MAINE: Summary of Fraud and Abuse Statutes and Regulations

Prepared by
Elizabeth A. Olivier (eolivier@preti.com)
John P. Doyle (jdoyle@preti.com)

Preti Flaherty Beliveau & Pachios LLP
Portland, ME

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1) ANTI-KICKBACK

MaineCare Benefits Manual 10-144 Code of Maine Regulations Ch. 101, § 1
The MaineCare Benefits Manual includes, as grounds for sanctioning providers, rebating or accepting a fee or portion of a fee or charge for a MaineCare member referral (kickback). 10-144 CMR Ch. 101, § 1.20-1(I). It also expressly includes soliciting, offering, or receiving a kickback, bribe, or rebate as an example of fraudulent conduct; and mandates compliance with the federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b (prohibiting the solicitation or receipt of any remuneration in return for a referral or for the purchasing, leasing, ordering, or arranging for, or recommending the purchasing, leasing, or ordering of any good, facility, service, or item for which payment may be made under the Medicare program; and the offering or payment of any remuneration to induce a person to take such action). 10-144 CMR Ch. 101, § 1.22-1(B)(13), and § 1.22-2(C)(2)and(3).

Maine State Services Manual 10-144 Code of Maine Regulations Ch. 104, § 1
The Maine State Services Manual, which provides the overall policies and procedures for those state services administered by the Maine Department of Health and Human Services, includes as grounds for sanctioning providers, rebating or accepting a fee or portion of a fee or charge for a participant referral (kickback). 10-144 CMR Ch. 104, §1.12(I).

Practitioner Licensing Statutes Title 32 Maine Revised Statutes Annotated
Certain of the practitioner licensing statutes expressly include, as grounds for disciplining the provider, fee splitting or the giving or accepting of a rebate from another provider. 32 MRSA §2431-A 2(P) provides for discipline against an optometrist who splits or divides a fee with an individual not an associate, or who
gives or accepts a rebate from an optician or ophthalmic dispenser. 32 M.R.S.A. §503-B(5) provides for discipline against a chiropractor who splits or divides a fee with an individual who is not an associate licensed as a chiropractor.

Maine Medical Laboratory Act 22 M.R.S.A. §2033
Maine’s Medical Laboratory Act, 22 M.R.S.A. §2033 prohibits the owner or director of a licensed laboratory from offering or implying to offer rebates to persons submitting specimens or other fee splitting inducements. The contractual provision of laboratory services for a fixed fee independent of the number of specimens submitted is deemed a violation of this law.

2) PROHIBITIONS ON SELF-REFERRAL

Health Care Practitioner Self-Referrals
Title 22 Maine Revised Statues Annotated, Ch. 414, §2081 et seq.
Maine’s Health Care Practitioner Self-Referral law prohibits a health care practitioner (an individual regulated under Maine law to provide health services) from referring a patient to an outside facility in which the health care practitioner is an investor unless that health care practitioner directly provides health services within the facility and will be personally involved with the provision of care to the referred patient. An “investment interest” is a debt or security issued by a facility, but does not include interest in a hospital licensed under state law. A facility in which a health care practitioner has an investment interest may be exempt from this prohibition if the Bureau of Insurance determines there is a demonstrated need in the community for the facility and alternative financing is not available. There is no need to demonstrate alternative financing if the practitioner has sufficient financial resources in the provider’s practice without seeking financing from outside sources other than conventional bank loans. The statute excepts from its application: (1) a health care practitioner’s referral of a patient who is a member of a health maintenance organization or a preferred provider organization licensed in Maine to a facility in which the practitioner is an investor when the referral is made pursuant to a contract with the organization; and (2) a health care practitioner’s referral of a patient to a publicly traded facility. A facility will meet the publicly traded exception when: (1) the facility is traded on the New York Stock Exchange or American Stock Exchange, or is a national market system security traded under a system operated by the National Association of Securities Dealers; (2) the facility, at the end of its most recent fiscal year, had total net assets of at least $50 million related to the furnishing of health services; (3) the facility markets or furnishes its services to investors who are referring health care practitioners and to other health care practitioners on equal terms; (4) all stock held in the facility is of one class; (5) the facility does not loan funds or guarantee loans for health care practitioners who are in a position to make referrals to a facility; (6) the income on the health care practitioner’s investment is tied to his/her equity in the facility rather than to the volume of referrals made; and (7) the investment interest does not exceed half of 1% of the facility’s total equity. The statute also prohibits a health care practitioner from compelling or coercing, or
attempting to compel or coerce, any other health care practitioner to violate any of its provisions and from participating in any arrangement designed to evade its prohibitions by using a third party to redirect prohibited referrals if the third party was not involved in the referral. Violations subject the practitioner to a civil penalty of no more than $2,000 for each referral, bill, or claim, and to disciplinary action by the applicable licensing body.

