

BRINGING ORDER TO CYBERMEDICINE: APPLYING THE CORPORATE PRACTICE OF MEDICINE DOCTRINE TO TAME THE WILD WILD WEB

Abstract: The model of health care offerings via the Internet, generally known as "cybermedicine," may prove to be a significant advance in the provision of medical services. At present, however, cybermedicine presents many potential hazards to "cyberpatients" because it is virtually unregulated. This Note asserts the need for a revival of the corporate practice of medicine doctrine to address these dangers. The corporate practice of medicine doctrine prohibits corporations and other lay entities from employing physicians. This Note examines the various kinds of cybermedicine, describes the advantages and disadvantages flowing from the practice of medicine over the Internet, and advocates the application of the corporate practice of medicine doctrine to cybermedicine as an intermediate regulatory measure to stem the dangers and abuses that currently abound in cybermedicine.

INTRODUCTION

Soraya Bittencourt is burdened by two health problems: Grave's disease, a dangerous thyroid condition, and diabetes. Despite these infirmities, she maintains a rigorous work schedule as an executive for a computer software company. One would think that Soraya would be unable to keep her weekly doctor's appointment, given her time-intensive work commitment. In reality, however, she has no problem in making time to "meet" with her physician. Rather than drive to the doctor's office, she logs onto the Internet and consults with her doctor in cyberspace. Thanks to the Internet, Soraya can send the results from her daily blood tests and elicit comments from her doctor—all in a matter of seconds.¹ In using Internet technology for personal health purposes, Soraya is participating in cybermedicine and taking part in the "quiet revolution" currently under way in the world of medicine.²

¹ See *Quacks, Bogus Treatments Infect the Internet*, SAN ANTONIO EXPRESS-NEWS, OCL. 21, 1996, at 1D [hereinafter *Bogus Treatments*].

² Diane Jennings, *Bitter Pill to Swallow: 'Cybermedicine' Simplicity Has Fans but Raises Concerns*, DALLAS MORNING NEWS, Nov. 6, 1998, at 1A.

With the expansion of telecommunications technology, innovative models of health care delivery have evolved.³ Where patients once needed to visit a physician in person to receive medical treatment, now they can utilize telephonic, video, and computer technology to interact with medical practitioners in new and unique ways.⁴ The model of health care offerings via the Internet, generally known as "cybermedicine," may prove to be a significant advance in the provision of medical services.⁵ At present, however, cybermedicine presents many potential hazards to "cyberpatients."⁶ Those seeking medical advice on the Internet may fall victim to bad medical advice proffered by non-physicians, unlicensed physicians, or other assorted quacks operating in cyberspace.⁷ In addition, due to its sudden and tremendous growth, cybermedicine has become big business, creating a tension for health care providers between delivering proper medical care and making a healthy profit.⁸

Many of the dangers posed by cybermedicine are exacerbated by the fact that it is virtually unregulated at present.⁹ On occasion, several states have apprehended persons practicing medicine over the Internet without a valid medical license.¹⁰ Sporadic enforcement of state licensing laws, however, does little to stem the potential abuses and rampant commercialism of cybermedicine.¹¹

This Note asserts the need for a revival by states of the corporate practice of medicine prohibition to address the dangers posed by cybermedicine. The corporate practice of medicine doctrine prohibits

³ See ALAN S. GOLDBERG & JOCELYN F. GORDON, *TELEMEDICINE: EMERGING LEGAL ISSUES* 1-2 (1998); Barbara J. Tyler, *Cyberdoctors: The Virtual Housecall—The Actual Practice of Medicine on the Internet is Here; Is it a Telemedical Accident Waiting to Happen?*, 31 IND. L. REV. 259, 259-63 (1998).

⁴ See GOLDBERG & GORDON, *supra* note 3, at 1.

⁵ See Nicholas P. Terry, *Cyber-Malpractice: Legal Exposure for Cybermedicine*, 25 AM. J.L. & MED. 327, 328 (1999).

⁶ See Jennings, *supra* note 2, at 1A; *Bogus Treatments*, *supra* note 1, at 1D.

⁷ See Gunther Eysenbach & Thomas L. Diepgen, *Evaluation of Cyberdocs*, 353 THE LANCET 1526, 1526 (1998); *Bogus Treatments*, *supra* note 1, at 1D; *Good Morning America: Internet House Calls* (ABC television broadcast, Aug. 3, 1999) (transcript #99080311-j01) [hereinafter *Good Morning America*]. A quack is "a pretender to medical skill" or "dishonest practitioner." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1856 (Philip Babcock Gove ed., 1986).

⁸ See Jennings, *supra* note 2, at 1A; Gary Baldwin, *Web Rx*, AM. MED. NEWS, Aug. 3, 1998, at 23.

⁹ See Jan Greene, *Sign on and Say 'Ah-h-h-h-h,'* HOSP. & HEALTH NETWORKS, Apr. 20, 1997, at 45; *Bogus Treatments*, *supra* note 1, at 1D.

¹⁰ See Jennings, *supra* note 2, at 1A.

¹¹ See *id.*; *Bogus Treatments*, *supra* note 1, at 1D.

corporations and other lay entities from employing physicians.¹² The doctrine is aimed at preserving physicians' professional autonomy in the provision of quality healthcare.¹³ Part I of this Note will detail the various manifestations of cybermedicine and describe the advantages and disadvantages flowing from the practice of medicine over the Internet.¹⁴ Part II will describe the context in which the corporate practice of medicine doctrine originated and its current status in the modern health care climate.¹⁵ Finally, Part III will advocate the application of the corporate practice of medicine doctrine to cybermedicine as at least an intermediate regulatory measure to stem the dangers and abuses that currently abound in cybermedicine.¹⁶

I. THE BACKGROUND AND CURRENT LANDSCAPE OF CYBERMEDICINE

A. Cybermedicine: Origin & Description

Advancement in telecommunications technology has had a significant impact on the provision of health care.¹⁷ Prior to the invention of the telephone, physicians relied almost exclusively on face-to-face consultations in treating their patients.¹⁸ The advent of the telephone opened another avenue for patient/physician interaction and has become a commonplace means for giving and receiving medical assistance, particularly in emergency situations.¹⁹ Recent technological innovations have fueled a further expansion of "telemedicine," the use of telecommunications and video technology to provide health care services to patients at some location distant from the provider.²⁰ For instance, improved satellite communications allow doctors to utilize interactive television systems for real-time examinations, diagnosis and treatment.²¹

¹² See George F. Indest, III & Barbara A. Egolf, *Is Medicine Headed for an Assembly Line? Exploring the Doctrine of the Unauthorized Corporate Practice of Medicine*, 6 BUS. L. TODAY 32, 33-34 (1997).

¹³ See *id.*

¹⁴ See *infra* notes 17-103 and accompanying text.

¹⁵ See *infra* notes 104-199 and accompanying text.

¹⁶ See *infra* notes 200-254 and accompanying text.

¹⁷ See GOLDBERG & GORDON, *supra* note 3, at 1.

¹⁸ See Alissa R. Spielberg, *Online Without a Net: Physician-Patient Communication by Electronic Mail*, 25 AM. J.L. & MED. 267, 268 (1999).

¹⁹ See *id.*; Alissa R. Spielberg, *On Call and Online: Sociohistorical, Legal, and Ethical Implications of E-Mail for the Patient-Physician Relationship*, 280 JAMA 1353, 1354 (1998).

²⁰ GOLDBERG & GORDON, *supra* note 3, at 1.

²¹ See *id.* "Real-time" communication refers to communication via the Internet whereby computer users exchange written messages instantaneously transmitted through cyber-

As with telephonic and video technology, the computer technology of the 1980s and 1990s has expanded the possibilities for the provision of health care.²² At present, doctors and patients can, and increasingly do, correspond by e-mail.²³ This particular manifestation of cybermedicine, the practice of medicine via computer, is merely an extension of telemedicine in that it serves to patch geographical holes in medical coverage.²⁴ Other manifestations of cybermedicine, however, prove that cybermedicine encompasses much more than telemedicine.²⁵ Computer technology—in particular, the Internet—allows a far greater array of unique interactions among health care providers and consumer-patients, including marketing, creating patient/physician relationships, providing advice, and prescribing and selling drugs—and levels of interactivity as yet unknown.²⁶

The plethora of medically-related websites currently available on the Internet illustrates the breadth and variety of cybermedicine.²⁷ CyberDocs is representative of websites that offer consumer-patients the opportunity to initiate “live” consultations with physicians on the Internet.²⁸ The two co-founders of the website, Dr. Steven Kohler and Dr. Kerry Archer, advertise the service as a “virtual housecall.”²⁹ Upon connecting to CyberDocs, patients input their medical history, reason for consulting the doctor and credit card number.³⁰ After the patient completes these preliminary matters, the “cyberdoctor” logs on and the physician and patient can engage in real-time communication

space, thereby creating the effect of a “live” conversation. See Greene, *supra* note 9, at 45; *CyberDocs Today Announced the First Virtual Doctors Office on the World Wide Web!*, M2 Presswire, Oct. 4, 1996, available at 1996 WL 11276562 [hereinafter *CyberDocs Today Announced*].

²² See Spielberg, *supra* note 18, at 269–70; Terry, *supra* note 5, at 328.

²³ See, e.g., Spielberg, *supra* note 18, at 269; Christine Gorman, *E-Mail Your Doctor; Frustrated by Phone Tag? Join the Growing Ranks of Doctors and Patients Talking Through the Net*, TIME, Aug. 17, 1998, at 82; Richard Saltus, *Take Two Aspirin and E-Mail Me in the Morning*, BOSTON GLOBE MAG., Jan. 18, 1998, at 11.

