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## MSA/MSP Vendor Qualifications: The Industry and Its Professionals

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When I am provided the opportunity to stand in a room full of people and present on the topic of Medicare Secondary Payer (“MSP”) compliance, I always make it a point to tell the attendees that the information being provided is “MSP compliance according to me.” I say that, or some version of the phrase, to make sure that nobody thinks that I am trying to represent that my word is the only word on the subject.

The MSP industry is dotted with talented professionals across multiple disciplines. My words are based on my experiences and opinions as a lawyer, MSP professional of almost two decades, and industry voice. However, I fully acknowledge the fact there are other professionals in the MSP industry with slightly different practices and beliefs as how to approach MSP compliance. As a result, I like to give the people attending my lecture about the MSP their deserved respect by not preaching a one-size-fits-all method on the subject. And to be honest, I think that I may just be smart enough and self-aware enough to know that there are things that I may not know.

I signed off of my last article for the National Council of Self-Insurers (“NCSI”) “Choosing an MSA Vendor: How and Who,” by asking readers to reach out with questions or comments about my opinions, recommendations, and conclusions. And also to tell me where I may have erred. I am happy to say that of the three choices, people only reached out with comments. One comment in particular was that mention should have been made about the qualifications that an individual or entity must have to be a Medicare Set-Aside (“MSA”)/MSP compliance vendor/provider.

The commenter was correct in bringing up my omission. Assessing the qualifications of an MSA/MSP Compliance professional could be a pretty important factor for a company in choosing an MSA/MSP Compliance vendor. The answer is short ... there are NO baseline qualifications that an individual must hold to prepare an MSA, submit an MSA for approval, or to be generally employed in the MSP industry. Thank you and good night!

Kidding aside, while there are no baseline qualification requirements, per se, there are industry certifications as well as areas of compliance that do demand professional qualifications, even if they are not MSP-specific.

### CMS Guidance on MSP/MSA Vendor Qualifications

A person can literally be a lumberjack, hairdresser, or vacuum salesman today and MSA vendor tomorrow. Search the Workers’ Compensation Medicare Set-Aside Arrangement (“WCMSA”) Reference Guide, and you’ll see no reference as to who is qualified to prepare an MSA, or limitations as to who cannot. Section 6.0 of the Reference Guide mentions who can help with the MSA process generally, and Section 10.4 notes the difference between a life care plan (“LCP”) and a future treatment projection, which denotes certain qualifications. Absent those two sections and sections regarding professional administration, there really isn’t a whole lot said by CMS about who can be an MSA vendor/allocator or involved in the MSA/MSP compliance process.

Section 6.0 of the WCMSA Reference Guide is copied below in full, and Section 10.4 of the WCMSA Reference Guide is copied in part:

#### **6.0 Who Can Help with the WCMSA Process?**

Setting up a WCMSA arrangement, submitting the proposal to CMS for approval, and selecting the best way to administer the arrangement can be complicated. If you are an injured worker who will need future medical treatment, an attorney may be able to explain this process and provide legal help. An attorney can also help you consider whether you should have a separate administrator for your WCMSA. You may also find it useful to seek advice from financial and tax professionals in the planning phases and once the WCMSA is established.

Once a WCMSA is established and funded, it must be administered. This can be done by the claimant, by the claimant's representative payee, appointed guardian, or conservator, or by a professional administrator. The administrator must establish the WCMSA account, pay Medicare-covered services from the WCMSA account, and provide CMS with a reporting of the expenditures from the WCMSA. See the WCMSA User Guide and the WCMSA Self-Administration Toolkit for more information on administering the account and proper reporting to CMS. The User Guide is located at

<https://www.cob.cms.hhs.gov/WCMSA/assets/wcmsa/userManual/WCMSAUserManual.pdf>, and the Toolkit at <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/Self-Administration-Toolkit-for-WCMSAs.pdf>.

#### 10.4 Section 20 – Life Care / Future Treatment Plan

For the purpose of evaluating plan proposals, either a Life Care Plan or Future Treatment is **required** for submission.

A Life Care Plan is a dynamic document based on published standards of practice, comprehensive assessment, data analysis, and research that provides an organized concise plan for current and future needs with associated costs for individuals who have experienced catastrophic injury or have chronic health needs. A life care plan is appropriate when the claimant's injury or disease is extensive and serious, e.g., paraplegia, quadriplegia, brain damage.