Bureau of Insurance Rules 02-031 Code of Maine Regulations Ch. 870
Bureau of Insurance rules set forth criteria for determining whether there are adequate safeguards against the conflict of interest that may arise when health care practitioners self-refer patients to facilities in which they have an investment interest, and establishes a process for applying to the Superintendent of Insurance for an exemption authorizing referrals to a practitioner-owned facility. Community need and the unavailability of any feasible source of alternative financing (criteria that must exist for the facility to be exempt), are demonstrated by at least one of the following: (1) there is no other facility of reasonable quality that provides appropriate service to the community; (2) the use of other facilities is onerous or creates too great a hardship for patients; (3) the facility is formed to own or lease medical equipment that replaces obsolete or otherwise inadequate equipment in or under the control of a hospital located in a federally designated health manpower shortage area; or (4) the fees charged by the facility for the health care service are competitive with the fees charged outside the community. To be and remain exempt, the facility must: (1) give individuals not in a position to self-refer the opportunity to invest in the facility on the same terms as offered referring practitioners; (2) not require an investing practitioner to make referrals to the facility or otherwise generate business as a condition of investment; (3) market its services to all investors on equal terms; (4) not provide or guarantee loans for practitioners who are in a position to self-refer; and (5) have an internal utilization review program. Further, income on the practitioner’s investment must be tied to equity rather than the volume of referrals; the investment contract between the facility and the practitioner may not include a non-competition clause that prevents the practitioner from investing in other facilities; the practitioner must disclose the investment interest when making referrals and provide the patient a list of alternative facilities that are reasonably available; the practitioner shall, upon request, disclose the investment interest to third-party payers who provide coverage to clients; and, if the practitioner’s financial interest in the facility is incompatible with the patient’s interest, the practitioner shall make alternative arrangements for that patient’s care. Applicants for an exemption must file a signed affidavit, with supporting documentation, that describes how the requirements have been met.

MaineCare Benefits Manual 10-144 Code of Maine Regulations Ch. 101, § 1.20(J)
These rules list among the grounds for sanctioning providers, self-referrals for designated health services determined to be in violation of the Stark Law. The following are identified as designated health services for which referrals are prohibited: clinical laboratory services; physical therapy services; occupational
therapy services; radiology services, including magnetic resonance imaging, computed tomography scans, and ultrasound services; radiation therapy services and supplies; durable medical equipment and supplies; parenteral and enteral nutrients, equipment, and supplies; prosthetics, orthotics, and prosthetic devices and supplies; home health services; outpatient prescription drugs; inpatient and outpatient hospital services; and speech-language pathology services.