²⁴ See Terry, *supra* note 5, at 327.

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.* at 335–36; Tyler, *supra* note 3, at 263.

²⁸ See CyberDocs, at <http://www.cyberdocs.com> (last visited Apr. 8, 2000); Terry, *supra* note 5, at 349; Aaron Zitner, *Cybermedicine Seen as Unhealthy by Some; Concerns Voiced Over Diagnosing Ills, Prescribing Medicine on 'Net*, BOSTON GLOBE, Aug. 6, 1998, at C1. Among other websites offering Internet medical consultations are Go Ask Alice! and Yahoo!. See Go Ask Alice!, at <http://www.goaskalice.columbia.edu/about.html> (last visited Apr. 8, 2000); Yahoo!, at <http://www.yahoo.com/Health> (last visited Apr. 8, 2000).

²⁹ See Zitner, *supra* note 28, at C1; *CyberDocs Today Announced*, *supra* note 21.

³⁰ See Tyler, *supra* note 3, at 285–86. A typical visit to CyberDocs costs fifty dollars. See *id.*

over the Internet.³¹ During the course of this virtual interaction, the physician may diagnose the patient's ailment and prescribe medication, without ever meeting the patient face-to-face.³²

In addition to "live" medical consultations on the Internet, patients wishing to receive prescription medicine can bypass a visit to the local pharmacy or doctor's office by accessing online pharmacies such as Pill Box Pharmacy.³³ Persons seeking refills of existing prescriptions can purchase drugs over the computer simply by clicking the mouse and providing their credit card number.³⁴ For patient-consumers without prescriptions, many pharmacy websites make available an online questionnaire, which includes questions about physical characteristics and medical history.³⁵ A cyberdoctor then examines the completed questionnaire and decides whether or not to fill the requested order for the patient.³⁶

Medical research firms have joined doctors and pharmacists in creating innovative Internet business models.³⁷ MedOptions and other similar medical research websites assist persons seeking information on specific ailments and diseases.³⁸ For a fee varying from \$89 to \$500, researchers scour the World Wide Web for information pertinent to the patient's condition and prepare a report with the latest research and a list of top specialists.³⁹

B. Advantages of Cybermedicine

In many ways, cybermedicine represents a valuable innovation in the provision of health care.⁴⁰ The use of computers allows patients to

³¹ See *id.* at 286. A "cyberdoctor" is one who practices medicine over the Internet. See Lisa Ramirez, 'Cyberdocs' Popular, But Potentially Dangerous Some Say, KNIGHT RIDDER WASHINGTON BUREAU, July 26, 1999.

³² See Zitner, *supra* note 28, at C1.

³³ See Pill Box Pharmacy, at <http://www.pillboxpharmacy.com/services.html> (last visited Apr. 8, 2000); Jennings, *supra* note 2, at 1A. Other online pharmacies include U-Save Pharmacy and SafeNet Pharmacy. See U-Save Pharmacy, at <http://www.usave.com/usave/index.html> (last visited Apr. 8, 2000); SafeNet Pharmacy, at <http://www.safenet-pharmacy.com> (last visited Apr. 8, 2000).

³⁴ See Jennings, *supra* note 2, at 1A.

³⁵ See *id.*

³⁶ See *id.*

³⁷ Marc Fisher, *The Doctor is Out; When Illness Struck, He Plunged into the New Medical Reality—And Discovered That the Line Between Patient and Physician is Gone*, THE WASHINGTON POST, July 19, 1998, at W08.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See Tyler, *supra* note 3, at 263; *Bogus Treatments*, *supra* note 1, at 1D.

receive specialized and affordable medical assistance anytime and from anywhere in the world, even in the most remote locations.⁴¹ The story of Zhu Ling exemplifies this point.⁴² Ling, a student at Tsinghua University in China, was suffering from an unknown malady and on the brink of death when her friends decided to seek medical help via the Internet.⁴³ Several internationally-renowned medical experts responded to Ling's friends' pleas for assistance.⁴⁴ The doctors, communicating exclusively over the Internet, worked together to correctly diagnose Ling's condition (thallium poisoning) and suggest a course of treatment.⁴⁵ The doctors' diagnosis and suggested treatment ultimately saved Ling's life.⁴⁶

The global reach of cybermedicine is only one of its advantages.⁴⁷ Cybermedicine serves as an alternative for people who are uncomfortable with discussing certain medical problems during face-to-face encounters with physicians.⁴⁸ One proponent of cybermedicine notes that the Internet is particularly well-suited for the sale of Viagra, a drug treatment for erectile dysfunction in males, for two reasons: (1) a physical examination is typically unnecessary in prescribing the drug, and (2) the relative anonymity of cyberspace saves men the embarrassment of discussing sexual dysfunction with their doctor or pharmacist.⁴⁹ Thus, cybermedicine promotes health by prompting some people to seek treatments over the Internet that they would not otherwise seek in person.⁵⁰

In addition to its accessibility and potential for promoting health, advocates of cybermedicine also point out that the Internet can be a valuable educational resource for patients.⁵¹ With over 100,000 websites devoted to health and medicine, patients are empowered to take the initiative and become more informed about their own well-being.⁵² Indeed, many Americans already use the Internet as a health resource; according to one estimation, thirty-three million American

⁴¹ See Tyler, *supra* note 3, at 263; Greene, *supra* note 9, at 45.

⁴² See Tyler, *supra* note 3, at 259.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.* at 260.

⁴⁷ See Jennings, *supra* note 2, at 1A.

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See Eryn Brown, *Where to Find Medical Advice on the Web*, FORTUNE, Mar. 17, 1997, at W2.

⁵² See *id.*; Jo Revill, *Cyberchondriacs*, EVENING STANDARD, Nov. 15, 1999, at 10.

citizens—one in six people—used the Internet in 1998 to seek health-related advice.⁵³

C. Problems with Cybermedicine

Despite the numerous advantages of cybermedicine, many feel that cybermedicine is "bad medicine."⁵⁴ One major concern raised by critics is the unreliability inherent in performing medical examinations via computer.⁵⁵ In an Internet medical consultation, for example, a doctor may treat a patient without ever seeing him/her or knowing with any certainty that he/she is speaking truthfully about his/her symptoms.⁵⁶ According to Dr. Herbert Ratansky, Chair of the Council on Ethical and Judicial Affairs for the American Medical Association (AMA): "You can't obtain all the information you need without meeting and examining the patient."⁵⁷ Dr. Ratansky joins other critics of cybermedicine worried that online medical care will result in increased misdiagnoses.⁵⁸

In addition to the difficulty in acquiring adequate information in an online medical consultation, the anonymity shrouding the participants of cybermedicine exchanges also poses problems.⁵⁹ It is virtually impossible for patients to know for certain whether a given online practitioner is in fact a licensed or qualified physician.⁶⁰ Dr. James Winn, Executive Vice President of the Federation of State Medical Boards, notes that: "Doctors who have lost their licenses or didn't complete their training can hide in cyberspace . . . and cause serious

⁵³ See Revill, *supra* note 52, at 10.

⁵⁴ See, e.g., Ramirez, *supra* note 31; Jamie Talan, *Medical Advice Gets Caught in the Web; Legality of Practice is Issue*, ARIZ. REPUBLIC, Nov. 5, 1998, at H11; *Bogus Treatments*, *supra* note 1, at 1D. Dr. Nancy Dickey, president of the AMA, has expressed her view that cybermedicine is "not good medicine" and is "something to be terribly concerned about." Jennings, *supra* note 2, at 1A.

⁵⁵ See Tyler, *supra* note 3, at 288; Ramirez, *supra* note 31; *Let the Surfer Beware*, NEWSWEEK, Nov. 16, 1998, at 90.

⁵⁶ See Tyler, *supra* note 3, at 288; Zitner, *supra* note 28, at C1; Greene, *supra* note 9, at 45.

⁵⁷ Ramirez, *supra* note 31.

⁵⁸ See *id.*

⁵⁹ See, e.g., *Bogus Treatments*, *supra* note 1, at 1D; *Good Morning America*, *supra* note 7.

⁶⁰ See *Bogus Treatments*, *supra* note 1, at 1D; *Good Morning America*, *supra* note 7. Certain cybermedicine websites provide information regarding the qualifications of their doctors on staff. See Greene, *supra* note 9, at 45. CyberDocs, for example, posts copies of the physicians' degrees, board certification, and licenses on its website. See *id.* Despite these safeguards, however, the Internet remains vulnerable to persons practicing medicine under invalid or false credentials. See Elizabeth M. Cosin, *Surfing the Web Just Might Save or Extend a Life*, SAN DIEGO UNION-TRIB., Nov. 4, 1996, at E-4; *Good Morning America*, *supra* note 7.

harm."⁶¹ The problem of unlicensed cybermedicine practitioners is not merely a hypothetical one, as evidenced by the story of Alvin Chernoff.⁶² Chernoff was struggling with severe depression and turned to the Internet in the hopes of finding appropriate medication.⁶³ He came across the website of Dr. Peter Hitzig who, unbeknownst to Chernoff, was under investigation by state and federal authorities for charges ranging from illegal prescribing of drugs to having sex with patients.⁶⁴ Dr. Hitzig advised Chernoff to stop taking the medication recommended by his psychiatrist; instead, he prescribed Chernoff an unorthodox cocktail of drugs.⁶⁵ Shortly thereafter, Chernoff took his own life; many speculate that Chernoff's suicide is attributable to the change in medication.⁶⁶

In addition to the tragic Chernoff incident, a study by two German public-health specialists lends further support to the notion that seeking sound medical advice over the Internet is a risky proposition.⁶⁷ The researchers contacted seventeen websites offering medical consultations.⁶⁸ Each researcher posed as a fictitious kidney-transplant patient who is troubled by painful, oozing red blisters on his chest.⁶⁹ Ten cyberdoctors responded to the researchers' fictitious inquiry.⁷⁰ Three cyberdoctors refused to give advice due to their lack of expertise in dermatology.⁷¹ Five cyberdoctors gave the proper diagnosis of herpes zoster and appropriately recommended prompt treatment with antiviral drugs.⁷² The remaining two cyberdoctors, however, gave questionable medical advice.⁷³ The first practitioner, who described

⁶¹ Ramirez, *supra* note 31.