Although submission of a life care plan is optional, you are **required** to include drug and dosage lists. Include all pricing charts, cost projections, pricing information, and explanatory narratives and analyses.

A Future Treatment Summary lists all expected care by type, level, frequency, cost per event, and total for all expected future medical and pharmacy care. A Future Treatment Plan is required in the absence of a Life-Care Plan. Future Treatment Summaries do not require the same stringent evaluation as a Life Care Plan; however, they delineate the treatment care pricing expectations by the submitter for the purpose of WCMSA calculation. The Future Treatment Summary gives the WCRC some insight into the pricing methods used by the submitter, and should not be construed to carry the same weight as treatment records or Life Care Plans.

In my opinion, the lack of specificity as to baseline qualifications to prepare an MSA is intentional, or if not intentional an arguably beneficial omission. One reason qualifications may be omitted is because the WCMSA Reference Guide is drafted to anticipate that MSA review and submission will occur in cases that qualify under the CMS MSA review and approval thresholds. If an MSA is submitted for review and approval, then CMS (through their contractor) can serve as a check on deficient MSA proposals and vendors. I am not advocating submission v. non-submission and don't want to take up too much time on that topic. However, if the parties choose to proceed with the MSA review and approval process, the process itself and the resulting MSA approval amount can serve as a check on the qualifications of the individual/entity that prepared the MSA for submission. Don't misconstrue what I am saying: CMS would not per se find a vendor deficient. However, bad results will definitely let clients know which vendors know their stuff versus who is lacking.

Additionally, MSAs are somewhat formulaic. The actual process of preparing an MSA, what is required to do so, how approval can be achieved, etc. is basically laid out by CMS in the WCMSA Reference Guide. The WCMSA Reference Guide, which took the place of the memo guidance issued by CMS, established what is needed for an individual/entity to prepare an MSA and submit an MSA for review and approval. The qualitative value added into the MSA process can be found on a vendor-by-vendor basis, based upon what additional skillset each vendor brings (legal expertise, technologic advances, in-house medical professionals, etc.). However, everyone starts from the same basic baseline.

Now, I know that the air may have been sucked out of multiple MSA vendor offices across the country by me using the word “formulaic” to describe MSAs, but on a baseline level it is true. And I would argue that more stringent published qualification criteria could actually take away a lot of the legal, medical and other professional skill that serves as an incentive for innovation and advocacy for MSA/MSP consumers and the industry. This industry has a wide array of different mindsets, products, and professionals all working off of a very basic set of rules. In my opinion, that is what gives us non-submit MSA programs, data-based MSA proposals, legal-based MSA proposals, industry groups, etc. Different opinions are a good thing.

When an MSA is prepared, professionals from multiple disciplines are usually engaged. Lawyers, nurses, life care planners, annuity brokers, technology companies, independent underwriters, professional administrators, etc. may all touch an MSA file. If baseline qualifications were created, each of the disciplines noted would have to be accounted for in the qualification process, which could create an exclusionary atmosphere and stifle some of the innovation and advocacy that has quite literally built the MSA industry.

## MSA/MSP Compliance Certifications

Referencing back to my earlier comment about a lumberjack, hairdresser, etc. being able to become an MSA vendor without oversight: if someone were to jump into the Medicare compliance field from a different vocation, how could they show their qualification to the field, or that they did in fact establish some baseline qualifications? One way is to earn an MSA/MSP certification.

Despite the fact that post-nominal initials are commonplace with Medicare compliance vendors, there are no credentials, certifications or licenses required by CMS to operate in the Medicare compliance industry. As a result, vendors vary greatly in what types of individuals they utilize, ranging from registered nurses to attorneys, and what, if any, certifications those individuals maintain.

One common certification in the MSA field is the Medicare Set-Aside Certified Consultants (“MSCC”) program. Certification is handled through the International Commission on Health Care Certification (“ICHCC”). The ICHCC requires a minimum of 12 months of employment within the past three years within the workers’ compensation or liability insurance industry; a minimum of an Associate’s Degree in a related field; completion of an approved training course; completion of an MSA work sample; and passing of an examination. To maintain this certification, MSCCs must renew their credentials every three years by either retaking the examination or completing 15 hours of continuing education units.

