

THE TRADE WITH MEDICINE

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ABSTRACT: *Is there a link between trade and medicine? As origins, commercial interests were foreign from the medical tradition; in other words, the answer would be negative. From this point of view, the differences between a hospital and a commercial enterprise should be more than obvious. It will therefore be very important to note the differences between a doctor from a trader, a patient from a customer, and eventually the patient from the merchandise. Is medicine a business? Although the answer is negative in theory, in practice we can find answers in formal terms that are positive (unfavorable but by implication). In fact, this is a tribute paid to a number of shortcomings: from the lack of a vocational education to the anemic reaction of various institutions with a precise role in this direction.*

KEYWORDS: *commerce, economic thinking, medicine, differentiation*

JEL CLASSIFICATION: *K 29, K 32, K 42*

WARNING

We will not go on the slippery ground of speculation¹ and not on that of a so called literature which cultivates at all costs the sensational²; therefore we will limit ourselves only to outline some parts in the equation medicine/trade.

INTRODUCTION

Is there a link between trade and medicine? Hippocrates considered that commercial interests were foreign from the medical tradition; in other words, the answer

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¹ M. Newton, *The Encyclopedia of Conspiracies and Conspiracy Theories*, Facts On File, 2006.

² G. Lanctôt, *Medical Mafia. How to Get Out of It Alive and Take Back Our Health & Wealth*, Self Published, 2002.

would be negative. From this point of view, the differences between a hospital and a commercial enterprise should be more than obvious. It will therefore be very important to note the differences between a doctor from a trader, a patient from a customer, and eventually the patient from the merchandise.

ESSENTIAL DIFFERENCES

Hospital vs. commercial enterprise

The main reason for every commercial enterprise's establishment is profit making. Therefore, sustentation of a non-profit making organization is a nonsense. Even more, even commercial enterprises which have a profit, but it is down to expectations, they are winding up because their sustentation imply to many sacrifices regard the emolument. Of course that in strategic branches can be started some autonomus administration or national companies. But even they will have to have a positive economical balance otherwise they will be winding up or buy-out just to be steamlined again their activity.

Even if they are not profitable, in terms of immediate economic thinking, meaning that the expenditures are greater than revenues, some hospitals are maintained active, exclusive due to non-economic indicators namely the medical performance. Example: Fundeni Hospital (also, *exempli gratia*, *The Memorial for the Institute of Cardiovascular Diseases Prof. C.C. Iliescu*).

The differentiation of a doctor from a merchant

From our point of view, there are three major differences between a doctor and a merchant. First: the high intellectual character of the medical activities. Of course that this perspective can be an old one; nowadays, the vocational training for a top financier require a qualification obtained in the wake of a superior education which do not exclude but, on the contrary, is based on high intellectual abilities.

The second difference is given by the exceptional-humanitarian character of the medical work³. Obviously, this is the base of foundation for medicine and which transforms, eventually, the nature of medical activity into a non-commercial one.

The third difference is given by clientele and its forming way. The doctor seeks to "get rid of" the patient by healing him, conversely the merchant, is targeted to gain the client's dependency (creating and strengthening the relationship with the) customers. It is also true that the merchant, through his offered quality services and goods "gets rid of" the customer, but unavoidably he seeks the customer's return, while the customer's return to the doctor is based on other reasons (medical examination, disease relapse etc.)

The differentiation of a patient from a client

The differentiation of the patient from merchandise was partially presented earlier. Although both of them have rights (and corresponding obligations), the patient is

³ Art. 375 para. 3 from Law No. 95 / 2006 concerning the reform in the health system, printed in the "Official Journal of Romania", Part I, nr. 372 from April 28, 2006, completed and modified.

associated with the art of healing (to be independent), while the client is considered more like being dependent.

The differentiation of a patient from merchandise

The patient should not be considered as a form of an object of medical care, but a subject (with all ensuing consequences - especially the special attention in affective issues). The specialized literature put a lot of accent on the fact that „at the end of the examination process, the doctor will know: (a) his patient physical and socially, (b) patient's weakest and strongest points, (c) psychopathological proves of the patient, (d) disease nature and treatment strategy and (e) required skills to surpass the critical stage. Aristotle stated that if for an object we care to the extent that it is useful, on the other hand, special care should be taken for a person.

ONE MORE QUESTION. IS MEDICINE A BUSINESS?

For final answer's accuracy, we thought that it is more suggestive to present simultaneously the arguments and points to qualify the medical activities as commercial activities and, on the other side, the counter arguments that can be bring to turn down the medical commercialization theory.

