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HEALTH CARE LAW ADVISOR ALERT: CORPORATE PRACTICE OF MEDICINE AND FEE SPLITTING–CONSIDERATIONS FOR TELEHEALTH VENTURES

The increase in the use of telemedicine during the COVID-19 pandemic has given rise to new business ventures among medical practices, technology companies and sometimes also venture capitalists. The relationship between and among the medical practice, the technology component and the financiers must be carefully structured to comply with federal and state law. If structured appropriately, licensed medical providers can be relieved of business administrative functions and instead focus on clinical care. Core legal doctrines driving the business structure of health care ventures include: (1) the corporate practice of medicine (the "CPOM") doctrine; (2) illegal fee splitting laws; and (3) federal and state physician self-referral and anti-kickback statutes. This article focuses on the implications of the CPOM and fee splitting doctrines on medical services and health care technology ventures.

Corporate Practice of Medicine

The CPOM doctrine prohibits corporations from practicing medicine or employing a physician to provide medical services. *See* WIS. STAT. §448.03(1) (requiring a license to practice medicine); WIS. STAT. § 448.08(1m) (prohibiting fee splitting with non-physicians). The rationale for the CPOM doctrine is that unlicensed entities are not bound by the ethical rules that govern the quality of care delivered by a physician to a patient. Wisconsin's CPOM doctrine is derived not only from the Wisconsin Medical Practices Act, but also from guidance established in Wisconsin Attorney General Opinions.[1] With respect to legally permissible forms of organization for medical providers, the Wisconsin Statutes expressly permit Wisconsin-licensed health care professionals (including, but not limited, to physicians, chiropractors, dentists, podiatrists, optometrists, nurses, pharmacists, and psychologists) to organize themselves and be co-owners in a service corporation and to organize as a professional partnership. *See* WIS. STAT. § 180.1901. Those health care providers whose professional negligence is covered by the Injured Patient and Families Compensation Fund might also organize as a limited liability company ("LLC") with minimal risk of compliance issues, although the law is less clear with respect to LLCs than with service corporations and

professional partnerships.[2]

Failure to comply with CPOM and related fee splitting laws can have meaningful implications, such as: (i) physician licensure action or revocation; (ii) liability of non-physician business partners for engaging in medical practice without a license; (iii) voiding of an underlying business arrangement for illegality; and (iv) recoupment of reimbursement payments by commercial or government insurers.[3] A violation of Wisconsin Medical Practice Act requirements may result in a fine of not more than $10,000 or imprisonment for not more than nine months, or for physicians specifically, a fine of not more than $25,000, with certain narrow exceptions. *See* WIS. STAT. § 448.09(1)-(1m).

Which jurisdiction's CPOM doctrine applies to a health care venture depends upon where the patients are located, which can be expansive if telemedicine is involved. Since telemedicine is frequently practiced across state lines, physician groups and telehealth businesses must structure their operations to account for the variability of the CPOM and fee splitting doctrines (and the degree of enforcement thereof) among jurisdictions. For example, New York's CPOM doctrine and related enforcement is strong comparative to Wisconsin law.[4]

Management Services Organizations

Compliance with the CPOM and fee-splitting doctrines becomes more complex when clinical telemedicine or medical technology businesses require equity financing from non-licensed investors.[5] A joint venture for telemedicine services may comply with CPOM and related laws by directing the investment by non-licensed persons or entities into a separate state-approved legal entity, often called a management services organization ("MSO"), that would provide non-clinical, administrative support services to physician group practices and other health care providers. The MSO would be compensated for any business and administrative services provided to the legally separate medical practice, excluding revenue earned directly from professional services fees. MSO support services can include areas such as: (i) financial management, budgeting and accounting services; (ii) information technology (IT) services; (iii) human resources and non-clinical personnel management; (iv) coding, billing and collection services; (v) providing and managing office space[6]; (vi) credentialing and contract management; (vii) vendor management and group purchasing; and (viii) marketing services.

In many jurisdictions, central to the analysis of compliance with the CPOM doctrine is the degree of control that the MSO exercises over the operation of the medical practice and/or the professional judgment of licensed health care professionals.[7] Note that even a high level of control over *business* decisions may be suspect in certain jurisdictions.[8] In Illinois, a direct correlation between the fee earned by the clinical practice and the amount paid to the MSO has been found to violate the CPOM laws in addition to the state's fee splitting statutes.[9] Because a MSO's degree of control over a medical practice may be effectuated

by a confluence of multiple factors, and will ultimately be judged against a body of law which varies by jurisdiction (*i.e.,* where patients are located during treatment), all MSO arrangements should be evaluated by legal counsel for compliance purposes.

