

The Corporate Practice of Medicine and Management Service Organizations

The key is to be familiar with your state law.

BY LAWRENCE F. KOBAK, DPM, JD

What is the corporate practice of medicine (CPOM)? The legal concept of CPOM generally prohibits corporations, entities, or individual non-physicians from practicing medicine. It also prohibits a business corporation from employing a physician to provide professional medical services. By physician, it means physicians with plenary licenses; this means MDs and DOs. It does not generally include podiatrists, dentists, psychologists, DPTs, or DNPs. It certainly does not include unlicensed non-medical personnel. The rationale is that people without a license to treat the entire body should not be able to expand their scope of practice by hiring those with a plenary scope of practice. Podiatrists, of course, can work for podiatrists.

Why does this matter to podiatrists? Some podiatric practitioners who are entrepreneurial think this is a way to expand their practice to be a comprehensive medical model. It is a way to poten-

tially expand their income flow by partnering with MDs, DOs, and dentists. Being entrepreneurial is fine.

a dentist. A practitioner who is limited to treating the lower extremity is not allowed to profit by owning or par-

The legal concept of corporate practice of medicine (CPOM) generally prohibits corporations, entities, or individual non-physicians from practicing medicine.

Wanting to earn more money is fine. However, it must be done in a legally acceptable way.

In states that follow the corporate practice of medicine, a podiatrist may not employ an MD, or for that matter,

tially owning a practice that performs back surgery or oral examinations. In effect, it expands the scope of practice of the podiatrist by allowing her/him to profit by it. The same extends to unlicensed/non-medical personnel.

They cannot own or partially own a medical practice of any kind. To summarize, a podiatrist can own a practice that includes the full scope of what podiatry consists of in that state where she/he is practicing. A civilian cannot own or partially own a podiatrist's practice. Some states have exceptions. In New York, a licensed Article 28 facility is a legal exception to

Continued on page 48



CPOM (from page 47)

this rule. Article 28 facilities, which can be owned by unlicensed people, usually are hospitals and skilled nursing facilities.

31 states currently follow some form of CPOM. These include Arizona, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, and Wisconsin.

19 states have no statutory prohibition against CPOM. Keep in mind that these states do have rules that must still be followed, even if they allow a CPOM. Additionally, even if a state allows CPOM, that does not replace the need to obey the federal Anti-Kickback Statute and the federal Stark Law! The states that allow CPOM are Alabama, Alaska, Connecticut, Delaware, Florida, Hawaii, Idaho, Maine, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, Oklahoma, Rhode Island, Utah, Vermont, Virginia and Wyoming.

Management Service Organization

Next, what is a management service organization (MSO)? It is a corporate entity that provides various functions such as coding, billing and collection services, human resources, including *non-clinical* employee management, marketing, purchasing of supplies, performing the administrative credentialing tasks, overseeing compliance issues and schedules, and obtaining and managing the physical office. An MSO cannot practice medicine in any way. A good rule of thumb is that it cannot perform any function that requires a medical license to perform.

An MSO can be owned by the owners of the practice itself or separate people, or a combination of both. However, the MSO is a separate entity from the medical practice in fact as well as deed. The following are some examples of what an MSO cannot legally do in most states:

1) An MSO may not evaluate the

medical skill of a perspective medically licensed employee. It can evaluate the skills of a secretary, biller, or cleaning service.

2) An MSO may not evaluate which medicine to buy for office use. It may evaluate and purchase cleaning supplies. It may negotiate the buying of medical supplies if it first obtained the approval of the physicians in the office. The injectables are decided by the physicians, not the MSO.

3) An MSO may not control the medical practice's checkbook. If it does, in fact, it controls the medical practice, and that is not allowed in states that recognize CPOM. Remember, the MSO is a separate entity.

4) An MSO, may not make any medical/podiatric decisions.

5) An MSO may not terminate medical personnel.

6) An MSO may not make or determine the need for a medical referral.

7) An MSO may not determine which tests are necessary for a patient or condition. That is clearly a medical judgment.

8) An MSO may not govern how many patients a physician must see in a set time period.

9) An MSO may not "incentivize" any of the staff to increase the use of the facilities that might maximize practice income.

