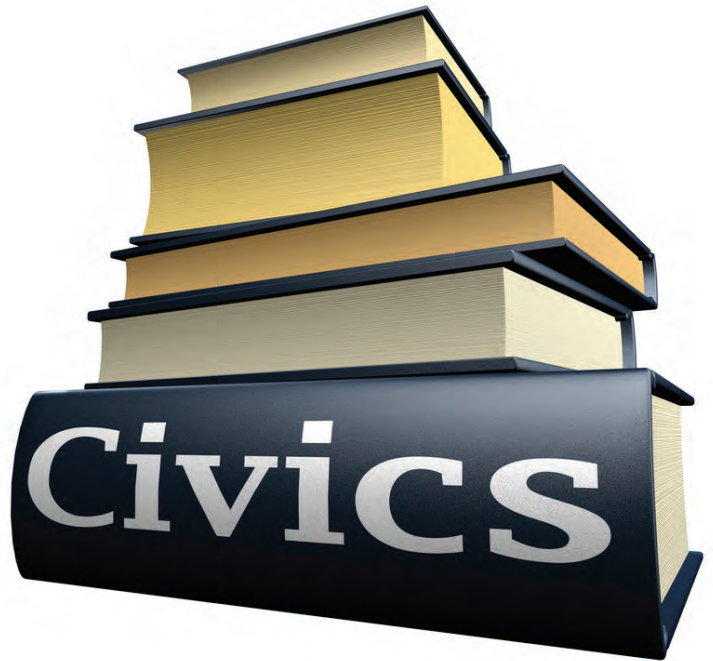


Civics 101 for Podiatrists: 5 Points

Don't try to be
your own lawyer.

BY LAWRENCE F. KOBAK, DPM, JD



1) "It Is Not Fair"

Healthcare attorneys often find podiatrists have very interesting notions about our legal system. The phrase attorneys hear most often is "it is not fair." While notions of fairness are a wonderful concept, "fairness" is not usually a successful legal argument. Our justice system is made up of laws passed by the House of Representatives and the United States Senate. These are Federal Laws. That is how Medicare began. They are usually controlling over state laws, but not always. There are individual state laws that are passed by that state's elected representatives. Those laws generally only apply for residents of that state and that state alone.

The Federal Courts, the highest being the Supreme Court, make what is called "case law". That is how abortion and same-sex marriage became legal. There are also federal administrative bodies that regulate, such as the CMS. It regulates Medicare. There are state administrative bodies that regulate professional licensure, including your license to practice podiatry in your state. These regulations have the force of law behind them. So do the court decisions.

Fairness may be a consideration in some of this panoply of laws, but other considerations are cost and political philosophy. You could probably fill in many other considerations for various laws. Fairness is often at the back of the line. Let us take a deeper

dollar for the second bagel and so on. He also explained that each nail that was removed could be equally responsible for a potential professional negligence claim, not half of a claim. *"It was not fair that he got paid less than full price for each nail surgery."*

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(and any other healthcare provider) be licensed in the
state where the patient is physically located.**

dive into an example of an unfair regulation that podiatry has had to live under for decades: bilateral foot surgeries. Medicare has paid full for the first bunionectomy and no more than half when done on the other foot within a prescribed period.

To better illustrate this, a podiatrist attended a fair hearing. He had with him a bag consisting of a dozen bagels. The hearing concerned his billing full price for all ten nails that had chemical matrixectomies. He informed the committee that he had paid one dollar for the first bagel. They looked at him quizzically. He then proceeded to tell them that he was charged a full

It was a great argument. This really happened. CMS and most healthcare insurance companies do not agree. They have other considerations, such as cost. Civics lesson number 1—"It is not fair [to me]" is usually a very poor argument.

2) I Treated My Patient with Telemedicine. It Does Not Matter Which State Either One of Us Was in.

It very much matters which state the patient is in. Most states require that the podiatrist (and any other healthcare provider) be licensed in the state where the patient is physi-

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cally located. That means if your patient goes to Florida, Utah, or Southern California during the winter, that patient cannot be treated by you unless you are licensed to treat that patient in the other state. The detailed requirements vary from state to state. This also applies if you treat the patient through telemedicine when the patient is at their weekend home in a neighboring state. This would also apply if your office were in Philadelphia and your patient lives over the river in New Jersey. Telemedicine would not be a legal option unless you were also licensed to practice podiatry in New Jersey.