Fee Splitting Prohibitions

In addition to CPOM concerns, the compensation arrangement between the physician practice and the MSO must be structured to avoid state prohibitions against fee splitting with non-licensed persons or entities. Wisconsin's statutory fee splitting provision prohibits physicians from giving or receiving (directly or indirectly) any form of compensation or anything of value to a person, firm or corporation for inducing or referring a person to communicate with a licensee in a professional capacity or for professional services that were not personally rendered or at the direction of the other licensed professional. [10] *See* WIS. STAT. § 448.08(1m).

Fee splitting case law varies significantly based upon the law of the local jurisdiction, the specific types of business services provided by the MSO (*e.g.*, leasing of space and equipment, marketing, billing or other business and administrative services), and the compensation structure outlined in the management services agreement.[11] A threshold consideration is whether applicable state law permits fees paid to the MSO that are based upon a percentage of revenue earned from professional services. Some state fee splitting laws permit compensation based upon a percentage of revenue, so long as the consideration is commensurate with the value of services furnished.[12] On the other end of the spectrum, Illinois essentially views any percentage relationship with a physician or professional service corporation as a violation of fee splitting.[13] Additionally, if a MSO generates business or referrals for a medical services entity through marketing or similar services, and under the compensation structure provided by the management services agreement the MSO's marketing services ultimately increase the MSO's revenue stream from the medical services entity, then a management services arrangement is more likely to be scrutinized for illegality in states which enforce fee splitting prohibitions.[14]

In summary, if a telehealth business model depends directly or indirectly on revenues generated from physician services, rather than a technology license, legal analysis for compliance with the CPOM and fee splitting laws is advisable. In addition to legal counsel, a valuation expert should be consulted to ensure that the compensation paid to the non-licensed MSO under the management services agreement reflect the value of each of the various services actually provided by the MSO, rather than increased business volume or referrals.

Irrespective of whether telehealth services will be provided in jurisdictions where CPOM and/or fee splitting laws are strong (or strongly enforced), health care companies should note that the federal Stark or anti-kickback statutes could be implicated if an MSO is deemed to be

referring business to the professional services corporation and fee is viewed as compensation for referrals.[15] Recent changes to the federal Stark and anti-kickback laws should generally benefit telehealth and remote patient monitoring; however, experienced legal counsel should be consulted regarding the impact of such fraud and abuse laws on the business arrangement.[16]

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[1] *See* WIS. STAT. § 448.03(1) (requiring licensure by the Medical Examining Board to "practice medicine and surgery, or attempt to do so or make a representation as authorized to do so"); WIS. STAT. § 448.08(1m) (fee splitting prohibition). See also 71 Op. Att'y Gen. 108 (1982); 75 Op. Att'y Gen. 200 (1986) (widely criticized and ignored on certain grounds discussed herein).

[2] The Wisconsin Department of Regulation and Licensing, which was disbanded in 2011 and replaced by the Department of Safety and Professional Services ("DSPS"), had for years published frequently asked questions ("FAQ") guidance on its website that prohibited physicians from practicing medicine under an LLC or limited liability partnership ("LLP") form of business. The FAQ was based upon an AG opinion, 75 Op. Att'y Gen. 200 (1986), holding that physicians may not organize as business corporations, but note that LLCs and LLPs did not exist at the time of the AG opinion. This FAQ has been removed, as well as a subsequent FAQ that expressly stated that two or more physicians may enter into either partnerships or service corporations. *See* ANDREW G. JACK ET AL, AMERICAN HEALTH LAWYERS ASSOCIATION, CORPORATE PRACTICE OF MEDICINE: A 50-STATE SURVEY 570(2nd ed. 2020). The rationale for the 1986 AG opinion was that business corporations afforded broad limited liability for their members (no carve out for a member's own professional negligence, as is the case for a service corporation or general partnership). See Adam J. Tutaj, Wisconsin's Corporate Practice of Medicine Doctrine: Dead Letter, Trap for the Unwary, or Both?, STATE BAR OF WIS. PINNACLE, TRACK 3, SESSION 4 (Dec. 2019). In view of the current ambiguity under Wisconsin law with respect to LLCs, any two more medical professionals seeking to organize as an LLC confirm that patients can in fact be compensated for professional negligence by coverage by the Injured Patient and Families Compensation Fund for the area of medical practice at issue.