⁶² See *Good Morning America*, *supra* note 7. There have been numerous other incidents where unlicensed doctors were found to be giving medical advice on the Internet. South Carolina medical regulators discovered that a doctor who had previously lost his license was giving medical advice on the Internet. See Greene, *supra* note 9, at 45. Likewise, members of the news service, Newsday, found out that Walter Scholl was a medical consultant for the Prodigy online service despite have lost his license two years earlier. See *Bogus Treatments*, *supra* note 1, at 1D.

⁶³ See *Good Morning America*, *supra* note 7.

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See Eysenbach & Diepgen, *supra* note 7, at 1526.

⁶⁸ See *id.*

⁶⁹ See *id.* These symptoms describe a textbook case of shingles in an immunosuppressed person. See *the Surfer Beware*, *supra* note 55, at 90.

⁷⁰ See Eysenbach & Diepgen, *supra* note 7, at 1526.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

himself as a "well-known naturopathic doctor, lecturer, and author," assured the patient that "the . . . cysts are probably nothing to worry about" and recommended "the homeopathic medicine Apis 30D" and "vitamin C."⁷⁴ Another self-described "nutritionist" diagnosed the problem as congestion of the eliminative organs and advised the patient to "breathe deeply (fresh air), drink plenty of rain water" and to "get Red Clover and Dandelion . . . and eat as many as you can."⁷⁵ Also disturbing was the fact that seven cyberdoctors did not respond at all, potentially costing the patient the opportunity for recovery.⁷⁶

The inherent unreliability of practicing medicine on the Internet is not the only problem associated with cybermedicine; many commentators also find that the commercial nature of cybermedicine detracts from the medical profession.⁷⁷ The majority of the medical services offered on the Internet—whether consultations with cyberdoctors or specialized research portfolios—are offered by cybermedicine practitioners for a price.⁷⁸ Of concern is the possibility that cyberdoctors' sense of duty and responsibility to their patients will be eroded by their unfettered desire for financial gain.⁷⁹ Dr. Nancy Dickey, President of the American Medical Association, is pessimistic about the intentions of cyberdoctors: "Physicians are committed to doing what's best for patients, and it would appear to me that the motivations in these kind of websites are far more financial than patient well-being."⁸⁰ Dr. Robert Filice may exemplify Dr. Dickey's worst vision of a cyberdoctor.⁸¹ A consultant for the Pill Box Pharmacy website, Dr. Filice readily admits that his Internet practice yields great financial reward.⁸² The quality of his practice was called into question, however, when he prescribed Viagra for a reporter posing as a patient, despite the fact that the reporter's completed questionnaire noted that he did not suffer from erectile dysfunction.⁸³

⁷⁴ *Id.*

⁷⁵ Eysenbach & Diepgen, *supra* note 7, at 1526.

⁷⁶ *See id.*

⁷⁷ Jennings, *supra* note 2, at 1A; Baldwin, *supra* note 8, at 23.

⁷⁸ *See, e.g.,* Dr. Robert Baker, 'Ah Yes, Cancer—Just a Click Here for a Cure,' INDEPENDENT (U.K.), Nov. 18, 1999, at 9; Fisher, *supra* note 37, at W08. Furthermore, medical information sites are vehicles to advertise and sell products. *See* Tyler, *supra* note 3, at 273. Advertisers spent \$74 million on Internet advertising in 1996 alone. *See id.*

⁷⁹ *See* Jennings, *supra* note 2, at 1A; Baldwin, *supra* note 8, at 23.

⁸⁰ Jennings, *supra* note 2, at 1A.

⁸¹ *See id.*

⁸² *See id.*

⁸³ *See id.*

D. *The Current Lack of State and Federal Regulation of Cybermedicine*

To date, there has been no meaningful state regulation of cybermedicine in the United States.⁸⁴ States regulate the practice of medicine through unique state licensure laws.⁸⁵ Current state licensing statutes require physicians to be licensed in the state in which they practice medicine.⁸⁶ Doctors providing medical advice over the Internet, however, often consult with patients residing in other states; thus, these doctors may be practicing medicine in places where they are not licensed to do so.⁸⁷ Most states, however, have not explicitly included medical consultations over the Internet within their statutory definition of the "practice of medicine."⁸⁸ Thus, at present, state laws lack specific licensing provisions for cybermedicine.⁸⁹ Consequently, few states have prosecuted individual physicians or websites for the practice of cybermedicine without a license.⁹⁰

Federal regulation of cybermedicine is similarly non-existent.⁹¹ At present, no federal agency oversees cybermedicine.⁹² Though some members of Congress have initiated legislation proposing a national licensing scheme, Congress as a whole has yet to take any action in this regard.⁹³ In 1996, the House of Delegates of the Federation of State Medical Boards approved the Model Legislation Regarding Licensure (the "Model Act"), which proposes a special-purpose license

⁸⁴ See Greene, *supra* note 9, at 45; *Bogus Treatments*, *supra* note 1, at 1D.

⁸⁵ See GOLDBERG & GORDON, *supra* note 3, at 3.

⁸⁶ See *id.*

⁸⁷ See *id.*; Spielberg, *supra* note 18, at 291.

⁸⁸ See GOLDBERG & GORDON, *supra* note 3, at 4.

⁸⁹ See *id.* at 4-5; Ranney V. Wiesemann, Note, *On-Line or On-Call? Legal and Ethical Challenges Emerging in Cybermedicine*, 43 ST. LOUIS U. L.J. 1119, 1146 (1999).

⁹⁰ See Rita Rubin, *Prescribing On Line: Industry's Rapid Growth, Change Defy Regulation*, USA TODAY, Nov. 2, 1998, at 1A (reporting that, despite ongoing investigations by five states—Arizona, Colorado, Nevada, Texas, and Washington—into doctors performing online consultations for Viagra prescriptions, no physicians had been disciplined or taken into court). *But see* Jennings, *supra* note 2, at 1A (noting that Ohio issued several cease-and-desist orders against pharmacies who were unlicensed in Ohio yet shipped pills there).

⁹¹ See Wiesemann, *supra* note 89, at 1148; Jennings, *supra* note 2, at 1A.

⁹² See Jennings, *supra* note 2, at 1A. Dr. Steven Kohler, co-founder of CyberDocs, predicts and recognizes the necessity of the creation of regulatory agencies to stem the abuses in cybermedicine. See *id.*

⁹³ See Improved Access for Telehealth Act of 1997, H.R. 966, 105th Cong. (1997); Comprehensive Telehealth Act of 1997, S. 385, 105th Cong. (1997). In 1997, Representative Larry Combest (R-Tex.) and Senator Kent Conrad (D-N.D.) each introduced a bill in the House and Senate, respectively, that called for a study of physician licensure and telemedicine; neither bill was voted upon by Congress. See Improved Access for Telehealth Act of 1997, H.R. 966, 105th Cong. (1997); Comprehensive Telehealth Act of 1997, S. 385, 105th Cong. (1997).

that would allow physicians to engage in the practice of medicine across state lines.⁹⁴ Though its language is broad enough to encompass the practice of medicine over state lines via the Internet, the Model Act does not promise to have a significant impact on cybermedicine, considering that only two states have adopted it.⁹⁵ Commentators generally are not optimistic that federal authorities will be able to wrest control over physician licensing from the states in the near future.⁹⁶

Since there presently are no state or federal regulations of cybermedicine, cyberdoctors themselves determine the standards of cybermedicine.⁹⁷ Some cyberdoctors strictly adhere to state licensing laws.⁹⁸ For example, the Massachusetts-licensed doctors affiliated with CyberDocs choose to restrict their services only to patients logging in from Massachusetts or from outside of the United States.⁹⁹ Currently, there is a movement towards the adoption by cybermedicine sites of self-regulatory codes of conduct.¹⁰⁰ The leading advocate of self-regulation is the Health on the Net Foundation (HON), which has promulgated a Code of Conduct meant to be displayed on participating websites.¹⁰¹ The Code includes provisions containing the following assurances: (1) only medical professionals provide medical advice on the site; (2) the information provided on the site is designed to support, not replace, the relationship that exists between a patient and his or her existing physician; and (3) most information contained on

⁹⁴ See GOLDBERG & GORDON, *supra* note 3, at 5. The Model Act envisions a licensing scheme where physicians wishing to practice over state lines could obtain a special license from their own state medical board, without having to complete the full licensing process in the other states where they wish to practice medicine. See *Telemedicine: Model Act Would Create Special Licenses for Physicians Practicing Telemedicine*, HEALTH L. REP. (BNA) No. 43, at 1645 (Nov. 2, 1995).

⁹⁵ See GOLDBERG & GORDON, *supra* note 3, at 6. The Model Act does not specify any medium of interstate medical practice that it seeks to regulate; rather, the Act proposes a generic "special purpose license to practice medicine across state lines." See *id.* at 5. Only Alabama and Texas have enacted legislation based on the Model Act. See *id.* at 6.

