N.D.A.G. Letter to Hoy (Oct. 23, 1990)

October 23, 1990

Mr. Robert G. Hoy
Cass County State's Attorney
P.O. Box 2806
Fargo, ND 58108

Dear Mr. Hoy:

Thank you for your April 12, 1990, letter requesting an opinion concerning a nonprofit corporation employing physicians and surgeons providing medical care within North Dakota.

Your first question is whether North Dakota prohibits a nonprofit corporation from employing physicians and surgeons to provide medical care in North Dakota. You ask this question in light of N.D.C.C. § 43-17-34 which provides for a class B misdemeanor offense if any person practices medicine in the state without complying with the provisions of N.D.C.C. ch. 43-17. Apparently, you may be called upon to determine whether a class B misdemeanor offense has occurred in a situation where a nonprofit corporation may be considered practicing medicine within the state and where the corporation has not been licensed to practice medicine.

As noted, a criminal offense is committed when persons practice medicine unlawfully within the state. Traditionally, this office has refrained from issuing Attorney General's opinions determining whether a criminal offense has occurred in a particular factual situation. It has been the long-standing policy of this office that the state's attorney of each county is primarily responsible for reviewing the facts and circumstances of each particular case to determine whether a criminal offense has occurred and whether a prosecution must result. Prosecutorial discretion is an important part of a prosecutor's responsibility to the public which he serves.

I believe this tradition and policy should be continued. I have refrained from issuing opinions determining whether a set of facts constitutes a criminal offense. Instead, I believe it is appropriate to defer to the state's attorney's judgment in each particular case. Members of my staff are always available to state's attorneys for consultation and for a second opinion if one is requested. However, I do not believe it is appropriate for the Attorney General to compel the state's attorney to act by issuing a decision indicating that a certain factual situation will result in a criminal offense.

As a general observation intended only to assist and provide counsel, I believe that North Dakota public policy prohibits a corporation, other than a professional corporation, from employing physicians to provide medical care.

The general rule is that a statute authorizing the formation of corporations to carry on any lawful business does not include the work of learned professions except in those jurisdictions where there is legislation authorizing professional corporations. New York State Optometric Ass'n, Inc. v. Whelan, 389 N.Y.S.2d 161 (N.Y. App. Div. 1976); Kelley v. Duling Enterprises, Inc., 172 N.W.2d 727 (S.D. 1969); Kerner v. United Medical Service, Inc., 200 N.E. 157 (Ill. 1936); State v. Goldman Jewelry Co., 51 P.2d 995 (Kan. 1935). This rule has been applied to the practice of medicine holding it to be an impermissible corporate object. Garcia v. Texas State Board of Medical Examiners, 358 F. Supp. 1016 (W.D. Tex. 1973), vacated 492 F.2d 131 (5th Cir. 1974), on remand 384 F. Supp. 434 (W.D. Tex. 1974), aff'd, 421 U.S. 995 (1975). The general reason for this rule is that human personal qualifications required for the practice of these professions cannot be possessed by a corporation. 1A Fletcher C Corp § 97 (Rev. Ed. 1983).

This general rule has been accepted in North Dakota with respect to the practice of architecture. In State Board of Architecture v. Kirkham, Michael and Associates, Inc., 179 N.W.2d 409 (N.D. 1970), the court noted that the law regulating architects referred to an individual's personal qualifications including one's legal age, character, and prescribed study courses. Based upon these requirements, the court concluded that a non-human entity could not be licensed to practice this profession. "All of the above makes it obvious that a corporation is not qualified to be licensed to practice architecture under our law " 179 N.W.2d at 412.

The North Dakota laws regulating the practice of medicine are found at N.D.C.C. ch. 43-17. In reviewing the statutes in N.D.C.C. ch. 43-17, it appears the term "person" is used routinely to refer to a human as opposed to a business organization. For example, N.D.C.C. § 43-17-01(2) defines the practice of medicine to include the situation when "one" holds "himself" out to the public as being engaged in the diagnosis and treatment of diseases and injuries of human beings. Additionally, N.D.C.C. § 43-17-02(1) exempts certain "students" from the provisions of the chapter. Because the chapter refers specifically to human qualifications which cannot be possessed by a business organization, I believe the rule announced in State Board of Architecture would also be applied to the practice of medicine and that our supreme court would hold that a corporation is not qualified to be licensed to practice medicine in our state at this time.

For all these reasons, I believe that it would be proper for a state's attorney to conclude that the prohibition found within N.D.C.C. § 43-17-34 applies to non-professional corporations practicing medicine. However, the ultimate determination of whether a crime has been committed in a particular factual situation must be left to the state's attorney in each and every case.

Your second question is whether a nonprofit corporation may be organized to employ physicians and surgeons to provide medical care in North Dakota. This question does not appear to be related to your duties as state's attorney in determining whether the criminal offense provided for by N.D.C.C. § 43-17-34 has occurred. Instead, this would be the concern of the Secretary of State's Office in the event nonprofit corporation papers are submitted to that office for filing and for the issuance of the certificate of incorporation.

Because a question may still result from the Secretary of State's Office, I will respond to your question and will provide a copy of my response to Secretary of State Jim Kusler.

N.D.C.C. § 10-24-04 allows nonprofit corporations to be organized for any one or more lawful purpose not for pecuniary profit and not incorporable under the Business Corporation or Cooperative Association Acts. Based upon the outline submitted with your letter describing the manner and structure in which the nonprofit corporation will operate, I assume that this organization would not be incorporable under the Business Corporation Act or the Cooperative Association Act. Thus, the remaining question is whether it is a lawful purpose for a nonprofit corporation to employ physicians and surgeons providing medical care.

N.D.C.C. § 10-24-30 states that if the Secretary of State finds the articles of incorporation of a nonprofit corporation conform to law, he must file the documents and issue a certificate of incorporation if all the necessary fees have been paid. A similar provision exists for profit corporations. N.D.C.C. § 10-19.1-11.

In Coal Harbor Stock Farm, Inc. v. Meier, 191 N.W.2d 583 (N.D. 1971), the North Dakota Supreme Court reviewed the Secretary of State's refusal to accept articles of incorporation which indicated the corporation's purpose was to engage in the business of farming or agriculture. In 1971 for-profit corporations were not authorized to engage in that business pursuant to a specific statute. N.D.C.C. § 10-06-01. Thus, acting upon the authority to review articles of incorporation to determine compliance with law, the Secretary of State refused to file the documents submitted to him.

The North Dakota Supreme Court agreed with the Secretary of State's decision to refuse the corporation's articles of incorporation. The court concluded the presence of a statute indicating a corporation could not engage in a particular purpose was sufficient to justify the Secretary of State's action. The court stated:

> "Where the statutes authorize the formation of corporations for 'any lawful purpose,' the word 'unlawful,' as applied in this connection, is not used exclusively in the sense of malum in se or malum prohibitum; it is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do -- in other words, such acts, powers, and contracts as are ultra vires."

191 N.W.2d at 588 (quoting 18 Am. Jur.2d Corporations, § 33).

I believe the same analysis should be used by the Secretary of State if he is presented with articles of incorporation for a nonprofit corporation seeking to employ physicians and surgeons providing medical care. The rule in this state appears to prevent the practice of a learned profession by a non-professional corporation. Therefore, the Secretary of State should refuse to accept these documents based upon the decision in State Board of Architecture.

I hope this discussion is helpful to you and to the Secretary of State.

Sincerely,

Nicholas J. Spaeth

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cc: Secretary of State Jim Kusler