[3] *See generally* JACK ET AL., *supra* note 2.

[4] *See id*.

[5] Under Wisconsin law, the term "person" (required to obtain a license issued by the

Medical Examining Board) extends to partnerships, associations, and corporations. See Wis. Stat. § 990.01(26). *See also* WIS. STAT. § 448.03(1).

[6] Whether a lease agreement between an MSO and a service provider entity is legal often depends upon whether the relationship between lessor and lessee involves referrals. See JACK ET AL., *supra* note 2, at 136-37 (comparing *The Petition for Declaratory Statement of Melbourne Health Associates, Inc. and John Lozito, M.D.*, 9 FALR 6295 (1987), with *The Petition for Declaratory Statement of Joseph M. Zeterberg, M.D.*, 12 FALR 1036 (1990)).

[7] *See* e.g., 83 Op. Cal. Atty. Gen. 170 (July 27, 2000) (emphasizing the impossibility of distinguishing between professional and non-professional services when scrutinizing an arrangement between an MSO and a union whereby the MSO selected the radiology site and radiologist and paid for radiology diagnostic services for union members in exchange for a fee that included both the gross amount for professional services and the MSO's compensation); JACK ET AL., *supra* note 2, at 69.

[8] *See* e.g., *Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, 2019 N.Y. Slip Op. 04643 (June 11, 2019). The New York Court of Appeals held that medical practices that give too much operational and financial control to MSOs are "fraudulently incorporated," and not entitled to reimbursement by no-fault auto insurers. See id. (cited by JACK ET AL., *supra* note 2, at 365-66).

[9] *See TLC The Laser Ctr., Inc. v. Midwest Eye Inst. II*, Ltd., 714 N.E.2d 45 (Ill. App. Ct. 1999) (concluding that where a service agreement provided for an annual fee to be paid to an unlicensed corporation, the arrangement illegally violated the corporate practice of medicine doctrine even where the fee was not a straight percentage, because there was a relationship between the amount of revenue earned and the fee paid).

[10] The Wisconsin Attorney General has issued an opinion that addresses fee splitting. See 71 Op. Att'y Gen. 108, 109 (1982) (asserting that the statutory prohibition against fee splitting was aimed at addressing "fees or commissions [that] were not for any services rendered to the patient, but purely a service rendered to the other physicians or surgeons in the way of sending them this business.")

[11] *See e.g., The Petition for Declaratory Statement of Edmund G. Lundy, M.D.*, 9 FALR 6289 (1987) (emphasizing the state statute's emphasis on prohibited *referrals* when finding no violation of the Florida fee-splitting prohibition under circumstances where a business entity provided office space, equipment, advertising and billing services to family practitioners in exchange for 40% of their respective collections) (cited in Jack et al., *supra* note 2, at 136); *TLC The Laser Ctr., Inc. v. Midwest Eye Inst. II*, Ltd., 714 N.E.2d 45, 56 (Ill. App. Ct. 1999) (finding that where a service agreement provided for an annual fee to be paid to an unlicensed corporation, the arrangement illegally violated the statutory prohibition against

fee splitting, even where the fee was not a straight percentage, because "the fee clearly increased as revenues increased"); *Vine Street Clinic v. HealthLink, Inc.*, 856 N.E.2d 422, 434 (Ill. 2006) (holding that a corporation that creates a network of health care providers may receive a flat fee for administrative services, but not a percentage fee, for services rendered). The Illinois Supreme Court reasoned that the flat fee did not implicate public policy concerns because the "flat fee is charged to each participating physician for administrative services rendered, not for referrals, and thus no 'recommendation' component exists." *Id*. at 435. Central to the court's ruling was the fact that the flat fee would not affect the treatment given to the patient. See JACK ET AL., *supra* note 2, at 168-69. See also *Ashley MRI Mgt. Corp. v. Perkes*, No. 001915-05, 2010 WL 441941(N.Y. Sup. Ct. Jan. 26, 2010). In this case, the court raised significant issues regarding a management relationship under which the non-licensed professional manager received a percentage of the "net revenue" earned by licensed health care professionals in connection with the subleasing of an MRI facility, concluding that such an arrangement "may be an illegal fee splitting arrangement." *Id*. The court in Ashley Management also questioned as a potentially illegal fee splitting arrangement an arrangement whereby one of the unlicensed business entities involved received a flat usage fee for each MRI or diagnostic scan performed by the licensed health professionals. The court explained that the direct sharing of radiology fees with a non-physician raises public policy concerns as to the quality of care and the corporate practice of medicine. See JACK ET AL., *supra* note 2, at 364.

