *Complete Service Bureau* adds up to a proscription of furnishing medical care through any "business" device. Efforts were directed toward keeping the layman "out of medicine" and the courts were willing enough to find the layman "in medicine." Though none of the old cases were overruled in *Complete Service Bureau*, it is significant that none were even cited. Surely there has been a change in the composite judicial attitude and approach. "We do not nowadays refute our predecessors, we pleasantly bid them good-bye."⁵⁴

Regulation and Supervision

At present there is no integrated pattern of regulation of the many organizations offering medical or hospital insurance or care. This is proper, in view of the different modes of organization and operation of various services and of the benefits they offer. Insurance companies are under the regulation of the insurance commissioner. Blue Cross is organized under a chapter of the Insurance Code,⁵⁵ an enabling act legalizing the establishment of nonprofit hospital service corporations. Being insurance, it is subject to regulation and supervision by the insurance commissioner. Clinics are governed by the Clinic Permit Act.⁵⁶

The Corporations Code makes California Physicians' Service expressly subject to examination by the Attorney General.⁵⁷ The Attorney General's

⁵² *Id.* at 218, 272 P.2d at 507. See *The People v. United Medical Service*, 362 Ill. 442, 200 N.E. 157 (1936).

⁵³ 216 Cal. 285, 14 P.2d 67 (1932).

⁵⁴ George Santayana, quoted in *COMMAGER, THE AMERICAN MIND* 332 (Yale University Press 1950).

⁵⁵ CAL. INS. CODE §§ 11491-11517 (Ch. 11A of Part 2 of Division II).

⁵⁶ CAL. HEALTH AND SAFETY CODE §§ 1200-1251. See Note, 4 STAN. L. REV. 401 (1952).

⁵⁷ CAL. CORP. CODE § 9505 provides: "A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it is formed . . ."

California Physicians' Service v. Garrison, 28 Cal.2d 790, 172 P.2d 4 (1946) held that CPS was not subject to regulation by the insurance commissioner, in that it offers "service" rather than "indemnity," and assumes no risk. Whatever the merits of this distinction, it seems that

Office has no policy of affirmative regulation, but does handle complaints through informal negotiation with CPS. By agreement, the same arrangement has been initiated with Kaiser Foundation Health Plan.⁵⁸

Where CSB, Ross-Loos and similar group plans fit into the regulatory pattern is difficult to say. No express regulatory provision is contained in section 9200 of the Corporations Code, though probably some of these plans fall within the language of section 9505 of the Corporations Code as nonprofit corporations holding property "subject to any public or charitable trust," thus subject to examination by the Attorney General.

Conclusion

Whether medical service plans are to be encouraged, or whether they are to be discouraged through constrictive legislative limitation is a political question. It is not a question of "medical ethics," and nothing is gained by couching political conclusions in the language of moral postulates, as the medical associations are wont to do.⁵⁹

If there is to be improvement in the manner by which people receive medical care, it is imperative that experimentation—group practice, salaried practice, lay sponsorship and prepayment—be allowed. To that end the *Complete Service Bureau* case seems a desirable step.

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CSB neatly fits the "service" category and thus would not be subject to regulation by the insurance commissioner. A possible distinction is that CSB's staff is a "closed-panel" of ten physicians, whereas CPS offers a patient his choice of twelve thousand licensed California physicians. 82 CALIFORNIA MEDICINE (No. 2) 137 (February, 1955). Be that as it may, the benefits offered by CSB and Kaiser Foundation Health Plan are no less service than those obtained through CPS.

⁵⁸ Interview with Mr. Harold B. Haas, Deputy Attorney General, State of California (March, 1955).

⁵⁹ Comment, *The American Medical Association*, 63 YALE L.J. 938, 976 (1954). See *American Medical Association v. U.S.*, 317 U.S. 519 (1943); *Group Health Etc. v. King Co. Med. Soc.*, 39 Wash.2d 586, 237 P.2d 737 (1951). At the national convention of the American Medical Association in San Francisco in June of 1954, Resolution 16 was introduced for the New York delegation, and referred to the Judicial Council of the AMA. Resolution 16 provides in part: "The interjection of a third party who has a valid interest, or who intervenes between the physician and the patient does not per se cause a contract to be unethical If, however, the third party be an organization or corporation which agrees to provide medical and/or surgical services through the medium of individual or group practice, payment to the physicians under contract being either on an indemnity or a per capita basis, a requirement restricting choice of physician to either the individual or group practitioners under contract vitiates the subscriber's right to free choice of physician. This is contrary to the best interests of the public and of the medical profession." 155 A.M.A.J. 1249 (1954).