

Business Laws & Corporate Practice of Medicine (CPOM): Issues and Considerations

Executive Summary

One of the primary goals of the Value-Based Payment (VBP) concept is to emphasize a collaborative approach to healthcare (as opposed to the siloed environment that currently exists). Currently, there are some obstacles to collaboration for some clinical groups. The current Business and Corporate Practice of Medicine (CPOM) laws present the following barriers in a VBP setting:

- Restrictions regarding which professionals can own and manage professional entities.
- Constraints on how medical professionals structure their corporate entities to optimize VBP implementation.
- Limitations on which professionals and entities can split fees (e.g., bundled payments for services including physicians and non-physicians).

Policy Question: *How should laws surrounding Professional Service Corporations be modified to align with VBP?*

In addressing this question, the Subcommittee should consider recommending exceptions to certain business and CPOM laws to allow for fee-splitting and collaborative management and organization of physician and non-physician providers. Such collaboration will be necessary for the success of the transition from the fragmented fee-for-service system to a VBP model, where one or more prospective payments are made for total cost of care, subpopulations, and/or a specific bundled services for patients with a given condition. Under a VBP system, a single payment may cover a particular condition or continuum of care even when multiple providers deliver that care (e.g., a payment for an episodic bundle versus a chronic bundle).

There is a pending Bill (S5862/A8153) introduced in June of this year that addresses many of these issues. The Bill is currently pending in the NYS Committee. The full text of the Bill is included with the materials for Meeting 5. The Subcommittee should consider supporting the passing of this Bill and whether additional regulatory change is needed to support VBP.

Introduction

This brief will provide an overview of the current regulatory framework that governs business law and CPOM in NYS and will present policy issues and examples for the Subcommittee's consideration. The issues and examples included in the brief are not exhaustive, and the Subcommittee is encouraged to consider options and alternatives not included herein.

Business Law and Corporate Practice of Medicine

Because providers are often paid separately for their services in the current fee-for-service environment, there is little need for the exceptions related to management, organization, or fee-splitting. Generally speaking, each provider submits its own claims and is paid separately for those services. However, in a VBP setting, payments will often be bundled or paid prospectively to cover a wide range of services across providers. Further, shared savings and losses will often be considered across groups of providers and a continuum of services. This change in payment methodology will inherently force both physician and non-physician providers (sometimes from different specialties) to organize together in some fashion and split payments for services as well as savings and losses.



Management and Organizational Restrictions

Current laws require that groups of physicians only practice medicine through a professional corporation (PC), a professional service limited liability company (PLLC), or a registered limited partnership in which all shareholders must be licensees of one profession and whose members practice only that profession. Physician groups are not permitted to provide medical services through a general business corporation (GBC) or limited liability company (LLC). Because a professional service corporation (i.e., PC or PLLC) may only provide professional services in the field within which its members are licensed, it may only manage the specific services that its members are licensed to provide. Management companies cannot manage a PC or PLLC.

Example 1: A dental practice management company provides business support and administrative services to seven independently-owned dental practices that maintain 40 offices in the state. The company may only provide arms-length, back-end business and administrative support to the independent dental practices. It may not subject the dental practices to undue control, which would include: compensation arrangement based on a percentage of the practices' revenue, control over bank accounts, or decisions involving patient care, treatment plans, and the hiring of clinical staff.

There is no exemption for a GBC to either use the title of dentistry, even if all principals or shareholders are licensed dentists. Since a GBC acts through its employees, no employee of a GBC may offer dentistry to the public or represent him or herself as practicing dentistry. Further, licensed dentists participating in a PC for the practice of dentistry could be guilty of professional misconduct for sharing the profits of their professional dentistry practice with shareholders of a general business corporation.

The broad NYS laws and regulations regarding organization and management of professional corporations may prove problematic in a VBP setting because various practitioners would inherently need to work together to coordinate patient care. The example depicts a barrier of the integration of primary care and behavioral health.