⁹⁶ See Spielberg, *supra* note 18, at 291-92; GOLDBERG & GORDON, *supra* note 3, at 5. States, rather than the federal government, traditionally have governed health care and the practice of medicine under the police power of the Tenth Amendment. See Joy Elizabeth Matak, Note, *Telemedicine: Medical Treatment Via Telecommunications Will Save Lives, But Can Congress Answer the Call?*, 22 VT. L. REV. 231, 240 (1997).

⁹⁷ See Terry, *supra* note 5, at 359-60; Tyler, *supra* note 3, at 285.

⁹⁸ Tyler, *supra* note 3, at 285.

⁹⁹ See *id.* Though the issue lies beyond the scope of this Note, some commentators see the need for the creation of an international regulatory body to issue cybermedicine licenses. See Eysenbach & Diepgen, *supra* note 7, at 1526.

¹⁰⁰ See Terry, *supra* note 5, at 359.

¹⁰¹ See *id.*

the site is supported by clear references to source data.¹⁰² A growing number of cybermedicine websites display the HON logo and purport to comply with its Code.¹⁰³

II. AN OVERVIEW OF THE CORPORATE PRACTICE OF MEDICINE DOCTRINE

A. *Statement of the Doctrine*

The corporate practice of medicine doctrine—derived from various sources including ethical rules established by the AMA, common law, and state law—prohibits corporations and other business entities from practicing medicine.¹⁰⁴ In practical terms, the doctrine renders unlawful the employment of doctors by unlicensed individuals or by corporations that are not formed and owned by doctors.¹⁰⁵ While application of the doctrine has varied over time and from state to state, it remains a viable legal restriction in most states to date.¹⁰⁶

The corporate practice of medicine doctrine can be an effective tool in regulating improper medical practices.¹⁰⁷ For example, courts

¹⁰² See *id.*

¹⁰³ See *id.* at 360.

¹⁰⁴ See Indest & Egolf, *supra* note 12, at 33–34. The corporate practice of medicine doctrine is alternately referred to as the “prohibition on the corporate practice of medicine” or the “unauthorized corporate practice of medicine doctrine.” *Id.*

¹⁰⁵ See *id.*

¹⁰⁶ NHLA/AAHA, PATIENT CARE AND PROFESSIONAL RESPONSIBILITY: IMPACT OF THE CORPORATE PRACTICE OF MEDICINE DOCTRINE AND RELATED LAWS AND REGULATIONS 6 (1997); Jeffrey F. Chase-Lubitz, Note, *The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry*, 40 VAND. L. REV. 445, 470–71 (1987). A few states maintain a strong and strictly enforced prohibition against the corporate practice of medicine, including California and Texas. See California Medical Practice Act, BUS. & PROF. § 2000 et seq. (1990); TEX. REV. CIV. STAT. ANN. art. 4495b, §§ 3.07(f), 3.08(12), and 3.08(15) (West 2000). Many states such as Kansas, Massachusetts, and Minnesota enforce the corporate practice of medicine doctrine subject to certain well-defined exceptions. See KAN. STAT. ANN. § 65–2801 et seq. (1992) (exempting hospitals from the doctrine); MASS. GEN. LAWS ch. 112, § 6 (1996); MASS. GEN. LAWS ch. 111, § 51 (1996); MASS. GEN. LAWS ch. 176B, § 7 (1996) (prohibiting the corporate practice of medicine other than by a physician-owned entity or a licensed clinic); MINN. STAT. § 147.081 (1998) (exempting non-profit corporations from the doctrine). A few states, including Arkansas and Oklahoma, maintain statutes which would suggest a ban on the corporate practice of medicine but do not actively enforce the doctrine. See Arkansas Medical Practice Act, ARK. CODE ANN. § 17–95–101 et seq. (Michie 1995); OKLA. STAT. tit. 59, §§ 491–494 (1989). Finally, a few states, including Florida, Maine, Missouri, and Vermont, have neither a statutory nor common law prohibition against the corporate practice of medicine. See generally D. Cameron Dobins, *Survey of State Laws Relating to the Corporate Practice of Medicine*, 9 HEALTH LAW. 18 (1997).

¹⁰⁷ See Indest & Egolf, *supra* note 12, at 34.

have applied the doctrine to nullify improper employment contracts as well as to impose criminal sanctions on employers and physicians participating in the corporate practice of medicine.¹⁰⁸ One rationale underlying the prohibition of the corporate practice of medicine is that physicians need to make medical decisions free from the interference of lay persons, particularly lay persons whose allegiance extends more to the bottom line than to the well-being of patients.¹⁰⁹

B. Evolution/Enforcement of the Doctrine

1. AMA Ethical Provisions

Physician licensure and the corporate practice of medicine doctrine evolved in the 1800s, when doctors struggled to attain professional autonomy and the respect of the general public.¹¹⁰ Doctors' archaic medical procedures were not very successful, and sometimes even dangerous.¹¹¹ In addition, doctors competed for business with "irregulars," quacks and so-called faith healers without any formal medical education.¹¹² Both the quality of doctors and societal respect for the profession increased following the creation of the AMA in 1846.¹¹³ The AMA quickly adopted the Code of Ethics, which declared the superiority of regular physicians over "irregulars" and encouraged the development of legal controls to elevate the status of legitimate doctors, thus improving the quality of health care.¹¹⁴ State legislatures responded by adopting statutes prohibiting the practice of medicine without a valid license.¹¹⁵

In the early 1900s, doctors faced another challenge to their autonomy when a growing number of corporations became involved in medicine.¹¹⁶ Businesses began to hire physicians on a salaried basis

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 33.

¹¹⁰ See GEORGE ROSEN, *THE STRUCTURE OF AMERICAN MEDICAL PRACTICE 1875-1941*, at 19 (1983); PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 82-83 (1982).

¹¹¹ See NHLA/AAHA, *supra* note 106, at 3. Popular medical treatments during the nineteenth century included bloodletting, purging and administering heavy dosages of mercury or quinine. RODNEY COE, *SOCIOLOGY OF MEDICINE* 181-82 (1970).

¹¹² See NHLA/AAHA, *supra* note 106, at 3; ROSEN, *supra* note 110, at 19.

¹¹³ See CARLETON CHAPMAN, *PHYSICIANS, LAW, AND ETHICS* 103 (1984).

¹¹⁴ See *id.* at 106.

¹¹⁵ See Andre Hampton, *Resurrection of the Prohibition on the Corporate Practice of Medicine: Teaching Old Dogma New Tricks*, 66 U. CIN. L. REV. 489, 499 (1998).

¹¹⁶ NHLA/AAHA, *supra* note 106, at 4; STARR, *supra* note 110, at 198-206; see also JAMES BURROW, *ORGANIZED MEDICINE IN THE PROGRESSIVE ERA* 119 (1977) (noting that

to treat their employees.¹¹⁷ In addition, a corporate practice of medicine developed whereby for-profit medical service companies maintained a staff of physicians and marketed their services to the public.¹¹⁸

The existence of corporate forms providing health care raised many concerns within the medical community.¹¹⁹ Critics argued that the corporate practice of medicine required physicians to handle an excessive caseload and thus served to diminish the quality of health care.¹²⁰ Critics also asserted that the corporate practice of medicine would hinder the independent judgment of licensed doctors by permitting lay persons to make policy decisions affecting medical care, such as which patients a doctor could see and the amount of services a doctor could provide.¹²¹ In response to these criticisms, the AMA established ethical principles in 1912 declaring it "unprofessional" for physicians to be under corporate control.¹²² Later, in 1934, the AMA condemned contractual arrangements whereby lay persons and entities directly profited from the services rendered by doctors.¹²³ Though the AMA ethical provisions never attained the force of law, they unquestionably influenced legislative and judicial action upholding the corporate practice of medicine doctrine.¹²⁴

2. Judicial Enforcement of the Corporate Practice of Medicine Doctrine

Following the AMA's declaration of the impropriety of corporate medical practice arrangements, many state courts in the 1930s began to enforce the corporate practice of medicine doctrine, thus giving legal force to the AMA ethical provisions.¹²⁵ Generally, courts have upheld the doctrine through broad interpretation of licensing stat-

"contract practice stood out in the Progressive Era as the most dangerous threat to whatever degree of unity the regular medical profession had achieved").

¹¹⁷ See NHLA/AAHA, *supra* note 106, at 4; STARR, *supra* note 110, at 200-06; BURROW, *supra* note 116, at 119-20.

¹¹⁸ See STARR, *supra* note 110, at 204-06.

¹¹⁹ See Jeffrey Berlant, *Medical Ethics and Monopolization*, in *ETHICS IN MEDICINE: HISTORICAL PERSPECTIVES AND CONTEMPORARY CONCERNS* 61, 61 (J. Reiser et al. eds., 1977).

¹²⁰ See NHLA/AAHA, *supra* note 106, at 4; Berlant, *supra* note 119, at 61.

¹²¹ See Berlant, *supra* note 119, at 61.

¹²² See NHLA/AAHA, *supra* note 106, at 4.

¹²³ See *id.*; Joseph Laufer, *Ethical and Legal Restrictions on Contract and Corporate Practice of Medicine*, 6 L. & CONTEMP. PROBS. 516, 519 (1939).

¹²⁴ See Hampton, *supra* note 115, at 501.