Another familiar credential program is the Certified Medicare Secondary Payer Professional (“CMSP/CMSP-F”) program. To earn the CMSP designation, an individual must complete a 20-hour workshop, including a passing exam score and a completion of a take-home case study. To maintain certification, 24 hours of continuing education is required every two years in an MSA related field.

It is indicated in the WCMSA Reference Guide that submission of a life care plan will be acceptable as an alternative to a Medicare Set-Aside in certain instances. As such, certified life care planners (“CLCP”) are commonplace in the

Medicare Set-Aside field, especially when projecting future care in liability cases. The CLCP professional designation is also certified by the ICHCC. The ICHCC requires at least 120 hours of post-graduate or post-specialty degree training in life care planning or applicable service areas; three years of field experience within the past five years; completion of an examination; and an individual must meet the ICHCC's definition of a "qualified health care professional."

Once again, I want to emphasize that no certification program or professional designation is required by, or affiliated with, CMS. The purpose of the above summary is to illustrate some of the more common healthcare designations and credential programs utilized by Medicare vendors. The main concern for vendors, or clients evaluating them, should be ensuring that its staff collectively has the requisite knowledge, education, mentoring, and experience to navigate all potential areas implicated in the Medicare compliance field (anatomy, ICD coding, Medicare coverage guidelines, settlement and release language, etc.).

I have to admit (the word admit makes everyone read a little more actively doesn't it?), I've worked on what is approaching tens of thousands of MSAs/MSP issues over the last 17 years, and I have not taken a certification course. There, I said it! And the truth shall set me free! (I'm of course saying that tongue in cheek). Such certifications were not available when I was coming up as a professional, and I was well into my career when they became refined and the norm. Does that make me deficient as an MSA provider/MSP compliance professional? I don't believe so. My clients don't think so. And my work product doesn't seem to think so. I would hope/believe that my experience as a service provider, lawyer, and educator of those who have taken certification courses qualifies me to part of the MSP/MSA industry. In actuality I advise/oversee a number of professionals who have the certifications as part of my day-to-day practice. Believe me, we speak the same nerdy MSP language, run in the same MSP circles, etc.

However, if someone were to ask me if I thought that certifications held value for the industry and the professionals that comprise it (this is where you read out loud: Ben, do you believe that certifications hold value for the industry and the professionals that comprise it?), I'd say: "Absolutely." Having structured courses that help people to break into the MSA/MSP industry is invaluable to MSP compliance consumers as well as professionals who need a place to start and continue their MSA/MSP education. I personally know many of the instructors who have taught in the certification programs, sat on industry boards with them, and have presented/taught materials alongside of them for years. Their knowledge and experience is what has helped to build the MSP industry. That said, do I believe that someone can be an MSP compliance professional/MSA provider without having a certification? Of course.

If someone were asking my honest opinion, I'd say that in both instances (certification and non-certification), the qualifications to be an MSA/MSP professional and a professional's maturation and skillset of an MSA/MSP provider will come through:

1. Experience
2. Education (through independent study, group study and mentorship)
3. Establishing individual relationships with multiple professionals and disciplines in the industry
4. Engagement in the MSP industry (joining groups, boards, etc.)
5. And whatever I am missing/is important to a client on a individualistic basis (again, I know enough to know that I don't know everything)

Going back to my first article for NCSI, which focused on factors to consider when choosing an MSA vendor, the factors above fall right in line with questions to consider and ask when engaging and vetting an MSA/MSP vendor.

Before moving onto the next section, I should note that the information noted about all of the certification bodies above was pulled from the organizations' websites. If additional information is needed regarding each/any certification, I would recommend reaching out to each individual organization referenced.

## Non-MSA/MSP Specific Qualifications

I just wrote nearly five and a half pages about the limited to nonexistent baseline qualifications to get into the MSA/MSP industry. However, that should not be construed to mean that there are no functions within the MSA/MSP industry that must be carried out by professionals with certain pre-requisite qualifications. I may not hit all of them, but I can give two brief examples where a professional must carry a certification or licensure to perform a certain function within the MSA/MCP industry.

One example is life care planners. My firm gets a few requests per year to prepare a life care plan instead of an MSA. We refer those cases out to certified life care planners, because my team is not staffed with a professional who has the requisite education and certifications that fulfill the professional requirements of being a certified life care planner. We certainly can and do prepare MSAs. However, the line into preparing certified life care plans is not crossed because of the professional qualifications required for that service.

