The Seven Most Ridiculous Laws and Rules That Affect You

These regulations simply make no sense.

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It is important to point out that everything in this article is just one person's opinion. This is a collection of ridiculous laws and rules that one encounters during their years as a podiatrist.

1. Independent Contractor vs. Employee

At first blush, most eyes glaze over on this one. W-2 versus a 1099 form on my taxes, so what? 1099 employees are self-employed independent contractors. They receive pay in accord with the terms of their contract and get a 1099 form to report income on their tax return. A W-2 employee receives a regular wage and employee benefits. The employer withholds income taxes from the employee's paycheck. Employee sounds better because the employer pays half of the Social Security and Medicare withholding. However, it seems one has more freedom as an "independent" contractor.

Yet, there is something much more sinister waiting in the weeds with this differentiation: the Federal Anti-Kickback Act. Let us look at an example. As a podiatrist, you go from clinic to clinic, treating patients. This may include nursing facilities. You are paid by the facility, a percentage of the amount collected. When podiatrists are asked if any of them get paid via a percentage of the money the facility collects for their treatment of patients, the common answer is yes. The next question is if they receive a W-2 form (employee) or a 1099 form (independent contractor) at the end of the year. Frequently, the answers are that they receive a 1099 form. As an independent contractor, you cannot be paid by a percentage of the amount collected. This is considered a kickback and is illegal.

The consequences can be ruinous to you, both professionally and personally. The solution is to insist that you be treated in fact, as an employee, not an independent contractor. This will protect you when you are paid via a percentage of money collected for the work that was performed by you. Yes, the difference of a form that you might not even have been aware of, can make the difference between enjoying your professional career and something very different. Please obtain competent legal advice when venturing into these waters.

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2. Paying Half for the Second Procedure

In the late '70s, the Podiatry Society of the State of New York had a peer review with a local podiatrist. It was regarding a practitioner having the temerity to charge the same amount of money for the matrixectomies of the right and left halluces, performed at the same time. The panel truly was giving this person a hard time on why he did not charge half the amount for the second procedure as he did for the first procedure. The podiatrist happened to be carrying a bag full of something that smelled delicious. One of the panelists finally asked about the bag. It turns out that the bag contained a dozen bagels that the podiatrist had picked up on his way to the peer review, to bring to his home.

Funny thing, he stated, the first bagel cost 25 cents. The second bagel also cost 25 cents. The labor, knowledge, and ingredients that went into the first bagel were the same for the second bagel. You can finish the analogy. This podiatrist did not want to give a volume discount.

Today, the medical and podiatry community readily accept the paradigm involving a discount for multiple procedures performed on contralateral body parts. Funny, the dentists tend to charge the same amount of money for the first, second, and third "cap".

3. The Corporate Practice of Medicine

A healthcare provider should not be able to expand the scope of prac-

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tice by running a practice beyond the legal scope of practice. A lay person should not be able to own a medical or podiatric practice and profit off the clinical decisions of someone else's license. However, most states have a glaring exception to that rule.

Public healthcare facilities, such as hospitals, nursing homes, free-standing ambulatory surgery centers, and clinics, if properly established, are legal in most states. In New York, they are called Article 28 facilities. Different states have different names with different hoops for the owners to jump through. However, the owners do not have to be physicians, dentists, podiatrists, or even healthcare providers! I guess the governmental concerns about the corporate practice of medicine only go so far. Expert legal advice is essential in this area.

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4. Insurance Audit Look-Back Restrictions and the Fraud and Abuse Exception

This one comes up all the time. The podiatrist gets audited. She calls confidently and informs them that while the insurance company is going back three years or more, her state law only permits a look-back of 18 months or less. The state's look-back law invariably has a fraud/abuse exception to the look-back period. Until you get to court, it is the insurance company that makes that call, not the podiatrist. The insurance company makes this determination on a "good-faith" analysis. Guess what determination they almost always make? The podiatrist proceeds to confidently state she needed an intent to commit fraud or abuse according to the law. She is not correct, however. Most states' laws define fraud as "known or should have known" that codes or billing were incorrect. This is the same for Medicare. You can drive a truck through that loophole.

Many podiatrists were quite grateful to their various lobbyists and professional societies when the limited look-back periods were passed by the various state legislators. They congratulated themselves and each other on a job well done. The insurance companies were waiting with their lobbyists and campaign contributions to make sure this loophole was slipped in the various state statutes. The companies will virtually always use that as a cudgel against you while negotiating a settlement.

5. When an Audit Is Performed by a Third Party with a Financial Incentive

You must love this one. A third-party conducts an audit, and they get to keep a percentage of the money they recover. They even have the unmitigated gall to claim that some of their audits result in discovering your under-billing. This would theoretically result in you getting more money from the carrier. Please, raise your hand if this ever occurred during one of your insurance audits.

Remember the Anti-Kickback laws I was referring to before in this article? Remember all those restrictions on self-referrals? They are designed to take the financial incentive out of ordering tests and treatments. Yet, these third-party audits do exactly that for the insurance company or government and are encouraged by regulations and statutes. Often known as RAC Audits, MAC Audits, MIC Audits, Medicare and Medicaid Audits, their sole purpose is to recover money from you. The party facilitating the recovery gets rewarded for it by obtaining a percentage of what they claim is the overpayment. Legal advice can be of great value in these audits.

6. Lack of Ability to Retire Your License in Many States without Negative Implications

Often, a podiatrist may be part of an administrative investigation later in his or her career. The state licensing body can cause a lot of trouble and aggravation. The soon-to-be retired practitioner may not want to deal with it. The soon-to-be retired practitioner just wants to turn in their license to practice. In many states, you may not do that. You can turn in your license due to an inability to physically or mentally practice, but that has a definite negative connotation. This is made public and to most, it means that the practitioner is a substance abuser, has cognitive deficiencies, or some other physical or mental pathology. As this is posted on the state's website open the public, this can be very embarrassing. These states have no way for a practitioner to just turn in their license to practice for no reason other than the time has come to retire.

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Situations such as these often necessitate needless investigations, hearings time, expense, and unnecessary stress to the practitioner. They serve no purpose in protecting the public.

7. State Licensing Board Refusing to Send Letter of Conclusion of Closed Investigation

Try to follow this. The podiatrist has been investigated by a state that will remain unnamed. S/he was interviewed, and evidence was reviewed. A lot of time went by. The state administrative body was con-

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tacted. The investigator told the podiatrist's attorney that the investigation was closed with no negative findings. The investigator claimed a letter of closure had been mailed to both the podiatrist and the attorney six months prior, but neither received the letter. A copy was requested. The investigator then stated that although that investigation was concluded, another investigator might be investigating something else concerning the same practitioner.

It was the policy of that state's board not to send a letter of conclusion on the concluded investigation while there was still an active investigation on another matter. The attorney told the investigator that the practitioner received no letter of any other investigation. The investigator stated that it is possible the new investigation has not gotten to that stage yet. The prior "concluded" investigation was supposedly concluded six months ago and went back several years. That means that the "new" investigation that has not proceeded to the stage to let the podiatrist know, must be more than six months old.

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Are you following this? Is this making any sense? This is a prime example of an administrative body with a rule that truly crosses the line of stupidity and equity. The practitioner is often caught in "no man's land" for no rational reason.

There you have it—in my opinion, seven examples of inane rules, regulations, and laws. Why don't you let *PM* know your favorite stupid law and regulations that you have to deal with in your practice of podiatry? **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, Health Care 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.