¹²⁵ See *id.* at 499; Chase-Lubitz, *supra* note 106, at 464.

utes.¹²⁶ Most state licensing laws, often contained within states' Medical Practice Acts, do not explicitly ban the corporate practice of medicine.¹²⁷ Rather, these Acts simply detail the qualifications necessary for obtaining a medical license and prohibit the practice of medicine without one.¹²⁸ Courts, however, have used such statutory language to enforce the corporate practice of medicine doctrine, reasoning that a corporation—because it lacks human qualities such as moral character and professional competence—cannot qualify for a license and thus is prohibited from practicing medicine.¹²⁹ In addition, state courts have used agency law principles to reason that corporations cannot indirectly practice medicine by employing physicians.¹³⁰

In 1936, in *People v. United Medical Service, Inc.*, the Illinois Supreme Court illustrated such aggressive statutory interpretation.¹³¹ In *United Medical Service*, the court held that a for-profit corporation which provided medical services through its clinic was in violation of the corporate practice of medicine doctrine.¹³² United Medical Service, Inc. was incorporated in 1930 with the purpose of promoting individual and public health through the study, prevention and treatment of disease.¹³³ To accomplish this purpose, United Medical Service, without applying for or obtaining a license to practice medicine, employed physicians to provide low-cost medical services to willing patients.¹³⁴ The court noted that licensure in the state of Illinois required the applicant to be at least twenty-one years old and of good moral character.¹³⁵ The court inferred from this statutory language

¹²⁶ See *Garcia v. Texas State Bd. of Med. Exam'rs*, 384 F. Supp. 434 (W.D. Tex. 1974); *People v. United Med. Serv., Inc.*, 200 N.E. 157 (Ill. 1936); see also Alanson Willcox, *Hospitals and the Corporate Practice of Medicine*, 45 CORNELL L.Q. 432, 436 (1960).

¹²⁷ See, e.g., CAL. BUS. & PROF. CODE § 2400 (West Supp. 1987) (providing that "[c]orporations and other artificial legal entities shall have no professional rights, privileges, or powers"). But see COLO. REV. STAT. § 12-36-134(7) (1985) (noting explicitly that corporations other than professional corporations are prohibited from practicing medicine).

¹²⁸ *Satellite and Commercial Medical Clinics, Report of the Board of Trustees: Part II*, 253 JAMA 1314, 1315-17 (1985).

¹²⁹ See *United Med. Serv.*, 200 N.E. at 162-63; Hampton, *supra* note 115, at 496.

¹³⁰ See Hampton, *supra* note 115, at 496 & n.41. The relevant agency principle is that acts of the employee are attributable to the employer. Courts thus reason that the acts of physicians employed by corporations are attributable to corporations, thereby creating a violation of licensing laws. See *id.*

¹³¹ See 200 N.E. 157, 157 (Ill. 1936).

¹³² See *id.* at 163-64.

¹³³ See *id.* at 158.

¹³⁴ See *id.* at 159.

¹³⁵ See *id.* at 162.

that the legislature intended only for individual persons to qualify for licensure.¹³⁶ Reasoning that United Medical Service—a business entity—could not qualify for an Illinois medical license as could an individual person, the court held that the corporation's activities violated the prohibition against the corporate practice of medicine.¹³⁷

While the type of aggressive statutory interpretation exemplified by the court in *United Medical Service* has typically provided a basis for enforcing the corporate practice of medicine doctrine, some commentators have found flaws in courts' deriving the doctrine from the fact that state statutes limit medical licenses to individuals.¹³⁸ One critic finds the courts' reasoning analogous to an argument that "a corporation cannot engage in trucking because a corporation cannot obtain a driver's license."¹³⁹ Others have asserted that legislative silence as to whether or not corporations can practice medicine indicates that the corporate practice of medicine is permissible.¹⁴⁰

In response to the critiques of the utilization of aggressive statutory interpretation to enforce the corporate practice of medicine ban, courts also refer to public policy considerations in enforcing the doctrine.¹⁴¹ The considerations typically advanced by courts in favor of upholding the doctrine are (1) prevention of lay control over doctors, (2) discouragement of the commercial exploitation of the medical practice, and (3) avoidance of a division of the physician's loyalty between patient and employer.¹⁴² The fear underlying these considerations is the notion that corporate medicine may prioritize financial profitability at the expense of public health and safety.¹⁴³

In 1974, in *Garcia v. Texas State Board of Medical Examiners*, the U.S. District Court for the Western District of Texas employed a public policy rationale in order to find that a non-profit health association violated the corporate practice of medicine doctrine.¹⁴⁴ At issue in *Garcia*

¹³⁶ See *United Med. Serv.*, 200 N.E. at 163.

¹³⁷ See *id.* at 163-64. The court further elaborated upon its holding that United Medical Service's employment of physicians amounted to the unlawful practice of medicine, noting that "the practice of a profession requires more than the ability to employ competent persons." *Id.*

¹³⁸ See Hampton, *supra* note 115, at 496-97; Chase-Lubitz, *supra* note 106, at 466-67.

¹³⁹ See Hampton, *supra* note 115, at 497.

¹⁴⁰ See Willcox, *supra* note 126, at 438-39.

¹⁴¹ See *id.* at 442-43; Hampton, *supra* note 115, at 497.

¹⁴² See Willcox, *supra* note 126, at 442-43.

¹⁴³ See, e.g., *Bartron v. Codrington County*, 2 N.W.2d 337, 346 (S.D. 1942) (noting that the practice of a profession by a for-profit corporation would result in an over-emphasis on the financial aspects and profitability of the practice).

¹⁴⁴ See 384 F. Supp. 434, 436, 438 (W.D. Tex. 1974).

was whether the Texas Secretary of State was justified in refusing to grant of a corporate charter to the San Antonio Community Health Maintenance Association (SACHMA) due to the fact that one of SACHMA's stated purposes was "the employment of licensed physicians."¹⁴⁵ The court affirmed the Secretary of State's decision to deny a charter, including the following statement outlining the court's policy concerns:

While it is no doubt true that this nation faces a grave shortage of doctors, is the panacea to be found in the formation of non-profit layman corporations? We think not To whom does the doctor owe his first duty—the patient or corporation? . . . What is to prevent or who is to control a private corporation from engaging in mass media advertising in the exaggerated fashion so familiar to every American? Who is to dictate the medical and administrative procedures to be followed? Where do budget considerations end and patient care begin?¹⁴⁶

The court was clearly concerned with the aforementioned three policy considerations—lay control over physicians, commercialization of health care, and the division of a doctor's loyalties—in holding that SACHMA's employment practices violated the corporate practice of medicine doctrine.¹⁴⁷

C. *A Demise of the Doctrine?*

The structure of health care delivery has changed radically since the AMA first established the principles underlying the corporate practice of medicine doctrine in the early 1900s.¹⁴⁸ Until recently, solo practice and fee-for-service payment were the norms in health care.¹⁴⁹ Supported by the prohibition of the corporate practice of medicine, the health care system was seemingly immune to the "corporatization" gripping industries in the mainstream of the economy.¹⁵⁰ Following the marked increase of health costs in the 1970s and 1980s, however,

¹⁴⁵ *Id.* at 436.

¹⁴⁶ *Id.* at 439–40.

¹⁴⁷ *See id.*

¹⁴⁸ *See* JAMES C. ROBINSON, *THE CORPORATE PRACTICE OF MEDICINE* 1–2 (1999).

¹⁴⁹ *See id.* at 2.

¹⁵⁰ *See id.* at 1.

new health care structures bearing corporate characteristics—known collectively as “managed care”—rose to prominence.¹⁵¹

In order to accommodate the managed care model of health care delivery, there have been both federal and state initiatives to carve exceptions to and otherwise diminish the corporate practice of medicine doctrine.¹⁵² The Federal Trade Commission (FTC) began to oppose the corporate practice of medicine doctrine in the 1970s, claiming that it constituted anti-competitive conduct by the medical industry.¹⁵³ In 1975, the FTC initiated an action to enjoin the AMA from publishing and distributing ethical codes limiting physicians' choices of financial arrangements.¹⁵⁴ As previously noted, the AMA's ethical principles proscribed contractual arrangements where lay persons benefited from services performed by doctors.¹⁵⁵ The AMA defended these principles as a means of preserving physician judgment and protecting patients.¹⁵⁶ The FTC determined, however, that the principles reduced competition and increased health care costs by restricting the creation of more innovative and economical business structures.¹⁵⁷ Thus, the FTC issued a Final Order in 1979 requiring the AMA to eliminate the ethical restrictions.¹⁵⁸ Though the AMA ethical codes never had the force of law, they did help to establish the ban on the corporate practice of medicine as accepted doctrine.¹⁵⁹ As one commentator noted, the FTC's abolition of the AMA ethical restrictions greatly weakened the foundation upon which the corporate practice of medicine doctrine was built.¹⁶⁰

In addition to the FTC initiative undercutting the doctrine, Congress reduced the strength of the corporate practice of medicine pro-

¹⁵¹ See *id.* at 2; MICHAEL E. MAKOVER, M.D., *MISMANAGED CARE: HOW CORPORATE MEDICINE JEOPARDIZES YOUR HEALTH* 13 (1998); Indest & Egolf, *supra* note 12, at 32–33. Managed care applies simple principles of business management to health care and has reduced medical costs and limited hospital stays. MAKOVER, at 14–15.

¹⁵² See Hampton, *supra* note 115, at 500; Chase-Lubitz, *supra* note 106, at 475–82.

¹⁵³ See NHLA/AHAA, *supra* note 106, at 8; Hampton, *supra* note 115, at 500.

¹⁵⁴ See Chase-Lubitz, *supra* note 106, at 475–77.

