

# 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



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# 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?

# Practitioner Scenario II

- 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

# Provider

- 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

# Contact Information

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