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MEDICAL TRAVEL: The Role of Law in a Dynamic Environment

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INTRODUCTION

Background

- Definition and scope of medical travel
 - Focus: US residents seeking care abroad that could be obtained in the United States
- Why would someone leave the US for medical care?
 - Cost of care in the US
 - Increased financial burden on individuals
 - Availability of quality providers elsewhere
 - Marketing by international destination providers and national trade and tourism councils
 - Consideration of cultural issues



INTRODUCTION

Legal Focus: The “Actors” in the Medical Travel Arena

- **The Patient**
 - Self-Pay
 - Covered Benefit
 - ERISA Plan
 - Insurer
- **Facilitator**
 - Arranges destination services, including travel
 - Relationship with patient (or client)
 - Relationship with self-insured employer or benefit consultant
- **Employer as ERISA Plan sponsor**
- **Destination Provider**



LEGAL FOCUS

Common Concern: Risk Reduction

- No settled law
- Reliance on existing jurisprudence for guidance/extrapolation
- Need to differentiate risk, liability and likelihood of suit
- Unlikely ever to reduce risk to zero
- Therefore can never reduce risk of being sued to zero
- Particular issue for dealing with US entities and individuals
 - US as a litigious environment
 - Generosity of malpractice awards
- Strategies for risk assessment, risk allocation and risk management



LEGAL FOCUS

Common Concern: Risk Reduction (cont.)

- Clarifying responsibilities and clear communication
- Two components - both important:
 - Documentation: What is written
 - Clear language, plain language
 - Relationships: What is said - and how
 - Consistency of message, relationship with patient as client



EMPLOYER RISK

Role of ERISA

- Background on ERISA
- Medical travel option as a choice
 - No coercion
 - Financial incentives?
- Scope and clarity of plan provisions
- Facilitator selection
 - Role of facilitator certification
- Scope of potential liability
 - Fiduciary responsibility
 - ERISA pre-emption
 - Responsibility for care provided?



FACILITATOR AS KEY TO MEDICAL TRAVEL

- Functions
 - Arranges for medical and travel-related services
 - Advises on/helps select destination provider
 - Arranges for/facilitates transmittal of relevant medical information
 - Arranges for/facilitates payment of destination provider fees
 - Arranges for/facilitates aftercare
 - Facilitates administration of ERISA plan medical travel option
 - Interfaces with all of the other relevant actors



POTENTIAL FACILITATOR LIABILITY: Managing Risk

- Context: Legal uncertainty
- Concept: Legal outcomes often depend on a judge's view of the client.
 - Informed consumer or party in need of protection?
 - Never a predetermined conclusion
 - The more information provided and the more appropriate the choices offered, the more likely to be seen as informed consumer



POTENTIAL FACILITATOR LIABILITY Concerns

- Payment arrangements
 - Should facilitator act as intermediary?
- Medical record transmission
 - Should facilitator handle data?
- Responsibility for malpractice
 - Theories for holding facilitator liable
 - Corporate negligence
 - Vicarious liability
 - Improper provision of information
- Responsibility for problems arising from travel arrangements/accommodations
- Responsibility for “frolics and detours”



POTENTIAL FACILITATOR LIABILITY

Principles of Risk Reduction

- Principle 1: Facilitator has to understand health care.
Expertise in travel is not sufficient.
- Principle 2: Be sure client knows the questions to ask.
Be sure client is asking them of the right parties.
 - domestic providers
 - legal counsel, etc.
- Principle 3: Be sure documentation with clients and providers is complete.
 - Address areas of respective responsibilities
 - Set out proper representations
 - Use lucid and understandable language



POTENTIAL FACILITATOR LIABILITY

Principles of Risk Reduction (cont.)

- Principle 4: Don't rely only on documentation.
 - Communicate with the client
 - Even better, have standard script for oral communication
 - Maintain record of what is said
 - Be sure it is consistent among client contacts
- Principle 5: Risk reduction is correlated with information.
 - Clarity as to extent client can rely on information provided
 - BUT: delicate balance between providing useful information - accurate and complete - without assuming responsibility for it
 - Caution client about need to obtain own independent assessment



POTENTIAL FACILITATOR LIABILITY

Principles of Risk Reduction (cont.)

- Points to communicate:
 - Agent of client, not provider
 - Not engaging in practice of medicine
 - Not making medical decisions
 - Client to consult with own caregivers, locally and abroad
 - Provide useful information about risks
 - Clearly define services being provided, medical and non-medical



POTENTIAL FACILITATOR LIABILITY

Principles of Risk Reduction: Provider Selection

- Caution about endorsing providers
- Choice is good
- Make recommendations but stress independent client responsibility to validate quality of providers
- Balance:
 - taking responsibility for endorsing quality of provider but not behaving “foolishly” in recommending known poor quality provider
- Use of preferred networks
 - Be clear as to standards applied to select network
 - Be as objective as possible
 - Use of certification, accreditation, licensure
 - Value of site visit and doing background checks



POTENTIAL FACILITATOR LIABILITY

Principles of Risk Reduction: Client Acknowledgements

- Sought medical advice from own caregiver
- Discussed fitness to travel and treatment options with provider
- Recognition of risk associated with travel and seeking care abroad
- Completeness and accuracy of medical records
- Provision for modification of medical services scope upon arrival
- Provision for additional needed services during stay
- Understanding of possibility of recourse only to foreign jurisdiction in event of malpractice



FACILITATOR/PROVIDER RELATIONSHIP

Criteria for Destination Provider Selection

- Cost
 - How much less expensive than comparable US service?
- Quality
 - Sophistication of medical system
 - Ethical considerations
 - Accreditation of providers
- Geographic clusters
- “Familiarity” of environment
- Prevalence of English
- Transparency of legal system
- “Adequacy” of malpractice recovery



FACILITATOR/PROVIDER RELATIONSHIP

Issues to be Addressed

- Specify scope of responsibilities on behalf of client
- Specify client arrangements
- Facilitator fee arrangements
- Representations
 - Accreditation
 - Qualifications of staff providing services
 - Scope of practice
 - Notification of material changes
- Arrangements for client when in jurisdiction
 - Translator
 - Transportation
 - Amenities



FACILITATOR/PROVIDER RELATIONSHIP

Issues to be Addressed (cont.)

- Medical records
 - Receipt
 - Transfer
- Role in facilitating aftercare
- Site visit
- Exclusivity
- Marketing



FACILITATOR/PROVIDER RELATIONSHIP

Issues to be Addressed (Cont.)

- Other Issues
 - Indemnification
 - Confidentiality
 - Mechanism for dispute resolution
 - Jurisdiction for dispute resolution
 - Governing language of agreement



PROVIDER/PATIENT ISSUES

Confidentiality and Security of PHI

- Mechanisms for transmission of patient data
- Applicability of HIPAA privacy and security requirements
- