



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

Thursday, August 25, 2016

Mr. Steven Reames  
Executive Director  
Ada County Medical Society  
Via Email: [director@adamedicalsociety.org](mailto:director@adamedicalsociety.org)

Re: Physicians Wellness Initiative/Insurance

Dear Mr. Reames:

This letter is in response to your submittal on behalf of the Ada County Medical Society (“ACMS”) to the Idaho Department of Insurance with regard to the ACMS proposed Physicians Wellness Initiative (“PWI”) set to launch in the fall of 2016. The Department has directed this matter to me for review.

The stated purpose of the PWI is to bolster the mental health of physicians who practice medicine under a “crushing stress and work load” by providing ACMS members with “confidential, convenient, competent and cost-free access” to psychological treatment. The aim is “to reduce physician burnout at the personal, system, and industry level.” The benefit would provide ACMS members with up to six appointments in an annual period. The ACMS is also considering whether to offer these services to Idaho-licensed medical physicians who are not members of the ACMS.

Included with your submittal were documents about the inception of the project, membership qualification, advertising materials, and a draft contract to be entered into between the ACMS and a psychologist provider. The draft contract includes a provision to pay psychologist providers upwards of \$130.00 per session provided.

The question to the Department is whether the PWI as proposed is a form of insurance under Idaho law. The business of insurance requires a certificate of authority and compliance with certain regulatory standards. In Idaho, the term “insurance” is defined as a “contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies.” Section 41-102, Idaho Code. To “transact” insurance includes (1) solicitation and inducement; (2) preliminary negotiations; (3) effectuation of a contract of insurance; (4) transaction of matters subsequent to effectuation of a contract of insurance and arising out of it; and, (5) mailing or delivering any written solicitation to any person in the state by an insurer or any person acting on behalf of an insurer for fee or compensation. *See*, section 41-112, Idaho Code.

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“[T]he fundamental attribute of insurance is risk sharing.” *Altrua HealthShare, Inc., v. Deal*, 154 Idaho 390, 393-394, 299 P.3d 197, 200-201 (2013). In other words, the ACMS PWI project must assume some of the risk of paying for its members’ psychologist services as one of its membership benefits to be undertaking to indemnify its members. *Altrua HealthShare*, 154 Idaho at 395, 299 P.3d at 202. In view of the foregoing, the question is whether the PWI project is an insurance arrangement required to be licensed under Idaho law. *See*, chapter 3, title 41, Idaho Code.

You indicated that the PWI will be funded in the fall of 2016 and likely for the entire year of 2017 out of the ACMS general revenues. After that point, it will be funded out of the ACMS Foundation, which will in turn seek funding from St. Luke’s and St. Alphonsus’ hospitals and other group employers, grantors, and donors.

If a court were asked to review the PWI project to determine whether it was an insurance arrangement, it would review the documents associated with it and the contract between the ACMS and providers. When reviewing a document to determine whether it is an insurance contract, the case of *Messerli v. Monarch Memory Gardens, Inc.*, 88 Idaho 88, 397 P.2d 34 (1964) (“*Messerli*”) is instructive. The *Messerli* case presents a question whether the contract at issue is one of insurance and subject to the Idaho Insurance Code. In his majority opinion relating to the contract in question, Justice McFadden noted in *Messerli* that “[c]are must be taken to distinguish mere contracts to render service on the happening of a contingency from true contracts of insurance . . . . The cases have failed to declare a satisfactory rule for distinguishing between the two types of agreements, but it would seem that the contract should not be classed as insurance if the paramount purpose in its formation was the rendition of the services rendered.” *Messerli*, 88 Idaho at 108, 397 P.2d at 47 (citations omitted).

With regard to the ACMS program, it is reasonably presumed that the chief purpose of the program is to render service and treatment for psychological conditions related to medical physicians—and not one of insurance. That conclusion alone does not exclude the program from insurance regulation under title 41, Idaho Code. Other key factors are to be considered.

Other factors include the ACMS’s and the PWI’s exposure to risk. It is conceivable that the ACMS PWI program is exposed to substantial risk whereby medical physicians and other qualified persons may seek psychological services. The program has promised to provide the services with no additional charge to the physicians outside of membership fees. The program will seek donations from members, as well as grants and donations from local health institutions to supplement the program. On the other hand, a similar program was initiated in Lane County, Oregon, by the Lane County Medical Society in 2012. From the information provided, in the ensuing 3½ years since its commencement, just over 8% of the 800+ members of the medical society in Lane County accessed the services. A substantial portion of the psychological services were provided within two days.

Exposure to risk is restricted due to limits on benefits to medical physicians, physician assistants, nurse practitioners, and residents. Another factor under control of the ACMS is that the number of visits is limited to six visits in a one-year period. Where the number of visits are limited

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to six per year and the historical experience reflects a statistically low number of provider visits, the exposure to risk appears to be no greater than the income received from membership dues.

Therefore, in conclusion and based on the foregoing, although the ACMS may be exposed to substantial risk for promised services to its members, where the primary purpose of the PWI is in response to physician stress and work load and not as an insurance program; where the number of patient services provided is historically low; where the number of service visits are restricted on a per member basis; and where the cost of promised services does not exceed ACMS membership income, the PWI does not appear to be an insurance arrangement subject to a certificate of authority under Idaho law.

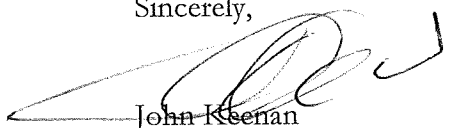
However, there are some circumstances that could rapidly change that conclusion and subject the PWI to insurance regulation under title 41, Idaho Code. The following are some cautionary notes directed to the ACMS board to consider. It is not an exhaustive list. In the following circumstances, the ACMS board should further inquire with its legal counsel or with the Department of Insurance, or both, as to whether the program is one of insurance under Idaho law:

1. Where the PWI experiences substantial changes in the program requiring substantial additional funding;
2. Where the ACMS assesses each member a contribution for PWI services;
3. Where there is a substantial increase in access to services beyond the historical experience;
4. Where the ACMS increases the number of visits per member on an annual basis;  
or,
5. Where membership fees, grants and donations do not cover the cost of providing the psychological services under the PWI project.

The ACMS is considering expanding the service to other Idaho medically-licensed persons who are not members of the ACMS. It is recommended that ACMS wait a reasonable time after commencement before expanding services to nonmember yet licensed physicians that do not pay membership dues. At that time, it may be determined whether the program has followed its historical trend, the degree of costs in proportion to income, and other related factors, to determine whether the ACMS is bearing risk in the form of insurance that is subject to the insurance code.

This letter was provided to assist you. The response is an informal and unofficial expression of the views of this office based upon research of the author. Please call me direct at 208.334.4283 if you have any questions. Thank you for the opportunity to be of service.

Sincerely,



John Keenan  
Deputy Attorney General