Example 2: In the case of integrated primary care and behavioral health, it may be necessary for a behavioral health physician (e.g. psychiatrist) to work in collaboration with a non-physician (e.g. psychologist) to coordinate patient care alongside the primary care internal medicine physician. These physicians with different specialties and non-physician practitioners may not only provide services as part of the continuum of care, but also may need to share office space and certain management functions. Current NYS law prohibits the two practitioners from forming a professional company because they are not all physicians. Further, each group would be prohibited from providing any management function to the other group.

With the emphasis on coordinated care and collaborative healthcare management, the current restrictions under NYS CPOM law may have an adverse effect in a VBP environment as medical practitioners will look to consolidate their services in an effort to provide patients with a broad range of medical care.



Corporate Entity Constraints

Many corporations are beginning to offer professional services because of the profitable advantages inherent in the licensed professions' client base. There are many current examples of the NYS Department of Health dealing with these issues, such as: Services of a managed care company blur the distinction between professional judgment and utilization review.

A GBC may provide services used by professionals. In these cases, there must be a clear distinction between who is providing professional services and who is providing the management services. Failing to do so may result in professional misconduct and/or unlicensed practice of the profession.

Example 3: A GBC may employ licensed professionals to provide in-house on site services to its own employees. For example, an accounting firm may employ a company nurse to provide services to the employees of the company. However, this company may not set up a business to provide these services to the public.

Fee Splitting

Another important aspect of NYS Business and CPOM law deals with fee splitting and profit sharing. Under NYS Education Law (§ 6509-a), licensed professionals or professional firms are prohibited from splitting or sharing their fees with individuals or entities not licensed to provide health care services. Essentially, a provider may not split a fee with a non-physician. This prohibition extends to business corporations and individuals who do not possess a license to provide the relevant health care services. The accompanying regulation expressly prohibits compensation arrangements involving fees paid as a percentage of, or even dependent upon revenue earned by healthcare professionals (8 NYCRR 29.1(b)(4)).

There is also a corporate parallel in NYS law on the prohibition of fee splitting between medical facilities and individuals or entities which have not been approved as a health care establishment by the Department of Health (10 NYCRR 600.9(c)). These provisions are designed to ensure that licensed professionals provide services to the public without undue influence from other professionals or from unlicensed persons who are not subject to the professional responsibility requirements prescribed in the Education Law.

Example 4: An individual injured his knee playing sports and required surgery. As part of the recovery process following the surgery, he required several months of physical therapy. Under the VBP arrangement, the MCO issued out one bundled payment to be allocated among the physical therapist and the surgeon. The two licensed practitioners were not members of the same professional firm and are therefore likely restricted under current NYS law from sharing the fee.

There are a few exemptions to the fee splitting restrictions. Health maintenance organizations (HMO) and hospitals regulated under the Public Health Law (§ 4405) may hire licensees to offer professional services to the public. In addition, insurance companies and managed care companies have authority to employ licensed professionals for utilization review (Article 48 of the Insurance Law). These exceptions, however, are very limited in nature and are not tailored to a VBP setting.

Historically, these business law and CPOM limitations were implemented to prevent non-licensed professionals from making decisions with respect to a patient's healthcare treatments. However, these laws will pose great challenges for



many licensed professionals as New York transitions to a VBP system. It will be necessary for practitioners across various fields to work with one another from an organizational, management, and fee-splitting standpoint.

Other Considerations

In addition to the scenarios and issues presented above, the Subcommittee should also consider:

- (1) Other potential scenarios and options regarding VBP and the need for collaborative care among various providers; and
- (2) Whether it would be prudent for the DOH to establish a work group comprised of specific NYS departments and stakeholders to address the pertinent business and CPOM laws to make recommendations one case by case basis.
- (3) Whether the Subcommittee supports the pending Bill which addresses many of the Business Law and CPOM issues addressed in this Policy Question.