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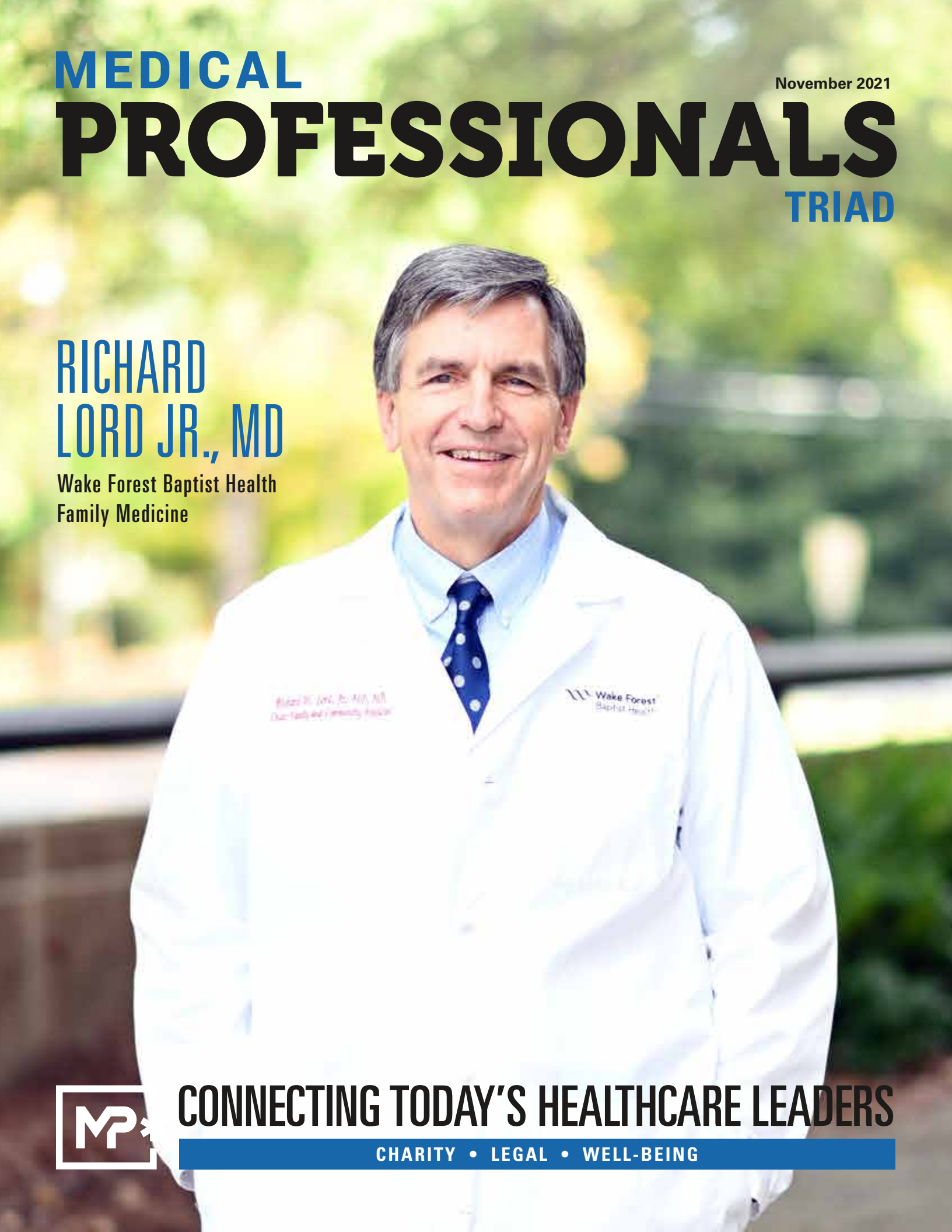

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CAN YOU SELL YOUR PRACTICE TO PRIVATE EQUITY?

