How can you organize a Massachusetts medical spa or integrative care center legally without fee-splitting?

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Unlike California, which provides clear guidance regarding legal and enforcement hot buttons for medical spas and integrative care clinics, Massachusetts law requires more digging.

As with New York and other states' laws, Massachusetts does not offer us the clearest picture of medical spa or integrative medicine compliance legal obligations.

For example, suppose you have a chiropractor who wants to start an integrative care center in Massachusetts, New York, California, Texas, Michigan, Oregon, Arizona, New Jersey, or any other state.

The chiropractor wants to give the medical doctor an incentive to cross-refer, yet not run afoul of anti-kickback rules (which prohibit giving something of value in exchange for a referral). Is there a more lawful or compliant way to create incentives within the business structure between the D.C., the M.D., and their respective entities – and should they form LLCs or professional corporations?

The chiropractor knows something about corporate practice of medicine, fee-splitting / anti-kickback prohibitions, and similar rules, but wonders whether the integrative care clinic will be difficult because it is a D.C. and not an M.D. who proposes to organize the clinic.

There's the rub, indeed.

In this situation, there are several areas of law to track. These include:

- **Corporate practice of medicine concerns**, as mentioned. Massachusuetts has an informal policy prohibiting undue intrusion from management companies, medical service organizations (MSOs) and others into clinical medical care. In other words, there is a strong prohibition against corporate practice of medicine.
- **Law of professional organizations**. Physicians can form professional medical corporations, and chiropractors can form professional chiropractic corporations, per Masachusetts General Law, Chapter 156a. However, the corporate practice of medicine is likely still a bar against a chiropractor hiring an MD into a professional chiropractic corporation.
- **Kickback and fee-splitting prohibitions**. For example, Chapter 175H of Massachusetts General Law deals with False Health Claims. Section 2 (false statements on applications for coverage and claims; failure to disclose) provides:

Any person who (1) knowingly and willfully makes or causes to be made any false statement or representation of a material

fact in any application for a payment of a health care benefit;[1] or (2) knowingly and willfully presents or causes to be presented an application for a health care benefit containing any false statement or representation of a material fact; or (3) knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to a health care benefit, including whether goods or services were medically necessary in accordance with professionally accepted standards; or (4) having knowledge of the occurrence of any event affecting his initial or continued right to any health care benefit, conceals or fails to disclose such an event with an intent to fraudulently secure such benefit either in a greater amount than is due or when no such benefit is due; or (5) having knowledge of the occurrence of any event affecting the health care benefit of any other individual in whose behalf he has made or presented an application for such benefit, or in whose behalf he is receiving any health care benefit, conceals or fails to disclose such an event with an intent to fraudulently secure such benefit either in a greater amount than is due or when no such benefit is due, shall be punished by a fine of not more than ten thousand dollars, or by imprisonment in a jail or house of correction for not more than two and one-half years or in the state prison for not more than five years, or by both such fine and imprisonment, and may be held liable in a civil action under section seven. Notwithstanding the foregoing, a person who is not a provider of services for which a health care benefit may be paid shall not be subject to prosecution hereunder for any statement or representation which such person makes without fraudulent intent.

Section 3(a) (solicitation, improper inducement to use goods, facilities, services, or products covered by insurance) provides:

Any person who solicits or receives any remuneration, directly or indirectly, overtly or covertly, in cash or in kind in return for purchasing, leasing, ordering or arranging for or recommending purchasing, leasing, or ordering of any good, facility, service, or item for which payment is or may be made in whole or in part by a health care insurer, or any person who offers or pays any remuneration, including any bribe or rebate, except as provided in subsection (b), directly or indirectly, overtly or covertly, in cash or in kind to induce any person to purchase, lease, order or arrange for or recommend purchasing, leasing or ordering of any good, facility, service, or item for which payment is or may be made in whole or in part by a health care insurer, shall be punished by a fine of not more than ten thousand dollars, or by imprisonment in a jail or house of correction for not more than two and one-half years or in the state prison for not more than five years, or by both such fine and imprisonment, and may be held liable in a civil action under section seven.

The authority to prosecute offenses under this chapter rests with the Attorney General's Office (section 5); penalties, as noted, include fines and imprisonment, as well as civil liabilities such as restitution (sections 2, 5, 7). Chapter 175H does not set forth any statutory exceptions (other than those set forth in section 3(b) which relate to retail pharmacies)

Fee-splitting prohibitions are alive and well in Massachusetts.

What are some options for the chiropractor, acupuncturist, or other non-MD healthcare service provider?

1. Rent space only. Create a "medical mall" in which the integrative care center is basically a storefront with independent practices. The problem is that rentals only do not provide sufficient incentive to the physician who believes they can do better without the chiropractor or non-MD provider.
2. Create a management company (MSO) and consider giving the MD a stake in the MSO. The issue is that this creates a conflict of interest for the physician, may require disclosure to the patient and the medical board, and requires that the MD do something specific to earn the management company stake.
3. Create a professional chiropractic corporation. One challenge here is that the corporate practice of medicine doctrine makes it difficult to manage an MD-drive integrative care clinic or multidisciplinary clinical enterprise.
4. Provide management / MSO services to a professional medical corporation. This can be financially advantageous if the MSO charges well (but at fair market value) for management and marketing services; but, this structure can give a lot of power to the MD president of the professional medical corporation.

These are just some of the potential configurations. There are pros and cons to the various alternatives. And, there are enforcement risks depending on how strongly a given state cares about corporate practice of medicine or takes fee-splitting

seriously enough to routinely investigate multi-disciplinary practices.

The main challenge here is that we have chiropractor-driven integrative care (in the integrative clinic scenario) and layperson-driven medical spa services (in the medical spa scenario). Once a licensed healthcare provider or non-licensee is at the top of the chain – and not the MD – then corporate practice of medicine and fee-splitting rules create issues.

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