¹⁵⁵ See NHLA/AAHA, *supra* note 106, at 4; Laufer, *supra* note 123, at 519.

¹⁵⁶ See NHLA/AAHA, *supra* note 106, at 8.

¹⁵⁷ See *In re American Med. Ass'n*, 94 F.T.C. 701, 1017–18 (1979).

¹⁵⁸ See *id.* at 1036–40. The AMA appealed the Final Order, but the United States Court of Appeals for the Second Circuit approved its enforcement with only minor modifications. See *American Med. Ass'n v. Federal Trade Comm'n*, 638 F.2d 443, 451, 453 (2d Cir. 1980). The Supreme Court later affirmed the Second Circuit's decision *per curiam* by a divided vote. See *American Med. Ass'n v. Federal Trade Comm'n*, 455 U.S. 676 (1982).

¹⁵⁹ See Hampton, *supra* note 115, at 501; Chase-Lubitz, *supra* note 106, at 478.

¹⁶⁰ See Chase-Lubitz, *supra* note 106, at 478.

hibition with the passage of the Health Maintenance Organization Act of 1973 (the "1973 Act").¹⁶¹ Health Maintenance Organizations (HMOs) possess many of the characteristics that the ban on the corporate practice of medicine was intended to eliminate.¹⁶² HMOs' fixed-budget structure permits the potential for lay control over physician decisions.¹⁶³ In addition, the fact that physicians are employees of HMOs raises the concern that physicians' loyalty will be divided between their employer and their patients.¹⁶⁴

Prior to the passage of the 1973 Act, many commentators and physicians perceived the corporate practice of medicine doctrine to be a hindrance to the establishment and development of HMOs.¹⁶⁵ With the passage of the 1973 Act, however, Congress effectively eliminated the possibility that the doctrine would be a barrier to HMOs.¹⁶⁶ In fact, the very purpose of the 1973 Act was to promote the development of HMOs as a means of controlling skyrocketing health care costs.¹⁶⁷ To effectuate this purpose, the 1973 Act preempts state laws requiring that all of the board of directors of an HMO must be physicians, thus permitting a degree of lay influence in the governance and administration of HMOs.¹⁶⁸ Although Congress neither expressly preempted nor entirely eliminated the corporate practice of medicine ban in the HMO Act, many commentators point out that the Act severely disabled the doctrine, making a definitive policy statement in favor of a corporate-based, competitive health care market.¹⁶⁹

Initiatives to diminish the breadth of the corporate practice of medicine doctrine have not arisen solely at the federal level; many states likewise have created exceptions to the doctrine.¹⁷⁰ Every state allows professional service corporations—which by definition are owned exclusively by doctors—to employ other physicians and share in the profits derived from their services.¹⁷¹ In addition, some states

¹⁶¹ See Pub. L. No. 93-222, 87 Stat. 917 (codified as amended at 42 U.S.C. § 300e (1994)); Hampton, *supra* note 115, at 501.

¹⁶² See Willcox, *supra* note 126, at 442-43.

¹⁶³ See Chase-Lubitz, *supra* note 106, at 480.

¹⁶⁴ See *id.* at 481.

¹⁶⁵ See Hansen, *Laws Affecting Group Health Plans*, 35 IOWA L. REV. 209, 211-13 (1950).

¹⁶⁶ See Hampton, *supra* note 115, at 501.

¹⁶⁷ See *id.*

¹⁶⁸ See 42 U.S.C. § 300e-10(a)(1)(B) (1994).

¹⁶⁹ See Chase-Lubitz, *supra* note 106, at 482.

¹⁷⁰ See Indest & Egolf, *supra* note 12, at 34-35.

¹⁷¹ See *id.* at 34; Adam M. Freiman, Comment, *The Abandonment of the Antiquated Corporate Practice of Medicine Doctrine: Injecting a Dose of Efficiency into the Modern Health Care Environment*, 47 EMORY L.J. 697, 707 (1998).

refuse to apply the corporate practice of medicine prohibition to nonprofit organizations.¹⁷² The rationale that state courts typically give for exempting nonprofit corporations is that the policy concerns underlying the doctrine—commercial exploitation, divided physician loyalty, and lay control over physicians—are not applicable when the profit motive is removed.¹⁷³ Another exception to the corporate practice of medicine doctrine permits medical schools to hire doctors to treat patients for instructional purposes.¹⁷⁴ Finally, corporations are permitted to hire doctors in a consulting capacity, so long as the doctors have no direct responsibilities to patients and thus are not engaged in the practice of medicine.¹⁷⁵

In 1997, in *Berlin v. Sarah Bush Lincoln Health Center*, the Illinois Supreme Court made a decision which is illustrative of state efforts to carve exceptions in the corporate practice of medicine doctrine.¹⁷⁶ In *Berlin*, the court exempted licensed hospitals from the prohibition on the corporate practice of medicine.¹⁷⁷ The plaintiff in the case, Dr. Richard Berlin, Jr., signed a five-year employment contract in 1992 with the Sara Bush Lincoln Health Center ("Health Center").¹⁷⁸ The contract contained a restrictive covenant prohibiting him from providing medical services within a fifty-mile radius of the Health Center for two years after the end of the employment agreement.¹⁷⁹ Dr. Berlin resigned in 1994 and promptly began working at a medical clinic one mile away from the Health Center.¹⁸⁰ The Health Center thereaf-

¹⁷² E.g., N.D. CENT. CODE § 26.1-49-02 (1995) (stating that "a nonprofit health service corporation . . . does not violate limitations on the corporate practice of medicine"); see also *California Physicians' Serv. v. Garrison*, 172 P.2d 4, 11-12 (Cal. 1946) (holding that nonprofit corporation's employment of physicians to practice medicine does not violate the corporate practice of medicine doctrine).

¹⁷³ See *People ex rel. State Bd. of Med. Exam'rs v. Pacific Health Corp.*, 82 P.2d 429, 431 (Cal. 1938) (stating that "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"); see also Lisa Rediger Hayward, Note, *Revising Washington's Corporate Practice of Medicine Doctrine*, 71 WASH. L. REV. 403, 410 (1996).

¹⁷⁴ See *Indest & Egolf*, *supra* note 12, at 34.

¹⁷⁵ See *id.* at 35.

¹⁷⁶ 688 N.E.2d 106, 106 (Ill. 1997).

¹⁷⁷ See *id.* at 113. By this decision, the Illinois Supreme Court reversed the decision by the Illinois Appellate Court in *Berlin v. Sarah Bush Lincoln Health Center*, 664 N.E.2d 337 (Ill. App. Ct. 1996), enforcing the corporate practice of medicine doctrine for the first time in over sixty years. See *Indest & Egolf*, *supra* note 12, at 35.

¹⁷⁸ See *Berlin*, 688 N.E.2d at 107.

¹⁷⁹ See *id.*

¹⁸⁰ See *id.* at 107-08.

ter sought to enforce the restrictive covenant in the contract and enjoin Dr. Berlin from working at the nearby clinic.¹⁸¹ Dr. Berlin argued that the covenant was unenforceable because the employment contract violated the state's prohibition of the corporate practice of medicine.¹⁸² The court first noted that the Illinois Medical Practice Act contains no express prohibition on the corporate employment of physicians.¹⁸³ The court further recognized that certain other Illinois statutes clearly authorize, and sometimes mandate, licensed hospital corporations to provide medical services.¹⁸⁴ The court reasoned that the public policy concerns supporting the corporate practice of medicine doctrine, such as lay control over physicians and commercialization of health care, are "inapplicable to a licensed hospital in the modern health care industry."¹⁸⁵ Thus, the court held that this particular employment contract was not unenforceable by virtue of the corporate practice of medicine ban.¹⁸⁶

D. Current Status of the Doctrine

Despite numerous chinks in its armor, the corporate practice of medicine ban continues to have applicability today.¹⁸⁷ In 1996, in *Conrad v. Medical Board of California*, the Court of Appeals of California recognized the continued legitimacy of the doctrine in the state of California by holding that municipal and county hospital districts were not exempt from the state's prohibition of the corporate practice of medicine.¹⁸⁸ The plaintiff in *Conrad*, a hospital district, sought to validate its policy of making employment contracts with its physicians.¹⁸⁹ Prior to *Conrad*, hospital districts in California typically

¹⁸¹ See *id.* at 108.

¹⁸² See *id.* at 110.

¹⁸³ See *Berlin*, 688 N.E.2d at 112.

¹⁸⁴ See *id.* at 113. The court referenced the Hospital Licensing Act, 210 ILCS 85/3 (West Supp. 1995), which defines "hospital" as "any institution . . . devoted primarily to the maintenance and operation of facilities for the diagnosis and treatment or care of . . . persons." *Id.* (emphasis added by court). The court also relied on language in the Hospital Emergency Service Act, 210 ILCS 80/0.01 (West 1994), requiring "every hospital which provides general medical and surgical hospital services" to also provide emergency services. *Id.* (emphasis added by court).

¹⁸⁵ See *id.* at 113-14.

¹⁸⁶ See *id.* at 114.

¹⁸⁷ See NHLA/AHAA, *supra* note 106, at 7; Chase-Lubitz, *supra* note 106, at 470-71. Chase-Lubitz writes: "Individuals attempting to establish new modes of health care delivery occasionally detonate a corporate practice landmine." *Id.* at 471.

¹⁸⁸ See 48 Cal. App. 4th 1038, 1049, 1051 (1996).