Indices to describe medical activities as having commercial nature	Counter arguments
During the Romanian Middle Ages (and beyond), there existed a guild of surgeons (barbers).	From the historically point of view, medicine has been regarded even from the beginning of mankind as a noncommercial act (contrary opinion was also issued – S.H. Miles); medicine is essentially noncommercial (Hippocrates). The guild was considered to be rather a union of the privileged ones.
The CAEN code provides a group of activities classified under numbers 861, 862 and 869 hospital care, outpatient and dental care, and other activities related to human health. CAEN is considering widening the range of activities which constitute acts of trade. Private medicine is organized as CMI or SRL (the latter being a real company).	The qualification of the medical acts as being noncommercial derives out of the legislator's will and from their intrinsic nature. None of the modern laws - Callimachus Code (1817), The Romanian Country commercial ledger (1840), The Civil Code (1864), The Commercial Code (1887), The New Civil Code (2009) - nor the laws regarding the medical system have ever qualified the health services as being commercial. Moreover, the actual legal framework allows not only doctors but also other liberal professions, to associate in a form

	of company (architects, for instance). Even in the revolute regime, according to Decree no. 212 of 13 May 1953 on the regulation of the medical profession, published in BO no. 16 of 16 May 1953, there was stated that medical activities could be practiced in private clinics or in the public system.
The field of private medicine is very successful (any form of professional medical activity aims to make a profit, which in this case is called freelancers income). All medical services are paid (whether indirectly through various insurance schemes, either directly by the beneficiaries when there are no contracts with third parties).	The actual payment does not necessary constitutes a trade. The criterion of gaining a profit from the work performed does not meet the necessary and sufficient legal element to qualify it as commercial act or not. Such a misfortunate point of view, would transform the simple seller into the real merchant on whose behalf the employee operates. Therefore a logical question arises: what does medicine actually sells, if we should accept the status of merchants for its practitioners.
Expressions as “the cost of hospitalization” actually represent “business” indicators.	“The cost of hospitalization” is an indicator for the construction affected for the health budget. But the performance and appreciation of the medical facilities is not limited to indicators such as “profit” or “loss” no matter how mercantile the enterprise really is (in accordance with this, there are places blamed for extremely onerous practices, but attended for some very successful curative results).

THE MEDICAL INDUSTRY

Although in the American literature the term “medical business” is used without much explanation, in our country we are rather justified to believe that the term “medical business” is only the species, and not the gender. An existence of a medical industry is unquestionably, but this refers to that which produces medical equipment and materials. This reference should affect only derogatory the proper medical acts, regardless the amounts of money at stake.

THE CROSSING OF MEDICINE WITH THE COMMERCIAL ACTS

Thus, despite the apparent contradiction between medicine and commerce we

cannot deny the existence of some relationships because practicing medicine cannot be achieved without the use of materials, instruments etc. But these relationships do not seem to have stopped at this level, as codes of professional ethics (and not only) assert the committing of certain offenses as being punishable either by doctors or by traders.

We should take into account that each field of activity that is driven to its maximum performance, appears to be irreconcilable with each other: medicine following to achieve maximum health (healing the patient) and on the other side the business tends to maximize its profit (gain control over the customer). The connection exists, but this interference should not transfer one own referential systems, but unsuitable to the other.

MEDICINE AND BUSINESS. BETWEEN ASSOCIATION

The practicing of medicine has ignored over time any trade rules, encouraging a behavior expressly chosen in order to exclude any interference for financial interests in the medical act⁴. However, such factors, as the limited financial resources, the “competition” between patients with different diseases on their allocation, required a very responsible dosage for the pecuniary efforts and services that may be offered for curative or palliative purpose⁵. Can the presence of such terms or words as “hospital cost” betray an onerous or lucid perspective on public health? The high costs entailed by the medical system must consider the efficient management of financial resources, especially since the discussion is conducted in a country with an economy less efficient.

“Health systems resources are limited. Therefore specialists in health economics developed in the late 1960s the “cost utility analysis” (CUA) using Quality Adjusted Life Years (QALYS). The ethical support for the “cost utility analysis” lies in the classical utilitarianism, namely to produce maximum health gain for the greatest number of people”⁶.

The free health programs offered by the state are part of its role in society, part of a policy of spending public money effectively⁷. But there were also cases where the benefits of a national screening were questioned, although their object was the early detection of certain types of serious conditions⁸. Is it possible therefore to remove national health programs, only as a result of a [dominant] interest of the medical industry? The answer, in theory, can be given. But what remains open is the discussing of concrete cases.

Returning to an issue already mentioned, we ask ourselves whether we can talk about health system performance in terms of business. How far can we stretch such an assessment? With all the avatars imposed by the financial aspects of managing a medical institution we cannot make a comparison between medical institutions, the medical services and their quality cannot be assessed in the terms of a company⁹. This is the

⁴ A. R. Nelson, p. 756.