Another example, and one that is near and dear to my heart, is lawyers. The MSP is a federal law, with federal regulations and enforcement provisions. A non-legal based entity or non-attorney can, of course, work in the MSP industry. However, there is a line that cannot be crossed by a non-legal based entity/non-attorney, or attorney not properly barred or employed to provide legal advice. In the event that legal advice is improperly provided certain ethical, error and omission and unauthorized practice of law issues may arise. I am not going to get into a state-by-state analysis as to what constitutes the "unauthorized practice of law," etc. My point is that as with a life care planner, there are non-MSP pre-qualifications for attorneys. Rules in regard to education, licensure, etc. that cannot be waived by being part of the MSA industry. To illustrate my point I'll, give one brief story and offer some questions for consideration when choosing an MSA/MSP compliance attorney.

First, the story. Last year an insurance defense attorney called me about a settlement that he had negotiated with a Medicare-entitled plaintiff. The defense attorney was asked by the client to use a release that was allegedly prepared in large part by an in-house attorney at a non-legal based MSA company. He had a few ethical concerns regarding the document in general and the source of the document. Some of the concerns were that the attorney who prepared the release was an in-house attorney for a non-legal based entity and was not barred in the state of jurisdiction where the release was being entered into. Additionally, the release as drafted created some specific issues because it did not gel with state law. We ultimately worked through the issues on a few different levels, unwound the concerns of the defense attorney, and the settlement proceeded. However, there were real ethical questions to deal with that were centered around the MSP compliance attorney, the potential unauthorized practice of law by an MSA company and their in-house attorney, the ethical obligations of the defense attorney to report their concerns about the potential unauthorized practice of law, and so on. The point of my story isn't doom and gloom. It is to emphasize that while there may not be standardized professional qualifications to be employed in the MSP compliance industry, consideration has to be given as to if there are professional qualifications to some services being performed within the MSP industry. For instance, I would not provide someone with an age rating, formulate an annuity quote, or draft a certified life care plan. I know where my professional line (and qualifications or lack thereof) stands and have to personally make sure that me and my team stay in our professional lane, so to speak. Please don't take my story to say that attorneys cannot provide services for non-legal based MSA companies. They certainly can and do. However, there should be an analysis done (and there likely is by most companies) as to the level of legal guidance that can be provided before entering murky waters.



In my field, I tell clients to ask MSP vendors if their in-house attorneys can:

1. Provide outside clients with legal advice.
2. If yes, does that advice provide the same protections as outside counsel or an independent attorney?
3. Which in-house attorneys of the MSP vendor may provide advice? All of them? Some of them?
4. What are the limitations on advice (federal/MSP laws, state by state)?
5. Does the MSP vendor have ethical opinions/research as to the type of advice that they may provide to outside clients? Can they provide those opinions to their clients?
6. Does the vendor have a clear line that they will not cross as to what may constitute the in-house attorney getting outside of their proverbial lane?
7. And so on and so on.

The point is that when it comes to MSA/MSP qualifications, MSA/MCP practitioners and consumers have to think about two distinct sets of qualifications. The first being the qualifications, or lack thereof, for the MSA/MCP industry generally. The second being the qualifications for certain professions that comprise the MSA/MCP industry and the functions that certain individuals may not be able to perform as a result. I use the legal field as an example because that's the basis for my experience. However, I am sure that there are other stories from other professions that could be illustrated as well.

Going back to my story: in the situation that I described, we were faced with the very real potential of turning in a very young attorney to a state bar for what we believed was an innocently intended, but potentially professional, unethical act. That is a heck of a spot to be in on both sides of a discussion. An ounce of prevention ... In my opinion, the situation could have been one where the lack of baseline qualifications in the MSA/MSP compliance injury blurred the line into an unintended area where baseline qualifications are the requirement. Luckily, we didn't have to push the point of getting those facts.

Again, thank you to the commenter who made mention of my omission in not discussing the qualifications of MSA/MSP compliance vendors. As with my prior NCSI article, I welcome questions, comments, concerns about my analysis of qualifications for professionals in the MSA/MSP compliance industry. Please feel free to reach out at [bbasista@dmclaw.com](mailto:bbasista@dmclaw.com) or (412) 508-9198. Also, prior to signing off, I wanted to give proper credit to my colleagues Michael D. Bergonzi, Esq. and Jessica L. Altobelli, Esq. for their research and co-writing of the MSA/MSP certification section of this article.

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