Medical Tourism: A Legal Issues Roadmap

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Health Care Law Practice Group

McBrayer, McGinnis, Leslie & Kirkland, PLLC
ATTORNEYS AT LAW
“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
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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