[12] *See* e.g., California Business and Professions Code §650(b); *Epic Med. Mgmt., LLC v. Paquette*, 198 Cal.Rptr.3d 28 (Cal. Ct. App. 2015) (relying on §650(b) in a case in which the management company actually charged a fee equal to 50% of the revenue for office medical services, 25% of the revenue for surgical services and 75% of the revenue of pharmaceutical-related revenues) (cited in JACK ET AL., supra note 2, at 66).

[13] Illinois's Medical Practice Act prohibits direct or indirect payment of a percentage of the licensee's professional fees, revenues or profits to anyone for negotiating fees, charges or terms of service or payment on behalf of the licensee, among numerous other prohibited services. See 225 Ill. Comp. Stat. 60/22.2. The Illinois Medical Practice Act includes several exceptions, including paying fair market value for billing, administrative assistance or collection services. See JACK ET AL., *supra* note 2, at 165-66.

[14] *See* JACK ET AL., supra note 2, at 136-138, 168-69 (summarizing key Florida and Illinois case law defining each state's fee splitting prohibition and emphasizing the courts' concern with payments for developing affiliations with local clinical practices, marketing services and "practice expansion" services, as well as incentives to add patients to a practice, respectively) (citing *The Petition for Declaratory Statement of Joseph M. Zeterberg*, M.D. 12 FALR 1036 (1990); *The Petition for Declaratory Statement of Magan Bakarania, M.D.*, Final Order Issued October 17, 1997; *The Petition for Declaratory Statement of Dr. Gary Johnson, M.D. and The Green Clinic*, 14 FALR 3936 (November 30, 1990); *The Petition for Declaratory*

Statement of Rew, Rogers and Silver, M.D.'s, P.A., 12 FALR 4139, Final Order issued August 25, 1999; *Gold, Vann and White, P.A. v. Friedenstab*, 831 So. 2d 692 (Dist. Ct. App. 2002). *See also E&B Mktg. Enter., Inc. v. Ryan*, 568 N.E.2d 339, 341-42 (Ill. App. Ct. 1991) (determining that an illegal fee splitting arrangement existed under Illinois law where the plaintiff was to receive a fee of 10% of all billings collected by the doctor in exchange for the plaintiff's advertising, which primarily targeted insurance companies); *Vine Street Clinic v. HealthLink, Inc.*, 856 N.E.2d 422 (Ill. 2006) (emphasizing that a flat service fee for administrative services reflected compensation for services actually rendered rather than compensation for referrals).

[15] *See* 42 U.S.C. §1395nn (Physician Self-Referral, or Stark law); 42 U.S.C. §1320a-7b(b) (Anti-Kickback statute). Note that health care ventures must also comply with state health care fraud and abuse statutes.

[16] *See* Medicare and State Health Care Programs: Fraud and Abuse; Revisions to Safe Harbors Under the Anti-Kickback Statute, and Civil Monetary Penalty Rules Regarding Beneficiary Inducements, 85 Fed. Reg. 77,684 (Dec. 2, 2020) (to be codified at 42 CFR pts. 1001, 1003), available at https://www.federalregister.gov/public-inspection/2020-26072/medicare-and-state-health-care-programs-fraud-and-abuse-revisions-to-safe-harbors-under-the (last accessed Feb. 22, 2021); Medicare Program; Modernizing and Clarifying the Physician Self-Referral Regulations, 85 Fed. Reg. 77,492 (Dec. 2, 2020) (to be codified at 42 C.F.R. pt. 411), available at https://www.federalregister.gov/public-inspection/2020-26140/medicare-program-modernizing-and-clarifying-the-physician-self-referral-regulations (last accessed Feb. 22, 2021).