10) Purchase of medical equipment should be overseen by the physicians, not the MSO.

11) The physicians should have the final say in which billing codes and procedures are used, not the MSO.

12) The physicians have the final say when it comes to contracts with third party vendors and contractual relationships, not the MSO.

How does an MSO get paid? The term of art that applies is "fair market value", otherwise referred to as FMV. For the services being provided, what is the FMV for those services in

that location? The MSO can submit its expenses on a periodic basis for reimbursement plus additional money for its services. Percentage deals vary by state law. For example, New York does not allow percentage of patient revenue arrangements. Florida prohibits a percentage for patient referrals. You must factor in federal rules and regulations. Again, it is foolish to attempt to navigate this terrain without an experienced healthcare attorney in

Percentage deals vary by state law.

For example, New York does not allow percentage of patient revenue arrangements.

this area of the law. The "cleanest", but not the only way, is for the MSO to get a set fee, based on FMV plus its expenses. Many MSO arrangements include appropriately set-up efficiency bonuses. What is legal varies from state to state. ***However, it is perfectly legal for an MSO to make a profit, consistent with fair market value, for its owners! Its owners may include or be exclusively podiatrists, even in states with CPOM laws.***

In many states, the MSO comes up in the No Fault context. Non-physicians seek a way to capitalize on the "system" and in effect, set up and finance a medical No Fault practice. The MSO "calls the shots" and controls the practice, lock, stock, and checkbook. In many of these practices, the physicians act as "rent-a-docs". In short, they do as they are told, for a fee. This is frowned upon. Licenses are lost. People are imprisoned. Several physicians have told me that the MSO used experienced attorneys to set up the MSO. They were assured by the MSO's attorneys that it was totally legal. However, the MSO's attorneys do not work for the employed physician. This might come as a shock to the podiatric profession, but as in every profession, there are a few "substandard" attorneys out there that will do things for money that they should not be doing. Sometimes, the same attorneys are owners of the MSO. That alone should be a red flag.

Continued on page 49

LEGAL CORNER

CPOM (from page 48)

From the physician/podiatrist point of view, any contract between you and an MSO should show that you, the podiatrist/owner of the podiatry practice, has the final authority to run your practice. You cannot avoid your state's laws by transferring responsibility to an MSO, even if you own all of it or part of it.

Something else cannot be minimized. Violations of the corporate practice of medicine regulations are actionable against your license to practice podiatry. Most states do not allow you, a licensed professional, to facilitate what is, in effect, the unlicensed practice of medicine/podiatry. Additionally, if you are found guilty of committing a crime, by illegally being involved in the corporate practice of medicine, that is disciplinary in and of itself against your professional license. The devil is in the details when it comes to what is and what is not allowed in each state concerning the corporate practice of medicine. One comma that is misplaced in your corporate papers can cause the loss of both your professional license and even

Violations of the corporate practice of medicine regulations are actionable against your license to practice podiatry.

your personal liberty. There are a lot of moving parts. You have your state statutes, your federal statutes, as well as your administrative rules and regulations. If that were not enough, you also have your state and federal case law.

Every state has its own wrinkles as to what is allowed and what is not. The complexities, which also involve federal statutes, require experienced health law attorneys to set up a management service organization that complies with the various state and federal statutes and case law. Even after you are appropriately running a legally created MSO, the ball is still in your hands to follow the rules. You cannot give a wink and a nod to the MSO for expediency sake. You must exercise real control over the medical aspects of your practice. Err on the side of caution.

While there are many rules concerning operating a management service organization, it is a viable option for additional income for the entrepreneurial podiatrist. **PM**



Dr. Kobak is Senior Counsel in Frier Levitt's Healthcare Department in the Uniondale, New York. Larry has extensive experience representing physicians in connection with licensure issues, as well as successfully defending physicians before Medical Boards, OPMC, OPD investigations, as well as Medicare Fraud, Fraud & Abuse, Hospital Actions, RAC Audits, Medicare Audits, OIG Fraud, Healthcare Fraud, Medical Audits, and Health Plan Billing Audits. As a licensed podiatrist

prior to becoming an attorney, he served as the international president of the Academy of Ambulatory Foot and Ankle Surgery.