⁵ No matter the situation „in practicing his profession the doctor gives priority to the patient’s interests, which prevail on any other interests” (Art. 4 from the Medical Deontological Code of the Romanian Physicians College).

⁶ L. Oprea, *The cost-utility analysis and moral justification*, in “Revista română de bioetică”, nr. 3 / 2005.

⁷ Also examine the HG nr. 1388 din 28. 12. 2010 concerning the approval of the national programs of health for the years 2011 and 2012, printed in the “Official Journal of Romania”, Part I, No. 893 from December 30, 2010.

⁸ R. M. Benoit, M. J. Naslund, p. 451.

⁹ R. Lilford, P. Pronovost, p. 955.

answer doctors give; economists would argue otherwise, especially since at one time the hospital managers could be elected only from among them.

May a business perspective be excluded from the medical practice especially where qualified labor hiring is done for profit?¹⁰ the “classic” example is that of private medical care. “Profit” is a result of the medical act and not its purpose. By converting the profit into a purpose, the medical act degrades from a morally point of view. After all, as Romanian saying states “money is a good servant, but a bad master.”

IS THERE A TRADE WITH MEDICINE?

The answer is, unfortunately, positive. But as there is a flourishing trade with the holy issues, in the same way there is one with medicine.

We will mention only that there are a lot of charlatans, deprived of any medical expertise and who are outside any form of therapy except of the psychiatric type (the so called “healers” that fill the pages with ads in newspapers, the “healers” present on stadiums, therapists who possess miraculous recipes or an apparatus that medical institutions with budgets of millions of Euros us cannot afford them). Verging the mass idiocy or not, these events, which are still in great demand, do not have the slightest connection with the medical art.

We also note the observation that even before the medical profession established its legal obligations for practitioners, it experienced a series of very high moral standards of the highest standards, as was the responsibility to act in their patients best interests¹¹. This is why the term “medical trade” concerns the medical practices that degrade the exploitation of knowledge at the expense of his subjects. Therefore the legal moral standards must be respected otherwise the deviation from these situations can create not only illegal and immoral issues, but they even deprofessionalize. For instance, we can no longer call medicine, but medicine trade, the conducting operations and investigations advantageous for the physician but never-ending for the patient. As in the same category we can introduce a certain type of conditioning in public hospitals.

Therefore, even the “privatized” medicine is not a form of trade. Moreover, the alternative that the private practice offers lead to a higher level of competition in terms of medical services and has always been extremely responsive to patients’ requirements¹².

CONFLICTS OF INTEREST

The medicine-business relationship implies other “gray” areas, too. For instance, one cannot ignore the existence of lobbyist groups that determined the content of certain contingent laws of medicine, such as the liability insurers and companies producing medicines, as the so-called “Common Sense Legal Reform Act” of USA.¹³

Doctors are also called to observe another important aspect, with a major impact on

¹⁰ M. I. Resnick, p. 1143.

¹¹ William W. Parmley, *The Commercialization of Medicine: “Business” Ethics Versus “Medical” Ethics*, in “Journal of the American College of Cardiology”, Vol. 26, No. 4 / 1995, p. 1090.

¹² Edward Shorter, ‘*Private Clinics in Central Europe 1850-1933*’, in “Social History of Medicine”, Vol. 3, Issue 2 / 1990, pp. 159-160.

¹³ L. Romanucci-Ross, L. Tancredi, *op. cit.*, p. 8.

medical ethics, namely the association between health services and business practices. In order to preserve ethical behavior there were regulated conflicts of interest¹⁴. *Exempli gratia*, it is considered that medical ethics is violated if a doctor offers a patient unnecessary treatment, but the effect of which is pecuniary in favor of the former. Also this issue includes referral to a particular laboratory due to financial arrangements, even if it offers services that will influence subsequent quality of care¹⁵.

But sometimes “the legitimate interests and obligations of different parties cannot be harmonized”¹⁶... The conflicts of interest received a legal definition by Law no. 161/2003¹⁷. *Mutatis mutandis*, this was usually described by the legislature to other areas such as the medical and public procurement.

Thus, the Law No. 95/2006 on healthcare reform, mentions that: “The conflicts of interest constitutes possession by the manager, individual, legal entity manager or representative of legal person, of shares or interests in companies or NGOs¹⁸, establishing trade relations with the hospital where the person performs or intends to perform the task manager. This provision applies in cases where such shares or interests are held by relatives or affinity to the fourth degree inclusive, of the person concerned”¹⁹.

In the domain of public procurement, the conflicts of interest is the situation when there is a personal interest that could adversely affect the conduct of a proceeding seeking a contract with a trader.

