

**DECLARATORY RULING OF  
THE  
MEDICAL LICENSURE COMMISSION OF ALABAMA**

The Medical Licensure Commission (the "Commission") and the Board of Medical Examiners (the "Board") have received a joint request that the Commission and the Board issue a Declaratory Ruling pursuant to Rules 540-X-1-.10 and 545-X-1-.09 of the Alabama Administrative Code addressing the determination of a "qualified person" for the purposes of Section 10A-5A-8.01(g) of the Alabama Limited Liability Company Law of 2014 and the employment of physicians by companies formed under or otherwise subject to the Act.

The Alabama legislature passed, and the Governor has signed, a significant overhaul of the Alabama limited liability company statute known as the "Alabama Limited Liability Company Law of 2014" ("Act"). One of the stated purposes of the new Act is to provide greater flexibility in the structure and use of limited liability companies (§10A-5A-1.06(a)). We note that the new Act provides that "a limited liability company shall possess and may exercise all the powers and privileges granted and enumerated by Chapter 1 or by any other law or by its limited liability company agreement" (§10A-5A-1.04(b)), and "may carry on any lawful activity" (§10A-5A-1.04(c)) [Emphasis added]. The prior law only noted that a limited liability company had the powers "enumerated in Chapter 1" (§10A-5-1.03) which specifically omitted professional services dealt with in Chapter 8. Thus the purpose and use of limited liability companies generally are much broader under the new Act.

Among other changes, the Act deferred to the licensing board and regulatory authorities with regard to many of the provisions of Article 8, the portion of the Act dealing with limited liability companies rendering professional services. In particular the new Act replaced the restrictions of the prior statute (§10A-5-8.01(a)) with a revised and broader provision:

(a) A limited liability company shall have the power to render professional services if it complies with the rules of the licensing authority for such profession. [Emphasis added.]

The Act also deleted the restrictions in the prior statute (§10A-5-8.01(g)) providing that limited liability companies organized to provide professional services: 1) may only render one professional service and services ancillary thereof, 2) may not engage in any business other than rendering professional services and services ancillary thereto, and 3) are subject to all the restrictions imposed on professional corporations by the Alabama Professional Corporations Law. The Board highlighted these restrictions in its letter on this subject dated June 26, 2008.

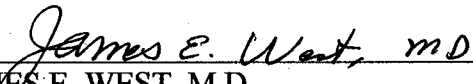
The Act provides that a limited liability company organized to render professional services may be "voluntarily transferred only to a qualified person" (§10A-5A-8.01(g)). A qualified person under the Act refers to "a person authorized by this state or a regulatory authority of this state to own a transferrable interest in that limited liability company." (§10A-5A-1.02(o)). A regulatory or licensing authority includes a "state regulatory licensing board, or other like agency

which has the power to issue a license or other legal authorization to render professional services” (§10-A-1-.03(49)). Thus, the Commission and the Board would constitute such licensing or regulatory authorities with respect to physicians. Finally, the Act broadly defines “person” to include individuals and organizations including partnerships, corporations and limited liability companies (§10A-5A-1.03(72)).

The Commission has previously recognized that “Physicians are free to enter into contracts of employment for their professional services with professional corporations, non-profit corporations, business corporations, partnerships, joint ventures or other entities” provided the physician is allowed to exercise his or her independent medical judgment and the physician’s actions with respect to the practice of medicine are not subject to the control of individuals not licensed to practice medicine. (See Declaratory Ruling, October 21, 1992). Consistent with this long standing position and the terms of the Act, the Commission hereby determines and declares the following:

1. A “Qualified Person” under Section 10A-5A-1.02(o) of the Act shall include licensed physicians and any entities otherwise allowed to employ physicians pursuant to the prior rulings of the Commission or the Board. Such entities would include professional corporations, non-profit corporations, business corporations, partnerships, joint ventures and limited liability companies formed under or otherwise subject to the terms of the Act, which shall be known as the Alabama Limited Liability Company Law of 2014.

2. The Board’s letter of June 26, 2008, is limited in scope and application to limited liability companies formed under or otherwise subject to the Alabama Limited Liability Company Law of 2014, or earlier versions of the law governing limited liability companies in Alabama, and shall not apply to any limited liability company formed under or otherwise subject to the Act, which shall be known as the Alabama Limited Liability Company Law of 2014.