3) FALSE CLAIMS/FRAUD & ABUSE

**Civil Liability of Persons Making False Claims**  
**Title 22 Maine Revised Statutes Annotated, Ch. 1 § 15**

Maine imposes civil liabilities on “[a]ny person, firm, association, partnership, corporation or other legal entity who makes or causes to be made or presents or causes to be presented for payment or approval any claim upon or against the department of Health and Human Services or upon any funds administered by the Department knowing such claim to be materially false, fictitious or fraudulent, or who knowingly makes any false written statement or knowingly submits any false document material to a false, fictitious or fraudulent claim, or who knowingly enters into any agreement, combination or conspiracy to defraud the department by obtaining the payment or approval of any materially false, fictitious or fraudulent claim, or who knowingly makes or causes to be made a false written statement or record material to an obligation to pay or transmit money or property to the department or knowingly conceals or knowingly and improperly materially avoids or materially decreases an obligation to pay or transmit money or property to the Department. The terms “knowing” or “knowingly” mean that, with respect to information, a person has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information or acts in reckless disregard of the truth or falsity of the information. A person may act knowingly without specific intent to defraud. In addition to any criminal liability that may be provided by law, the civil penalties for such false claims include restitution of excess benefits or payments, the payment of interest, treble damages per false claim, or $2,000 for each false claim, whichever is the greater amount, costs of the suit and investigation, as well as attorney’s fees.

**Credible Allegations of Fraud; Provider Payment Suspensions**  
**22 M.R.S.A. §1714-E**

If the Maine Department of Health and Human Services determines there is a “credible allegation of fraud” by a provider under the MaineCare program, it shall suspend payment, in whole or in part, to that provider as necessary to comply with applicable federal law. The provider may administratively appeal the Department’s decision to suspend payments, but the suspension is not stayed during the appeal process. There is an avenue for seeking expedited relief from a suspension of payments. Upon a final determination that fraud has occurred and that money is owed by the MaineCare provider to the Department, and after exhaustion of all administrative appeals and judicial review, the Department may retain and apply as
an offset to amounts determined to be owed to the Department any payments that were suspended. A “credible allegation of fraud” is defined by regulation as an allegation that the Department has verified, from any source, which has one or more indicia of reliability and which allegation, facts and evidence have been carefully reviewed by the Department. The source of an allegation may be, but is not limited to, fraud hotline complaints, claims data mining or patterns identified through provider audits, civil false claims cases and law enforcement investigations.

MaineCare Benefits Manual, 10-144 Code of Maine Regulations, Ch. 101, §1.22-3.

MaineCare Benefits Manual 10-144 Code of Maine Regulations Ch. 101, General Administrative Policies and Procedures

10-144 CMR Ch. 101, § 1.03-3, Requirements of Provider Participation

Providers in the MaineCare program must complete a Provider/Supplier Agreement with the Department of Health and Human Services. Those with such agreements are obligated to report any suspected or identified fraud or abuse by other providers or by members of the MaineCare program. 10-144 CMR Ch. 101, § 1.03-8 (U) and (X). They also must comply with the requirements of the Federal False Claims Act. 10-144 CMR Ch. 101, § 1.03-8(CC).

10-144 CMR Ch. 101, § 1.20, Sanctions

Section 1.20-1 of Chapter 101 of the MaineCare rules lists a number of reasons for which providers, individuals, or entities may be sanctioned under state rules. Those most relevant to false claims include:

A. Presenting or causing to be presented for payment any false or fraudulent claim for services or merchandise;
B. Submitting or causing to be submitted false information for the purpose of obtaining greater compensation than that to which the provider is legally entitled;
C. Submitting or causing to be submitted false information for the purpose of meeting prior authorization requirements; . . . and
T. Conviction for fraudulent billing practices, negligent practice, or patient abuse. . . .

Section 1.20-2 of the MaineCare rules lists the actual sanctions that may be imposed on providers, individuals, or entities for the reasons listed in Section 1.20-1. These sanctions include termination or suspension from participation in MaineCare, limitation of services which the provider is authorized to perform and for which the provider is authorized to receive services, withholding or offset of future MaineCare payments, forfeiture of payment, and penalties. Sections 1.20-3through 1.20-6 primarily address the procedural issues related to the imposition of a sanction.
10-144 CMR Ch. 101, § 1.22, Fraud/Abuse by a Provider Individual or Entity and Suspension of Payments

Section 1.22-1(A) of Chapter 101 of the MaineCare rules defines Fraud as follows:

A. Fraud includes intentional deception or misrepresentation, oral or written, which an individual knows to be false, or does not believe to be true, made with knowledge that deception or misrepresentation could result in some unauthorized benefits. The requisite intent is present if the misrepresentation was made knowingly or with a reckless disregard for the truth. (Emphasis added.)