It is worth noting that the doctor himself is not a “public civil server”²⁰.

THE FUNCTIONING OF HOSPITALS IN ROMANIA

But can the functioning of hospitals in Romania be reduced to an economic equation? If the National House of Health Insurance settles services, can we avoid the temptation to perform as many tests in order to increase the volume of payments? Theoretically, such a situation cannot be excluded, practically, its realization is severely censured by lack of funds and their waste would collapse hospital activity.

It’s almost hilarious how the Romanian legislator defines the hospital: “health unit with beds, of public utility, with legal personality, which provides medical services”²¹. The emphasis is on objects (beds), only the second and third sentence reveals the institutional nature, the healing nature constituting only in the final sentence ... Obviously, all health care facilities provide medical care, but only the hospital “hosts” the patient, therefore the “bed” is an important difference to be so stressed. But it is a strange option for the legislator to specify the specific difference before the proximal genre.

¹⁴ For the Romanian Law, please examine the Law No. 95/2006.

¹⁵ M. V. Rorty, A. E. Mills, P. H. Werhane, 180, 188.

¹⁶ George Khushf, *A Radical Rupture in the Paradigm of Modern Medicine: Conflicts of Interest, Fiduciary Obligations, and the Scientific Ideal*, in „Journal of Medicine and Philosophy”, Vol. 23, No. 1 / 1998, p. 98.

¹⁷ Art. 70 from the Law nr. 161 / 2003 concerning some measures to assure the transparency in the exercitation of public functions (printed in the “Official Journal of Romania”, Part I, No. 279 from April 21, 2003).

¹⁸ The associations and foundations may unfurl economical activities in following the purpose for which they have been created for.

¹⁹ Art. 180 para. 2 from Law No. 95/2006.

²⁰ Art. 375 para. 2 from Law No. 95 / 2006.

²¹ Art. 165 para. 1 from Law No. 95 / 2006.

EPILOGUE. QUO VADIS, CODEX COMMERCII?

In 2011, the new Civil Code's coming into force imposed not only new terms, but also the redefinition for some subject matters²². This established the monistic conception for private law relation, with certain, the regulation in the same legal document for all civil, family and commercial law relations. At the same time, it abolish the Family Code (which started in 1954), but also the Commercial Code (from 1887).

So, the Civil Code (from 2009, modified and became effective in 2011) stipulate that: "the present code's measures are applying between professionals [...]". The enforcement law for Civil Code specify: "The term "professional" present in Art. 3 of Civil Code includes the categories of trader, entrepreneur, economic trader and any other person authorized to do business or professional activities, as those terms are prescribed by law at the entry into force of the Civil Code."²³

Which is the effect of this unprecedented initiative for our legislative history? Today we notice that it disappear not only Commercial Code, but also the fact that commercial enterprises have to change their designation in enterprise: "*through all the content of the law, the expression of 'commercial' enterprise or commercial 'enterprises' is replaced by the term of 'enterprise' or 'enterprises'*"²⁴ and even the Law no. 31/1990 for commercial enterprises is changing the title in Law no. 31/1990 for enterprises.²⁵ Under this circumstances, our article's title and content are still justified?

But through the new regulations, even if the term of commercial activity disappear from legislation (but not from dictionary), the word of "trader" still exists in our lawgiver dictionary. As we notice in the specialized literature, professional is the gender and trader is the species. Professional means any person authorized to do business or professional activities (including liberal professions).

The importance of distinction: not all professionals are subjects, for example, to the insolvency procedure but the law stands that for only professionals who are "traders".

CONCLUSIONS

Is medicine a business? Although the answer is negative in theory, in practice we can find answers in formal terms that are positive (unfavorable but by implication). In fact, this is a tribute paid to a number of shortcomings: from the lack of a vocational education to the anemic reaction of various institutions with a precise role in this direction.

Today, when more and more areas interpenetrate themselves, there is no question of integrating in a positive or negative category of judgment, but the existence of laws that should protect the rights of patients and the fair unfurling of the acts of trade with the health system.

²² For a critical examination, see P. Popovici, *The abrogation of the Romanian of Commercial Law*, in "Studii de drept românesc", no. 2 / 2011, pp. 173-179.

²³ Art. 8 para. 1 from the Law No. 71/2001 for the implementation of Law no. 287/2009 of the Civil Code, printed in the "Official Journal of Romania", Part I, No. 409 from June 10, 2011.

²⁴ Art. 18 point 31 from the Law No. 76/2012 for the implementation of Law No. 134/2010 of Civil Procedure Code, printed in "Official Journal of Romania", Part I, no. 365 from May 30, 2012.

²⁵ Art. 34 point 1 from the Law No. 76/2012.

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