
Legal Briefs

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Professional Corporations

Nurse anesthetists are professionals. Because nurse anesthesia requires skill and knowledge which laymen and courts do not have, the courts designate the area a "profession." The level of performance of the profession, what a competent nurse anesthetist would do in a particular situation is referred to as the "standard of care." Members of the profession determine their own standard of care by performance. When the courts need information on the standard of care, for example when they are trying to determine whether certain conduct is negligent, they request testimony from nurse anesthetists as to what the standard of care is. However, there are multiple meanings of some terms and "professional" is a term that varies from context to context. Nowhere is this inconsistency as widely found as in the area of *professional corporations*.

Many nurse anesthetists who are self employed may want to incorporate their practices as professional corporations. Others may be employed by physician-owned professional corporations. Are nurse anesthetists the type of professional which may incorporate? May a nurse anesthetist become a shareholder, director or officer in a professional corporation owned by one or more anesthesiologists? Answers vary from state to state and CRNAs must consult their own advisers to find out what the answers may be in their respective state. However, a recent survey provides information which may be useful in dealing with corporation commissions in your state or in your own planning.

Business entities defined

Business entities are one of three types. *Proprietorships* are entities without agreement or special structure. There is one owner who has all authority and is liable for debts and liabilities. *Partnerships* consist of two or more owners who often have oral or written agreements providing for the sharing of profits and dealing with other matters. All partners are liable for business debts and liabilities. A *corporation* is treated as if it were a person and only the corporation is liable for business debts and liabilities. Corporations have centralized management through a board of directors and officers. Moreover, if a partner or proprietor dies or retires, it often means the end of the business enterprise. Corporations can have an existence that survives their owners.

For many years, state laws prohibited professionals from incorporating for a variety of reasons. Reasons frequently given included concerns over the so-called interference the corporation would have on traditional professional-client/patient relations. Professionals owe the utmost care to their patients. But employees of a corporation owe a duty of care to the corporation. Would this interfere? It was also felt that incorporation would have a profound effect on the relationship between professionals and patients. Patients would not be able to sue their professional and this would affect their relationship. This argument ignored the fact that in the field of health care, many professionals were

employed by hospitals which were already corporations.

By the early 1960's, the Internal Revenue Code had introduced a very important difference between corporations and partnerships or proprietors. The code gave much better benefits, primarily retirement plans, to corporations. State legislatures are traditionally composed of many lawyers, and these individuals could not incorporate. As a result, state legislatures created professional corporations.

Professional corporations were like ordinary corporations except: (1) liability to patients and clients was unlimited by the assets of the corporations—patients and clients could still sue the professionals who owned the corporation; and (2) they were unusually regulated by the board which licensed the professional who owned them. Today, only Arizona, Colorado, Oregon, Wisconsin and Wyoming continue to require that owners of professional corporations be liable as if they were partners. (Comment, *Willimette Law Review* Summer, 1988, page 733).

What about the tax story? The Internal Revenue Service at first refused to treat professional corporations as corporations for purposes of the more favorable retirement plans for which they were created. After losing in court, the tax code was changed (in, among other acts, TEFRA, the same legislation that gave nurse anesthetists medicare direct reimbursement) to limit benefits on professional corporations while making tax benefits for partnerships and proprietors comparable. While this reduces the impetus to incorporate practices from a tax standpoint, many health care practices were incorporated before the law was changed and others continued to incorporate for ease of management and other corporate benefits.

States regulate who can incorporate

Who is a "professional" and who must incorporate as a professional corporation varies from state to state. In some states, nurse anesthetists are required to incorporate only as professional corporations. In virtually all states, physicians are required to incorporate as professional corporations. Because one of the imperatives was to keep control of the professional corporation in the licensing board which regulated the profession, many states required that the professional corporation submit normal corporate reports to the licensing board and restricted the ability to serve as an officer, director or shareholder of a professional corporation to persons in good standing with the licensing board. As a result, professional corporations consisted of lawyers, doctors, accountants or other professionals but

not combinations. This usually paralleled professional ethical restrictions on combining with other professions. Lawyers are not permitted to set up partnerships with accountants or physicians by legal codes of ethics. There are, however, various professions whose members do combine and work together. In some states, the laws governing professional corporations were written in such a way that even these professionals could not combine because that would have required regulation by more than one regulatory board.