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Not really. In North Carolina, medical practices, with few exceptions, must be owned by physicians. The exceptions include joint ownership between physicians and advanced practice providers (APPs), ophthalmologists and optometrists, and psychiatrists and psychologists. However, a medical practice cannot be owned by a private equity firm.

The Corporate Practice of Medicine Doctrine

North Carolina has long prohibited the corporate practice of medicine. That is, corporations owned by laypeople cannot deliver professional medical services. However, the legal framework for this prohibition is an amalgam of statute, regulations, a 1955 Attorney General Opinion, and "Position Statements" issued by the North Carolina Medical Board that do not carry the force of statute or regulation but rather are intended to guide physicians in the ethical discharge of their duties. Our state's corporate practice of medicine doctrine can be summarized by three tenets.

First, individual physicians or APPs must be the ones delivering professional services. This makes sense. Someone who is not licensed to deliver care cannot deliver care. A plumber is not licensed to wire your house. But can that professional be employed by, or under contract with, a corporation owned by laypeople? The answer in North Carolina is "no."

Second, there can be no lay ownership of a professional corporation or professional limited liability company. This is codified in our statutes. As a corollary, corporations owned by laypeople cannot deliver medical care.

Third, physicians cannot split fees with non-licensed providers. This is somewhat grounded in our anti-referral statute but is specifically prohibited by a Position Statement of the North Carolina Medical Board. *Referrals Fees and Fee Splitting, Position Statement of North Carolina Medical Board, adopted 1993, amended 2013.* Thus, if a lay corporation employed a physician and charged and collected for that physician's services, such an arrangement would be deemed unauthorized "fee-splitting" since the lay corporation would be keeping some of the physician's fee for service.

Corporate Practice Doctrine Exceptions

North Carolina's corporate practice prohibition is riddled with exceptions that nearly swallow the rule. Non-profit hospitals can employ and collect money from services rendered by physicians. This exception seems to be extended to any hospital even if for-profit. Licensed HMOs are also exempt. The stated purpose for the exemptions for non-profits is that they, unlike their for-profit brethren, are bound (by their charters if nothing else) to put the interests of the patients over the interests of shareholder return.

Working With the Corporate Practice Doctrine

What is a physician to do if approached by a private equity (PE) firm? There may be a potential viable transaction, but not in the traditional sense. That is, PE cannot raise money, pay for a physician's practice, run it for several years, and then flip it.

The MSO Model

There are many instances in our state where PE has entered the health care space without violating the corporate practice of medicine doctrine. What I have described below is not a DIY guide, but a general outline of how PE can participate in health care and physicians can sell a portion of their practice.

First, the investors form a management services organization (MSO) to acquire non-clinical assets of a medical practice. MSOs promote efficiency by providing non-clinical support needed to deliver care through a medical practice model. It is not unusual for an MSO to handle human resources issues, preparation of accounting statements, revenue cycle management, accounts payable management, and billing and collections. The "pitch" is that the MSO does everything within a medical practice except practice medicine, and leaves to doctors what doctors do best, i.e., treat patients.

Second, the MSO enters into a management services agreement (MSA) to be the exclusive provider of managerial services to the practice. The devil is in the details here. There are some provisions of MSAs the Medical Board believes constructively turn over control of the medical practice to the MSO. For example, the medical practice should retain ownership and control of all medical charts, should retain the right to employ and discipline all providers, and should control all aspects of the delivery of care.

Third, the MSA requires the medical practice to pay the MSO a fee for the delivery of management services. This fee cannot be a percentage of revenues or profits; such a fee would be deemed unethical "fee-splitting." The fee, with few exceptions, should be "flat," and not in any way be based on the volume or value of referrals. The fee can be renegotiated as the practice grows because the work performed by the MSO would grow as well. The fee must be "fair market value" for the services rendered by the MSO.

Takeaways

This type of transaction is fraught with traps. Additionally, it has been my experience that the Medical Board looks to its licensees, not to the MSOs, to get this right. Don't try this at home.