¹⁸⁹ See *id.* at 1042.

treated physicians as independent contractors.¹⁹⁰ The court interpreted the applicable state law as requiring that hospital districts treat doctors as independent contractors rather than employees.¹⁹¹ This distinction was important to the court because, while an employer has the right to control the manner and means of accomplishing the desired result, in an independent contractor relationship, control may be exercised only as to the result of the work and not the means by which it is accomplished.¹⁹² In other words, the court found that employment relationships between doctors and lay entities raise questions of unlicensed control and divided loyalty, whereas independent contractor relationships preserve a requisite degree of autonomy for physicians.¹⁹³ Thus, the court held that the district hospital's employment relationship with doctors violated the ban against the corporate practice of medicine.¹⁹⁴

Outside of the judicial enforcement context, commentators note that the public policy considerations supporting the use of the corporate practice of medicine doctrine continue to have an important place in modern health care.¹⁹⁵ The "corporatization" of health care has produced some tangible benefits, including increased utilization of preventive medicine and more efficient care of Medicaid patients.¹⁹⁶ Yet many commentators have found that the emphasis on cost and time management has both reduced the quality of health care and damaged the doctor-patient relationship.¹⁹⁷ Despite the commercial nature of modern medical care, patient well-being, rather than financial gain, ought to be the primary concern for physicians.¹⁹⁸ Thus, one of the essential purposes of the corporate practice of medicine doctrine—the protection of the physician's professional obligation to the patient's health—is still of paramount importance today.¹⁹⁹

¹⁹⁰ See *id.* at 1048–49.

¹⁹¹ See *id.* at 1049.

¹⁹² See *id.* at 1043 n.4.

¹⁹³ See *Conrad*, 48 Cal. App. 4th at 1042–43, 1043 n.4.

¹⁹⁴ See *id.* at 1049, 1051.

¹⁹⁵ See generally MAKOVER, *supra* note 151, at 27–48; Hampton, *supra* note 115.

¹⁹⁶ See MAKOVER, *supra* note 151, at 86.

¹⁹⁷ See *id.* at 100–05; Hampton, *supra* note 115, at 519. Doctor C. Everett Koop, the former Surgeon General of the United States, refers to managed care as a "rapidly proliferating leviathan" that has changed its focus from the original laudable goals of preventive care and standardization of medical practice to one interested first and foremost in autocratic profit and only secondarily in maintaining health. Tyler, *supra* note 3, at 262.

¹⁹⁸ See MAKOVER, *supra* note 151, at 31–32; Hampton, *supra* note 115, at 519–20.

¹⁹⁹ See MAKOVER, *supra* note 151, at 31–32; Hampton, *supra* note 115, at 534.

III. ANALYSIS

A. *The Need for Cybermedicine Regulation*

In many respects, cybermedicine is both a logical extension of and a positive force in modern health care.²⁰⁰ Cyberpatients appreciate the convenience of being able to obtain medical advice from the comfort of their home or office in only a matter of seconds.²⁰¹ For some patients, the opportunity to receive a medical diagnosis and treatment via the Internet can mean the difference between life and death.²⁰² For others, cybermedicine offers an opportunity to obtain medical care for embarrassing symptoms they would otherwise leave untreated.²⁰³ Furthermore, many doctors believe that cybermedicine offers patients an opportunity to take a more active and constructive role in the physician-patient relationship.²⁰⁴ Given these recognizable advantages, along with the modern prevalence of the Internet and other computer technology, cybermedicine may well represent the future of health care.²⁰⁵

The future of Internet health care would be bleak, however, if cybermedicine were to remain unregulated.²⁰⁶ At present, the quality of medical advice patients receive over the Internet is often hampered not only by the impersonal nature of the examination, but also by unlicensed practitioners taking advantage of the anonymity of the cyberspace medium.²⁰⁷ In addition, the commercial nature of the cybermedicine may detract from doctors' professional responsibilities, particularly their strict duty of care to patients.²⁰⁸ Clearly, meaningful regulation of cybermedicine is necessary.²⁰⁹ Only after its potential dangers are minimized can cybermedicine be a truly positive innovation in health care delivery.²¹⁰

²⁰⁰ See Tyler, *supra* note 3, at 263; *Bogus Treatments*, *supra* note 1, at 1D.

²⁰¹ See *Bogus Treatments*, *supra* note 1, at 1D.

²⁰² See *supra* notes 42-46 and accompanying text.

²⁰³ See *supra* notes 48-50 and accompanying text.

²⁰⁴ See Brown, *supra* note 51, at 162.

²⁰⁵ See Jennings, *supra* note 2, at 1A.

²⁰⁶ See *supra* notes 54-83 and accompanying text.

²⁰⁷ See *supra* notes 54-76 and accompanying text.

²⁰⁸ See *supra* notes 77-83 and accompanying text.

²⁰⁹ See Jennings, *supra* note 2, at 1A; *Bogus Treatments*, *supra* note 1, at 1D; *Good Morning America*, *supra* note 7.

²¹⁰ See *Bogus Treatments*, *supra* note 1, at 1D.

B. *Legitimacy of the Corporate Practice of Medicine Doctrine*

Until specific cybermedicine regulations are promulgated, states should utilize the corporate practice of medicine doctrine as an intermediate regulatory scheme in order to address the problematic issues posed by cybermedicine.²¹¹ Despite the vast changes in health care delivery over the past century, the practice of medicine in cyberspace in many ways resembles the historical context in which the prohibition on the corporate practice of medicine originated.²¹² Modern-day "quacks" giving medical advice on the Internet pose the same dangers to patients as the "irregulars" of the 1800s who competed with legitimate doctors and tainted the reputation of the medical profession.²¹³ Also, the common cybermedicine business model—where lay persons or legal business entities employ cyberdoctors and profit from their services—is similar to the corporate medical practice in the early 20th century that raised concern within the medical profession.²¹⁴ Given these similarities, the aim of the corporate practice of medicine doctrine—promoting physician autonomy for the benefit of patients—is well-suited for cybermedicine.²¹⁵

The application of the corporate practice of medicine doctrine to cybermedicine remains feasible and necessary even when taking into account the many characteristics that distinguish the medical world in the 1800s from today.²¹⁶ Several state courts, such as those of California and Texas, have enforced the doctrine in recent years, despite the increasingly corporate reality of modern health care.²¹⁷ In addition, state courts and legislatures, regardless of the extent to which they have created exceptions to the doctrine, maintain that physician autonomy is a high priority in the delivery of health care.²¹⁸ As evidence, while the Illinois Supreme Court recently exempted licensed hospitals from the corporate practice of medicine doctrine in *Berlin*, the court nonetheless emphasized the fact that the hospital licensing process ensured both physician independence and patient safety and

²¹¹ See GOLDBERG & GORDON, *supra* note 3, at 17; see generally Hampton, *supra* note 115.

²¹² See *supra* notes 110–124 and accompanying text.

²¹³ See *supra* notes 110–115 and accompanying text.

²¹⁴ See *supra* notes 116–124 and accompanying text.

²¹⁵ See Indest & Egolf, *supra* note 12, at 33; Willcox, *supra* note 126, at 442–43.

²¹⁶ See, e.g., *Garcia v. Bd. of Med. Exam'rs*, 384 F. Supp. 434, 439–40 (W.D. Tex. 1974); *Conrad v. Med. Bd.*, 48 Cal. App. 4th 1038, 1049, 1051 (1996); see generally Hampton, *supra* note 115.

²¹⁷ See *Garcia*, 384 F. Supp. at 439–40; *Conrad*, 48 Cal. App. 4th at 1049, 1051.

²¹⁸ See *Berlin v. Sarah Bush Lincoln Health Ctr.*, 688 N.E.2d 106, 113–14 & n.5 (Ill. 1997).

thus rendered application of the doctrine superfluous.²¹⁹ The *Berlin* decision demonstrates that the values represented by the corporate practice of medicine doctrine—patient well-being and physician autonomy—continue to have a place in the increasingly corporate climate of modern medicine.²²⁰

The fact that other commentators have advocated the utilization of the corporate practice of medicine doctrine in the modern health care context lends further support for applying the doctrine for the purpose of regulating cybermedicine.²²¹ Andre Hampton, Associate Professor of Law at St. Mary's University School of Law, favors using the doctrine to eliminate risk-sharing agreements between physicians and insurers.²²² Under a risk-sharing system, doctors absorb part of the financial costs of health care.²²³ The risk-sharing system is problematic because the physician's financial goals may conflict with needs of the patient.²²⁴ Hampton concludes that application of the doctrine to eliminate risk-sharing arrangements would produce two important results: it would separate the respective functions of doctors and insurers, allowing physicians to concentrate on properly treating patients; in addition, it would repair the damage to the fiduciary relationship between physician and patient.²²⁵

C. *Application of the Corporate Practice of Medicine Doctrine to Cybermedicine*

Similar to the benefits foreseen by Hampton in applying the corporate practice of medicine doctrine to risk-sharing agreements, application of the doctrine to cybermedicine would serve both to reduce the rampant commercialism characterizing cybermedicine and to eliminate a number of unlicensed cyberdoctors practicing medicine over the Internet.²²⁶ Proper enforcement of the doctrine would result in the shutting down of cybermedicine websites owned by business entities or non-physicians.²²⁷ As a result, cyberpatients would be assured that existing cybermedicine sites were under the authority

²¹⁹ See *id.*

²²⁰ See *id.*

²²¹ See generally Hampton, *supra* note 115.

²²² See *id.* at 534.

²²³ See *id.* at 509.

²²⁴ See *id.* Hampton exemplifies this conflict in presenting the example of a doctor deciding whether to advise costly procedures that would be helpful to the patient but would have negative financial consequences for the physician. See *id.*

²²⁵ See *id.* at 519.

