Medical Tourism: A Legal Issues Roadmap

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Medical Tourism

“The practice of comfortably traveling abroad to have your medical procedure performed by highly qualified surgeons at some of the most advanced medical centers in the world…at a small fraction of the cost of care in the USA.”  - medretreat.com
Overview

• A “Fly-over” View from “30,000 feet”

• Medical Tourism Legal Issues Depend on the Client:
  • Patient
  • Facilitator
  • Payor
  • Provider
Background

Our focus is on US residents seeking health care abroad, but don’t forget about others traveling to the US for health care.

“Drivers” of Medical Tourism:

• Cost
• Renowned/Specialist Providers
• Alternative/Experimental Therapies
• Cultural Issues
Patient Perspective

- Travel
- Contingencies
- Foreign Jurisdiction
- Patient Health Information
Patient Perspective Cont.

- Travel
- Facilitator?
- Payment
- Travel Insurance
- More than Airline Tickets
  - Convalescence
  - Stairs
Patient Perspective Cont.

• Contingencies
  • Medical Complications/Evacuations
    • Medical Tourism Insurance
  • Foreign Jurisdiction
    • Medical Travel Destination Liability Waiver
Practitioner Scenario

- 5:00 P.M. Friday:
  - Email from Client Medical Tourism Facilitator
    - Needs to Send Patient’s File to a Physician in Mexico – File Contains PHI
    - Authorization Required Here? This is for Treatment Right?
International Information

• Sending Client’s Information to Foreign Provider
  • Patient’s data not bound by HIPAA safeguards outside US

• Receiving Client’s Information from Foreign Provider
  • EU Data Protection Directive (Directive 95/46/EC): a blueprint for EU privacy laws – *may catch US resident data*
  • Switzerland is not EU
International Information

- Receiving Client’s Information from Foreign Provider Outside of EU
  - India – May restrict disclosure of health information
  - Canada – May restrict disclosure of health information
  - China – May restrict disclosure of health information
  - Mexico – Industry-based protections
  - Singapore – Industry-based protections, pending legislation
  - Thailand – Regulates kingdom information use
Facilitator Perspective

• A Good Facilitator Presents Provider Options and Information for Patient Evaluation
  • Facility Track Record (if available)
  • Credentialing

• If Agent of Payor, Facilitator is a Business Associate for PHI

• Facilitator Coordinates Travel and Accommodations
Facilitator Agreement

- Facilitator as Agent of Payor/Patient
- Written Agreement Defining Responsibilities
  - No Guarantees
  - Not Health Care Professional
  - Provides Information on Travel and Health Care Providers
  - Does Not Endorse Travel or Health Care Providers
Facilitator Agreement

• Patient Accepts/Rejects Offer to Purchase Travel/Complication Insurance

• Patient Acknowledges that Patient Has Been Advised to Consult with His/Her Doctor about Medical Travel

• Patient Acknowledges Risks

• Patient Waives Liability
Tourism Insurance

• Medical Tourism Insurance Covers:
  • Complications/evacuations
  • Cancellations
  • Companions
  • Coverage in US, Worldwide or Other?
5:01 P.M. The Next Friday:

- Email from Client Physician Group
  - Wants Facilitator to Sign a Business Associate Agreement so Physician can Send Patient’s Information to Facilitator to Forward to Swiss Provider
  - Same Answer for a Payor-Facilitator Arrangement?
Payor Perspective

- What are a Payor’s Legal Concerns?
  - Planning Control, Selection of Facilitator
  - Patient Choice of Provider
  - Verifying Provider Credentialing
  - Who is Ultimately Responsible for Care?
  - Coverage for Complications
ERISA Issues

• For Group Health Plans Covered by ERISA (in rough terms):
  • Facilitator is Service Provider, Acting for Fiduciary
  • Plan Administrator is ERISA Fiduciary
  • Selecting Health Care Providers (and indirectly a Facilitator to coordinate medical travel) fall within an Administrator’s Fiduciary Function
ERISA Issues Cont.

• Due Diligence in the Selection of Foreign Provider and Indirectly Through the Diligent Selection of a Facilitator Can Help to Reduce Fiduciary Liability

• Look for the Facilitator to
  • Adhere to Clear Standards for “Provider Network” (like JCI Accreditation)
  • Offer Patient Choice
  • Collect Patient Acknowledgements and Waivers
Payor Risk

• Mitigating Factors:
  • Pays for but does not provide health care
  • Offers a choice of providers to ensure effective access to care, but patient exercises independent judgment in selecting provider
  • Reasonable Incentives: Coercion vs. Incentive to Engage in Medical Travel
  • Provide meaningful information about risks
Payor Exculpation

• Written patient acknowledgments can help reduce payor risk:
  • Patient consults with PCP about proposed care
  • Patient consults with PCP about risks of travel for such care
  • Patient independently understands the risks of:
    • Travel
    • Travel Abroad
    • Travel Abroad for Health Care
• Sending EU Resident Information to US Provider
  • EU Data Protection Directive (Directive 95/46/EC)
  • EU-US Safe Harbors
    • US companies offering “adequate data protections”
  • EU General Data Protection Regulation proposed January 2012 will extend EU data protection requirements
Europe

• EU Directive on patients’ rights in cross-border healthcare (Directive 2011/24/EU)
  • Provides a framework for cross-border healthcare between EU Member States
  • Addresses (among other things) reimbursement and sharing information for health care provided to an EU resident in another EU Member State
  • Set for transposition in Member States by Fall, 2013
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