The most obvious example of a situation where professions customarily combine is a group of engineers combining with a group of architects. A somewhat less obvious, but more relevant example is whether a professional corporation can consist of nurse anesthetists or anesthesiologists serving as shareholders, directors and/or officers in the same corporation.

Survey regarding professional corporation acts

The answer to this question obviously varies from state to state. However, the state of Oregon recently set up a special task force to examine the Oregon professional corporation act. The task force surveyed the professional corporations of all 50 states. The results are interesting. A word of caution is needed before reporting on the survey. While the survey is instructive concerning attitudes in various states, it was not and is not binding on any state. Questions may not have been understood; answers may not have been approved by regulatory bodies and information may not have been correctly tallied. It will still be necessary to check the proper answer with an authority in your state.

The survey asked "*Does your statute allow individuals licensed by allied professions to be shareholders of the same domestic professional corporation?*" A total of 20 jurisdictions answered *yes* (Alabama, Colorado, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, Tennessee, Utah, Virginia, Washington (permits licensed health care professionals to combine when they are working through a health maintenance organization), West Virginia and Wyoming). A total of 12 states answered *no* (Alaska, Arizona, Georgia, Kansas, Maryland, Nevada, North Dakota, Ohio, South Carolina, Texas, Vermont and Wisconsin).

Most of the states' answers indicate that their professional corporations are designed for architects, engineers and surveyors. Colorado, Georgia and Virginia answered that they permitted architects, engineers and surveyors to practice together. Illinois indicated that in addition to these profes-

sions, they considered "medicine" in all of its branches, podiatry and dentistry to be related professions.

Conspicuously missing from the group, is nursing. In fact, Illinois advised Fine & Ambrogne that it would not allow a corporation to consist of physicians and nurse anesthetists. Alabama, New Hampshire, Massachusetts, Minnesota, and Wyoming leave the decision to regulatory/licensing boards. In Massachusetts, at least, the regulatory boards reported that nurse anesthetists and anesthesiologists could be shareholders in the same professional corporation. The District of Columbia, Tennessee, Mississippi and Washington permit individuals licensed by allied professions to be shareholders of the same corporation. These states again gave architects, engineers and surveyors as examples of what they considered as allied professions. In West Virginia, this is not a concern because of all states answering the survey, West Virginia was the only state which did not limit shareholders to licensed professionals.

Answers to questions concerning officers and directors indicate other paths which may be taken to form corporations representing both groups even where allied professions are not permitted to combine or exceptions are not interpreted so as to permit nurse anesthetists and anesthesiologists to combine. Kentucky, Hawaii, Montana and New Hampshire require 50% of a professional corporation's board of directors to be licensed. Massachusetts requires a majority of the directors to be licensed while Alabama and Georgia require only one director to be licensed. Wyoming permits nonlicensed members of the board of directors. Maryland, Mis-

issippi and Ohio do not require that any member of the board of directors be licensed.

The survey showed that often states require that all officers in a professional corporation must be licensed professionals. Neither Maryland, Ohio nor Virginia require any officer to be licensed. Alabama, Colorado and Georgia require only that the president be licensed. Wisconsin requires the president and treasurer to be licensed while Tennessee requires the chief executive officer to be licensed. The District of Columbia, Illinois, Idaho, Massachusetts and North Dakota permit the secretary (called a "clerk" in Massachusetts) to be unlicensed. North Dakota allows the vice president and Massachusetts allows the treasurer to be unlicensed as well. Thus, whether the professional corporation was a medical or a nursing corporation, in these states, it would be possible to give the other professionals a meaningful voice in the affairs of the corporation.

Finally, if your state does not give you the flexibility you need, you can consider yet one more variation which is to take advantage of the law in 25 states that permits foreign professional corporations to do business in the state. Theoretically, a professional corporation could be established in West Virginia with mixed shareholders to do business in any of the 25 states. Or, maybe a holding company could be created in one of the two states that permits business corporations to be holding companies for professional corporations. Given the close scrutiny and regulation of these corporations, these approaches probably will not work, but there may be ways to make professional corporations work for you.