3) Natural Law and State Law and Finding Some “Baloney Loophole”

An exasperated podiatric client once quoted “Natural Law” to make her legal point. She wanted her attorney to use Natural Law in her defense. She was asked what she meant by Natural Law. She started quoting Plato and Aristotle. It had something to do with human values that can be applied due to a close observation of human nature. This may be an excellent argument in a philosophy class, but rarely will that work in a court of law in any of the 50 states or the District of Columbia. It would also be ill-advised to use in front of an administrative board, such as governs your podiatry license.

Another favorite is when a client, quite full of himself, started citing a California case for the proposition that something he did or did not do was quite proper. There was only one problem; the client was practicing 3,000 miles away in another state. There is no legal precedent set in Nebraska when a California court rules on a California issue, even if there is an analogous issue in Nebraska. In the same vein, a law affecting insurance companies in Oregon does not normally bind an insurance company in Georgia. That is our federal system.

Still another situation had a client ask her attorney, with a straight face, when there was no law or statute to back up her position to “find some baloney loophole; that is what you

lawyers do.” Most emphatically, that is not what attorneys do. They do try to find laws, regulations, and legal arguments that are helpful for a client’s particular situation. That often involves extensive legal research.

An example of what some might call a “baloney loophole” but others would not, occurs in a New York regulation that governs podiatrists’ licenses. If another state found you guilty of a crime, that crime must also be a crime if it occurred in New York. If it is not a crime, that is a complete and successful defense. In a

expanded to encompass healthcare fraud. When a podiatrist files a false insurance claim, it is a “false claim” under the Federal False Claims Act.

Still another podiatrist insisted upon using diagnosis codes that applied to hands, “feeling” they were analogous to the foot codes. Analogizing in medical coding can be very dangerous. In some circumstances, it can be considered fraudulent. It is advisable to get advice from a certified coding expert.

A well-meaning podiatrist, who sought to escape paying the extra

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real-life example, a client was found criminally guilty of a type of insurance fraud in New Jersey that required no intent to defraud anyone. There was no equivalent statute in New York. The podiatrist lost her license in New Jersey, but all charges were dropped in front of the Board of Podiatry in New York.

4) “That Law Was Not Meant to Apply to Me!”

A podiatrist once stated to her attorney, with a straight face, “that law was not meant to apply to me.” It involved use of the RICO statute against her. The RICO statute is designed to prosecute criminal enterprises, such as organized crime. In fact, in recent years, it has been used to prosecute healthcare providers who participated in the fraudulent practice of podiatry/medicine. The courts have viewed such an act as participating in a “criminal enterprise”.

Another podiatrist, fancying himself an expert on American history, stated that he could not be prosecuted under the Federal False Claims Act as that only applies to suppliers of military supplies that are substandard. He got the original use of the Federal False Claims Act correctly. It goes back to the American Civil War. However, many years ago, its use was

portion of Social Security and Medicare, contracted another podiatrist as an independent contractor, not an employee. He paid the podiatrist a percentage of the gross collections of patients treated by the independent contractor. When he was informed that this is considered a violation of the Federal Anti-Kickback Act, he immediately claimed there can be no kickback as they were both podiatrists, and the patients were really all his. Wrong. All he had to do was to have a real and legitimate employment agreement with the other podiatrist instead of an independent contractor agreement. Then, the other podiatrist could have been legally paid with a percentage of the gross money collected for patients he treated. Yes, that law did and does apply to that podiatrist, and every other podiatrist.

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5) “Tell Them I Am a Small Practice Losing Money and They Will Leave Me Alone.”

A podiatrist attempted to “get the government off his back” by telling them they were going after a small

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practice losing money. He told them to leave him alone. This was a Medicare audit. Prior to his calling a health-

The important point to be made is that the size argument does not work. It can easily boomerang when it is not true. It is ineffective when it is true. It is never a good idea to lie

years. Little if any of that very extensive education dealt with our system of government and its laws. The experts in that area are attorneys. The experts in the law that affect podiatrists are health law attorneys. We each have our job to do. **PM**

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care attorney, he was quite sure that his pleading poverty and lack of size would be an effective way of having the government go away.

Just imagine his reaction when the government responded by continuing their audit of his practice. By the way, his Medicare billing was well into the six figures for one year. His complaining only made the government more curious as to what was going on. His income from Medicare did not jive with the small size of his practice and the number of patients seen.

to a government investigator, federal or state; ask Martha Stewart, among others.

Conclusion

What is the takeaway from this article? You are highly trained healthcare professionals. Nobody can deliver a higher quality healthcare for your patients' feet and ankles than you. You have had four years of college, four years of a college of podiatric medicine, as well as a residency of up to another four



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