²²⁶ See Hampton, *supra* note 115, at 519.

²²⁷ See, e.g., *Garcia*, 384 F. Supp. at 439–40; *Conrad*, 48 Cal. App. 4th at 1049, 1051.

and control of qualified physicians rather than lay persons.²²⁸ As an additional result of the enforcement of the corporate practice of medicine ban, any unlicensed cybermedicine practitioners employed by such websites would be prevented from practicing medicine over the Internet.²²⁹ In sum, the application of the doctrine to cybermedicine would help to dispel the current image of an Internet medical practice as an exploitable business opportunity for lay persons, and it would also help to establish cybermedicine as a legitimate and safe way to render and receive medical care.²³⁰

The application of the corporate practice of medicine doctrine to cybermedicine can be achieved in a number of ways. Given that the doctrine is derived in part from states' Medical Practice Acts, the most realistic plan for enforcement of the doctrine would involve state, rather than federal, action.²³¹ Under one possible scheme of enforcement, a state attorney general or medical board could actively enforce the doctrine against corporations and other business entities that operate cybermedicine websites.²³² Effective enforcement would hinge upon cooperation from state courts, in the form of aggressive interpretation of the state's Medical Practice Acts and adherence to the policies underlying the corporate practice of medicine doctrine.²³³ Another possible scheme of enforcement would require state legislatures to enact—and enforce—laws specifically prohibiting the corporate practice of medicine.²³⁴

In addition to establishing a legal framework for applying the corporate practice of medicine doctrine to cybermedicine, it would also be essential for the states—whether through pronouncements by the attorney general, regulations, or laws passed by the legislature—to delineate the types of cyberspace interactions to be regulated.²³⁵ The doctrine only pertains to business entities engaged in the "practice of medicine"; thus, states would need to define the precise parameters of

²²⁸ See, e.g., *Garcia*, 384 F. Supp. at 439–40; *Indest & Egolf*, *supra* note 12, at 33.

²²⁹ See *Greene*, *supra* note 9, at 45; *Bogus Treatments*, *supra* note 1, at 1D.

²³⁰ See, e.g., *Garcia*, 384 F. Supp. at 439–40; *Hampton*, *supra* note 115, at 519.

²³¹ See *Indest & Egolf*, *supra* note 12, at 34.

²³² See, e.g., *Garcia*, 384 F. Supp. at 434; *People ex rel. State Bd. of Med. Exam'rs v. Pacific Health Corp.*, 82 P.2d 429, 429 (Cal. 1938); *Conrad*, 48 Cal. App. 4th at 1038 (civil claims brought by either state attorney general or state medical board).

²³³ See, e.g., *Garcia*, 384 F. Supp. at 439–40; *People v. United Med. Serv.*, 200 N.E. 157, 163 (Ill. 1936); *Conrad*, 48 Cal. App. 4th at 1050–51.

²³⁴ See, e.g., COLO. REV. STAT. § 12–36–134(7) (1985).

²³⁵ See *Bogus Treatments*, *supra* note 1, at 1D.

cybermedicine.²³⁶ Current state Medical Practice Acts typically define "the practice of medicine" broadly.²³⁷ More specificity is required, however, in addressing the issue of which of the multitude of medical websites currently in existence provide services constituting the practice of medicine.²³⁸ The state might, for example, expressly designate the provision of online diagnoses and prescriptions as the practice of medicine, while exempting other activities such as the compilation of medical information specifically tailored to a particular client's needs.²³⁹ In defining the boundaries of cybermedicine, states would guarantee more efficient and consistent enforcement of the corporate practice of medicine ban.²⁴⁰

D. The Limitations of Applying the Corporate Practice of Medicine Doctrine to Cybermedicine: Assessing Other Long-Term Alternatives

Despite the feasibility and benefit of applying the corporate practice of medicine doctrine to cybermedicine, the doctrine provides an imperfect solution to the problematic issues raised by cybermedicine.²⁴¹ First, the prohibition on the corporate practice of medicine would not be particularly effective in removing the threat of unlicensed cyberdoctors practicing medicine over the Internet.²⁴² Enforcement of the doctrine would only reach unlicensed cybermedicine practitioners who happen to be employed by a corporation or other lay entity. Furthermore, any unlicensed cyberdoctor affected by enforcement of the doctrine could later evade its strictures by establishing an independent cybermedicine website without any corporate ties.²⁴³ In addition, uneven enforcement of the corporate practice of

²³⁶ See *id.*

²³⁷ See, e.g., N.Y. EDUC. LAW, art. 131, § 6521 (defining the "practice of medicine" as "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition"); 225 ILL. COMP. STAT. 60/49 (1999) (defining the "practice of medicine" and providing sanctions for unlicensed persons who suggest a form of treatment for "the palliation, relief or cure of any physical or mental ailment or condition of any person with the intention of receiving compensation"); see also GOLDBERG & GORDON, *supra* note 3, at 3 n.2.

²³⁸ See *Bogus Treatments*, *supra* note 1, at 1D. There is no real consensus as to what constitutes the practice of medicine on the Internet. See *id.* Thomas Monahan, executive secretary for the New York State Board for Medicine, states: "If someone is diagnosing, that is considered the practice of medicine. But where's the line?" *Id.*

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ See Rubin, *supra* note 90, at 1A.

²⁴² See *id.*

²⁴³ See *id.*

medicine doctrine among the states could disrupt the efforts to stem the dangers of cybermedicine.²⁴⁴ If, for example, one state declined to apply the doctrine to cybermedicine, lay persons would have a safe haven in which they could incorporate a cybermedicine business.²⁴⁵ Thus, states enforcing the corporate practice of medicine doctrine would need to address not only the cybermedicine websites incorporated within their own state, but also those websites originating elsewhere.²⁴⁶ Finally, the efficacy of applying the corporate practice of medicine doctrine to cybermedicine relies on the assumption that physicians, rather than lay persons, are best suited to minimize the commercialism in cybermedicine.²⁴⁷ As the example of qualified cyberdoctor Dr. Filice shows, however, certain licensed physicians emphasize financial gain at the expense of quality patient care and thus are no less a risk than lay persons in terms of neglecting the values espoused by the medical profession.²⁴⁸

Although applying the corporate practice of medicine doctrine to cybermedicine is an imperfect remedy, it represents a workable intermediate regulatory scheme and is certainly preferable to the status quo of non-regulation in cybermedicine.²⁴⁹ Ultimately, however, either the states or the federal government need to enact laws specifically geared towards regulating cybermedicine.²⁵⁰ One way to regulate cybermedicine would be to revise physician licensure laws so that they explicitly pertain to cyberdoctors.²⁵¹ Such revised laws would create explicit statutory authority for state medical licensing boards and law enforcement officials to apprehend unlicensed individuals practicing medicine via the Internet.²⁵² Physician licensure has traditionally been a state function; therefore, the revision of licensure laws could easily take place at the state level.²⁵³

²⁴⁴ See *id.*

²⁴⁵ See *id.*

²⁴⁶ See Rubin, *supra* note 90, at 1A. Issues of legal jurisdiction over Internet websites are beyond the scope of this Note. For more information on this topic, see generally Howard Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925 (1998), and Richard S. Zembeck, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339 (1996).

²⁴⁷ See Jennings, *supra* note 2, at 1A.

²⁴⁸ See *id.*

²⁴⁹ See generally Hampton, *supra* note 115; see also *Bogus Treatments*, *supra* note 1, at 1D.

²⁵⁰ See Rubin, *supra* note 90, at 1A.

²⁵¹ See Wieseemann, *supra* note 89, at 1152-53; *Bogus Treatments*, *supra* note 1, at 1D.

²⁵² See *Bogus Treatments*, *supra* note 1, at 1D.

²⁵³ See GOLDBERG & GORDON, *supra* note 3, at 3.

The creation by the federal government of a national standard for physician licensure would be more effective than any state solution, however, in that it would eliminate any inconsistencies between state laws.²⁵⁴ In addition, a federal scheme might better address the breadth of cybermedicine, which is national—in fact, global—in scope and not restricted by state boundaries. In addition to changes in licensure laws, the federal government could also establish an agency to keep a registry of and otherwise monitor cybermedicine websites.

CONCLUSION

Cybermedicine offers both the best and worst of Internet technology. Cybermedicine enables interactions between doctor and patient previously thought impossible. As computers become more accessible and increasing numbers of people become familiar with the Internet, more and more patients will have the opportunity to take advantage of the unique health care possibilities offered by cybermedicine. Despite the numerous benefits of cybermedicine, the Internet remains both an essentially anonymous medium and an arena for entrepreneurs with creative ideas for cyberspace businesses. Neither of these qualities— anonymity or commercial opportunity—conforms with the traditional norms of quality health care, which emphasize personalized patient care above all else. The corporate practice of medicine doctrine evolved from AMA ethical standards espousing these patient-centered values. Thus, enforcement of the corporate practice of medicine doctrine in the cybermedicine context would signal an affirmation of professional values in this burgeoning area of medical practice. Furthermore, given the present lack of either state or federal initiatives aimed specifically at improving safety and security in cybermedicine, the corporate practice of medicine ban would provide some measure of stability to cybermedicine for the potentially lengthy period prior to the promulgation of cybermedicine regulations.

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²⁵⁴ See Rubin, *supra* note 90, at 1A. Though the regulation of health care traditionally has been a state function, Congress has the authority to enact health legislation under the Commerce Clause of the U.S. Constitution and has enacted such legislation in the past. See, e.g., Mammography Quality Standards Act of 1992, 42 U.S.C. § 263b (1994); Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, 1144 (1994).