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## Franchising for Medical, Dental and Veterinary Practices

In this article, I explain the legal issues for health care franchises. Medical, dental, and veterinary franchises exist in the marketplace, witness Doctors Express, Comfort Dental, and Banfield Pet Hospital. Let's see if they're legal.

### CORPORATE PRACTICE OF MEDICINE

The prohibition against the corporate practice of medicine is the most important law regarding the franchising of a medical, dental or veterinary practice. Briefly, the ban on the corporate practice of medicine means that non-licensed persons and corporations may not own or control a health care practice.

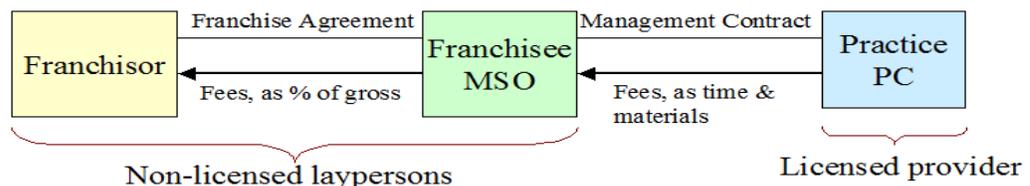
Corporate practice of medicine directly affects the three fundamental elements of a franchise. The three elements of a franchise are:

- #1. Control – the franchisee uses the franchised business system, and is subject to franchisor's control.
- #2. Fees – the franchisee pays fees to the franchisor.
- #3. Trademark – the franchisee uses the franchisor's trademark.

**#1- Control.** The first element of a franchise is control. All franchisors exert control over, and are intimately involved with, their franchisees' business operations. This implicates the legal prohibition on the corporate practice of medicine, because laypersons may not control a health care practice.

The Doctors Express franchise system (for urgent care centers) tries to solve the problem by separating the business side of the practice from the medical side. Most health care franchises take this approach. In brief, Doctor's Express argues that the franchise is not for a medical practice, instead, the franchise is for a practice management business that supports a separate medical practice. This is a PC / MSO model. The franchisee is a management services organization (MSO) that provides business support for a professional corporation (PC). The PC runs the health care practice, and in theory, this leaves the PC with absolute control over the practice of medicine, dentistry or veterinary services.

Here's a visual of the structure:



**#2- Fees.** The second element of a franchise is the payment of fees to the franchisor. Most franchisors take a percentage of the franchisee's gross revenue. This can violate the prohibition on fee splitting between laypersons and health care providers. A licensed healthcare professional (in our example, the PC) may not share professional fees with a non-licensed layperson (the franchisor or franchisee / MSO). The easiest way to handle this problem is to have the PC pay the franchisee / MSO on a time & materials basis (not a revenue share), and the franchisee / MSO pays the franchisor its percentage of gross. See above picture.

**#3- Name.** The third element of a franchise is the right to use the franchisor's name. No one seems to be paying attention to this element, but here's my 2 cents-- the essence of a franchise is for the franchise system to bring business (patients) to the franchisee through the franchisor's active marketing. Because California law requires that the doctor have sole control over advertising, it might be illegal for the franchisor to market on behalf of its franchisees. We'll see if the regulators figure this one out.

Can you franchise a health care practice without violating the ban on the corporate practice of medicine? I don't know. I can't tell you if Doctors Express is legal, but I can tell you that the CA Medical Board has already objected to a similar structure regarding a franchised med spa.

## HIPAA AND MORE

Every entity that receives patient data must be HIPAA compliant. The requirement of HIPAA compliance flows with the patient data. The patient data originates with the PC, then flows to the MSO as the MSO performs its business services for the PC, and then to the franchisor. The franchisor invariably has access to all data of its franchisees, whether to monitor the individual franchisee or to perform high-level data mining on the franchise system.

Doctor's Express tries to solve the HIPAA problem by drawing a line between: (1) individual patient data (which it says it never looks at), and (2) generic data which the franchisor uses to understand the business, for example, the number of patients per day, revenues per patient, repeat visits, and coding. Doctor's Express also has the PC enter into a HIPAA Business Associate Agreement with the franchisee / MSO. I advise an additional Business Associate Agreement for the franchisor. I also advise that each patient sign a HIPAA-compliant authorization to use the patient's data.

Never forget that health care franchising exists at the edge of the legal envelope. I don't know if a health care franchise can be compliant with the corporate practice of medicine, with HIPAA, or with the kickback and referral laws. [As regards referrals, beware when the franchisor drives referrals to franchisees, e.g. when the franchisor has a web-based referral center, or the franchisor has consultants who obtain patients for franchisees.] Health care laws are voluminous in text, broad in scope, meager in intelligence, and they weren't drafted with franchising in mind. We must wait and see how the regulators react to franchising.

## Marilyn Monroe

- It's not true that I had nothing on. I had the radio on.
- Wanting to be someone else is a waste of the person you are.
- No one ever told me I was pretty when I was a little girl. All little girls should be told they're pretty, even if they aren't.