  
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JAMES E. WEST, M.D.  
Chairman, Medical Licensure Commission of Alabama

Date: July 30, 2014

DECLARATORY RULING  
OF THE ALABAMA BOARD OF MEDICAL EXAMINERS

The Medical Licensure Commission (the “Commission”) and the Board of Medical Examiners (the “Board”) have received a joint request that the Commission and the Board issue a Declaratory Ruling pursuant to Rules 540-X-1-.10 and 545-X-1-.09 of the Alabama Administrative Code addressing the determination of a “qualified person” for purposes of Section 10A-5A-8.01(g) of the Alabama Limited Liability Company Law of 2014 and the employment of physicians by companies formed under or otherwise subject to the Act.

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individuals and organizations including partnerships, corporations and limited liability companies (§10A-5A-1.03(72)).

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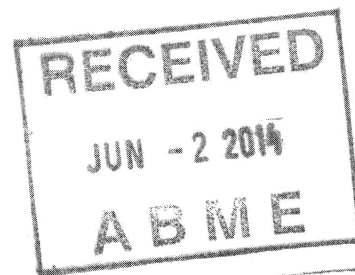
2. The Board’s letter of June 26, 2008, is limited in scope and application to limited liability companies formed under or otherwise subject to the Alabama Limited Liability Company Law, or earlier versions of the law governing limited liability companies in Alabama, and shall not apply to any limited liability company formed under or otherwise subject to the Act, which shall be known as the Alabama Limited Liability Company Law of 2014.



Boyde J. Harrison, M. D.

Chairman, Alabama Board of Medical Examiners

*June 18, 2014*



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(REPLY TO MONTGOMERY OFFICE)

May 29, 2014

Patricia E. Shaner, Esquire  
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Medical Licensure Commission of Alabama  
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Montgomery, Alabama 36101-0152

*Re:* Request for Declaratory Ruling of the Medical Licensure Commission and Board of Medical Examiners that Alabama Limited Liability Companies owned by certain non-physician entities may provide professional services through its employed physicians  
Our File No. 2557.1059

Dear Trish and Wayne:

The provision of medical services and the various medical providers involved with the provision of such services have changed radically over the last few years. Efforts to integrate multiple providers into a single provider and to affiliate various providers into larger systems have been accelerated by the Affordable Care Act passed in 2010. The beneficial elements of the tax treatment of limited liability companies, the liability protection afforded by them and the significant flexibility built in such entities make limited liability companies very attractive vehicles for such arrangements. However, the provision of professional physician services has not been available through a limited liability company in Alabama unless its ownership was limited strictly to other licensed physicians. This restriction has made prior efforts at integration of services and affiliation of providers more cumbersome and less effective.

For example many hospitals now own physician practices and employ physicians (consistent with your prior Declaratory Rulings). However, a hospital cannot use a tax disregarded, liability protected, single member limited liability company to employ its physicians. If the hospital wants to separate the physician practice activities from the hospital's other activities, the hospital will generally be limited to use of a business corporation subsidiary. Such an arrangement may have significant tax disadvantages and is far less flexible. Similarly, if a hospital and several physicians desire to form a provider that would provide professional medical services through employed physicians, the more flexible and desirable structure of a limited liability company has not been available.

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It is well established in Alabama that employment of a licensed physician by a general business corporation does not constitute fee splitting, or conducting or aiding and abetting the unlicensed practice of medicine. This established position was initially set forth in the Declaratory Rulings of the Medical Licensure Commission ("Commission") dated October 21, 1992, October 28, 1992, and November 6, 1995. The October 21, 1992 Declaratory Ruling also noted that "Physicians are free to enter into contracts of employment for their professional services with professional corporations, non-profit corporations, business corporations, partnerships, joint ventures or other entities" provided the physician is allowed to exercise his or her independent medical judgment and the physician's actions with respect to the practice of medicine are not subject to the control of individuals not licensed to practice medicine.

In 1993, Alabama adopted the initial Limited Liability Company statute. As the use of limited liability companies has grown more popular, the limited liability company has become the entity of choice for many business arrangements and most joint ventures. In response to its increased use, a request was made in 2008 that the Board of Medical Examiners (the "Board") approve the employment of physicians by limited liability companies consistent with the earlier rulings of the Commission. In response to the request the Board correctly noted in its letter of June 26, 2008, that the provisions of the limited liability company statute provided that a "limited liability company shall have the power to render professional services" if the company complies with, among other things, the restrictions imposed by the Alabama Professional Corporation Law (§10A-5-8.01(a) and (g)). The statute also provided restrictions on transfers of interests to those licensed to render the professional services (§10A-5-8.01(i)). The Board's letter recognized these limitations in the limited liability company statute and in essence held that a physician may not be employed by a limited liability company that is not compliant with such restrictions under the act. The Board's letter seemed clearly based on the inherent restrictions in the limited liability company statute rather than any reservation or concern about the employment of physicians generally by the newer entity form (see the Declaratory Ruling October 21, 1992 referenced above).