Section 1.22-1(B) details 13 examples of conduct that could constitute fraud pursuant to the MaineCare rules. (This is not an exhaustive list, and the possible bases for fraud are not limited to the 13 examples.) Some of these examples include: (1) billings for services, supplies, or equipment that were not rendered to, or used for, MaineCare members; (2) billings for supplies or equipment that are clearly unsuitable for the member’s needs or are so lacking in quality or sufficiency for the purpose as to be virtually worthless; and (3) flagrant and persistent overutilization of medical or paramedical services with little or no regard for results, the member’s ailments, condition, medical needs, or the provider’s orders. For the complete list see: 10-144 CMR Ch. 101, § 1.22-1(B).

Given federal and state financial participation in the MaineCare program, Maine’s regulations also subject provider claims for payment from MaineCare to federal and state statutes pertaining to criminal fraud. 10-144 Ch. 101, § 1.22-2(A) & (B). The MaineCare regulations also cite to and incorporate the provisions of 42 U.S.C. § 1320a-7b imposing criminal liability for certain conduct, such as the knowing and willful making of false statements of material fact in application for benefits or payments under the State Plan or the knowing and willful charging for services to a MaineCare patient at rates in excess of those allowed by the State, etc. 10-144 CMR Ch. 101, § 1.20-2(C).

10-144 Code of Maine Regulations Ch. 101, § 1.12-2(D) Personal Liability for Debts Owed to Maine Department of Health and Human Services

Effective July 7, 2017, the MaineCare Benefits Manual, Chapter I, Section 1, General Administrative Policies and Procedures, was amended to add language stating that the liability for debts owed to the Maine Department of Health and Human Services (DHHS) by the provider is enforceable against the provider, including any person who has an ownership or control interest in the provider, and against any officer, director or member of the provider who, in that capacity, is responsible for any control or any management of the funds or finances of the provider. Language was also added defining “individuals or entities with an ownership or control interest.” In accompanying rulemaking documents, DHHS stated that these changes were being made to clarify that individuals with management or control over the funds or finances of the provider are personally
liable. This addition also corresponds to the language of the MaineCare Provider Agreement, section (D)(3)(c), applicable to all MaineCare (Medicaid) providers.¹

4) UNFAIR BUSINESS PRACTICES

Unfair Trade Practices Act Title 5 Maine Revised Statutes Annotated Ch. 10, § 205-A, et seq.
Maine’s Unfair Trade Practices Act (UTPA) prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce, to include the advertising, offering for sale, sale or distribution of any services, property, article, commodity, or thing of value and any trade or commerce that directly or indirectly affects people of the state of Maine. The statute gives the Attorney General authority to conduct civil investigations and bring actions for injunctive relief and, in cases of intentional violations, civil penalties. It permits private causes of action for damages, restitution, injunctive relief, and/or attorneys’ fees by consumers who suffer loss of money or property due to the purchase or lease of goods, services, or property for personal, family, or household use.

Key Cases

An act may be deceptive under the Maine UTPA even though the defendant had no purpose to deceive and acted in good faith.

To justify a finding of unfairness under the Maine UTPA, the act or practice: (1) must cause, or be likely to cause, substantial injury to consumers; (2) that is not reasonably avoidable by consumers; and (3) that is not outweighed by any countervailing benefits to consumers or competition.

State v. Weinschenk, 2005 Me. 28, 868 A. 2d 200 (Me. 2005)
A material representation, omission, act, or practice, as would constitute a deceptive act for purposes of state UTPA, involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.

Binette v. Dyer Library Ass’n, 688 A. 2d 898 (Me. 1996)
The failure to honor a statutory mandate may constitute evidence of an unfair or deceptive act.

Claims under Maine’s UTPA are subject to Maine’s general six-year statute of limitations period for civil actions.

¹ As of February 2018, efforts were being undertaken to obtain clarification or a rescission of this rule and the language in the provider agreements.
Uniform Deceptive Trade Practices Act Title 10 Maine Revised Statutes Annotated § 1211 et seq.
With limited exceptions, the Deceptive Trade Practices Act prohibits the following deceptive practices in the course of one’s business or occupation: passing off goods or services as those of another; causing likelihood of confusion or misunderstanding as to source, sponsorship, approval, or certification of goods or services; causing likelihood of confusion or misunderstanding as to affiliation, connection, or association with or certification by another; use of deceptive representations or designations of geographic origin in connection with goods or services; representation that goods or services have sponsorship, approval characteristics, ingredients, uses, benefits, or quantities that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have; representation that deteriorated, altered, reconditioned, reclaimed, used, or secondhand goods are new; representation that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; disparagement of goods, services, or business of another by false or misleading representation of fact; advertisement of goods or services with intent not to sell them as advertised, or with intent not to supply reasonably expectable public demand, unless the advertisement disclosed a limited quantity; making of false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions, or engaging in any other conduct that creates a likelihood of confusion or misunderstanding. The law permits private actions for injunctive relief by those likely to be damaged by the deceptive practice.

Practitioner Licensing Statutes Title 32 Maine Revised Statutes Annotated
Several of the statutory provisions that define the grounds for taking disciplinary action against a practitioner’s license include false, misleading, or deceptive advertising as one ground. This applies to physicians (32 M.R.S.A. § 3282-A(2)(l)); osteopathic physicians (32 M.R.S.A. § 2591-A(2)(l)); chiropractors (32 M.R.S.A. § 503-B(3)); dental professionals (32 M.R.S.A. § 18325(1)(G)); nurses (32 M.R.S.A. § 2105-A(2)(l)); optometrists (32 M.R.S.A. § 2431-A(2)(l)); pharmacists (32 M.R.S.A. §13742-A(1)(D)); and podiatrists (32 M.R.S.A. § 3656(3)).

5) GENERAL WHISTLEBLOWER PROTECTIONS
Whistleblowers’ Protection Act 26 Maine Revised Statutes Annotated Chapter 7, Subchapter 5-B. § 831 et seq.
Maine’s Whistleblower Protection Act prohibits employers from taking any adverse action against employees for: (1) making a good-faith report to the employer or a public body of what the employee has reasonable cause to believe is a violation of any law or rule, or a condition or practice, that poses a health or safety risk; (2) being asked to participate in an investigation, hearing, or inquiry by the public body or in a court action; (3) refusing to carry out a directive to engage in activity that would be a violation of a law or rule or that would expose the employee or another individual to serious injury or death after having sought and been unable to obtain a correction of
the activity or condition from the employer; (4) making a good-faith report, consistent with applicable privacy laws, to the employer, involved patient, or a licensing, credentialing, or regulating authority of what the employee has reasonable cause to believe is a deviation from the applicable standard of care for a patient by an employer (health care provider, health care practitioner, or health care entity) charged with the care of the patient; or (5) reporting suspected abuse, neglect, or exploitation as required by Maine law. The employee must have brought the violation or condition to the attention of the employer and allowed the employer a reasonable opportunity to correct the condition before having reported to the public body.

Maine Rules for Licensing of Hospitals, at 10-144 C.M.R. Ch. 112 § 3.8, requires hospitals to annually provide each registered nurse in their employ a written notice providing information about the Maine Whistleblower Protection Act, including a copy of the text of statutory provisions.

6) HELPFUL LINKS

- Office of the Revisor of Statutes
- Maine Department of Health and Human Services
- Rule Chapters for the Department of Health and Human Services
- MaineCare Benefits Manual
- Maine Board of Licensure in Medicine
- Maine Board of Osteopathic Licensure
- Maine State Board of Nursing
- Maine Bureau of Insurance
- Maine Attorney General
- Office of Professional and Occupational Regulation (Includes links to laws and regulations related to the licensing of acupuncturists, alcohol and drug counselors, audiologists, chiropractors, complementary health care providers, counselors, dietitians, hearing aid dealers and fitters, massage therapists, naturopathic doctors, nursing home administrators, occupational therapists, pharmacy, pharmacy technicians, physical therapists, podiatrists, psychologists, respiratory care practitioners, social workers, and speech pathologists.)