On November 25, 2013, the Board, through its general counsel, acknowledged that in response to a request for an advisory opinion physicians may be employed by a limited liability limited partnership (LLLP) owned in part by a non-physician owned entity. The statutory authority of LLLPs does not contain the ownership or transfer restrictions generally found in the limited liability company statute. In its letter the Board acknowledged that there were no restrictions that would prevent professional and non-professional partners in an LLLP that provided professional services. The LLLP, however, is a very rarely used entity in Alabama and though providing some of the advantageous tax treatment of a limited liability company or even a registered limited liability partnership, it does not provide the structural and managerial flexibility of a limited liability company. For example, the LLLP format would not help a hospital seeking to form a sole member limited liability company to own various practices or a joint venture desiring to share certain management and control among its members.

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In the last legislative session, the Alabama legislature passed and the Governor has now signed a significant overhaul of the Alabama limited liability company statute known as the “Alabama Limited Liability Company Law of 2014” (“Act”). One of the stated purposes of the new Act is to provide greater flexibility in the structure and use of limited liability companies (§10A-5A-1.06(a)). We note that the new Act provides that “a limited liability company shall possess and may exercise all the powers and privileges granted and enumerated by Chapter 1 or by any other law or by its limited liability company agreement” (§10A-5A-1.04(b)), and “may carry on any lawful activity” (§10A-5A-1.04(c)) [Emphasis added]. The prior law only noted that a limited liability company had the powers “enumerated in Chapter 1” (§10A-5-1.03) which specifically omitted professional services dealt with in Chapter 8. Thus the purpose and use of limited liability companies generally are much broader under the new Act.

Among other changes the Act deferred to the licensing board and regulatory authorities with regard to many of the provisions of Article 8, the portion of the Act dealing with limited liability companies rendering professional services. In particular the new Act replaced the restrictions of the prior statute (§10A-5-8.01(a)) with a revised and broader provision:

- (a) A limited liability company shall have the power to render professional services if it complies with the rules of the licensing authority for such profession. (§10A-5A-8.01(a)) [Emphasis added]

The new Act also deleted the restrictions in the prior statute (§10A-5-8.01(g)) providing that limited liability companies organized to provide professional services: 1) may only render one professional service and services ancillary thereof, 2) may not engage in any business other than rendering professional services and services ancillary thereto, and 3) are subject to all the restrictions imposed on professional corporations by the Alabama Professional Corporations Law. The Board’s response to Question #1 in the 2008 letter made specific reference to restrictions 1 and 2 of the prior law in answering Question #1 in the negative. The third restriction was the subject of the Board’s response to Question #2 in the letter.

In addition, the new Act provides that a limited liability company organized to render professional services may be “voluntarily transferred only to a qualified person” [Emphasis added] (§10A-5A-8.01(g)). A qualified person under the new Act refers to “a person authorized by this state or a regulatory authority of this state to own a transferrable interest in that limited liability company.” (§10A-5A-1.02(o)). The Commission would constitute such licensing or regulatory authority with respect to physicians.<sup>1</sup> Finally, the Act broadly defines “person” to include individuals and organizations including partnerships, corporations and limited liability companies (§10A-5A-1.03(72)).

<sup>1</sup> The rest of the Act refers to a “licensing authority” rather than a “regulatory authority” and we suspect this was an accidental holdover from the uniform act. A licensing authority includes a “state regulatory licensing board, or other like agency which has the power to issue a license or other legal authorization to render professional services” (§10A-1-1.03(49)).

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Thus the Commission has the authority under the Act to determine who may own an interest in a limited liability company that offers professional physician services, and by doing so may significantly impact the availability of limited liability companies for use by hospitals, other providers, joint venturers and others consistent with the Commission's 1992 Declaratory Rulings.

Therefore, we request that the Commission consider the following actions that would facilitate the use of limited liability companies by various health care providers under the new Act:

(1) Issue a clarifying ruling that provides that the following would constitute a "Qualified Person" under Section 10A-5A-1.02(o) of the new Act: licensed physicians or other entities (corporation, partnership, etc.) otherwise allowed to employ physicians pursuant to the Declaratory Rulings of the Commission;

(2) restrict the Board's letter of 2008 to limited liability companies subject to the prior law and specifically declare that a physician may be employed by a limited liability company with non-physician owners consistent with Article 8 of the Act and the ruling requested herein that complies with the requirements of Article 8 of the new Act.

We recognize that this request will require a careful review of the Act and the prior law. If we can answer any questions or provide clarification on any matter discussed herein, please let me know.

Thank you for your careful consideration of this matter.

Very truly yours,

GILPIN GIVHAN, PC



John Ward Weiss

JWW:pcd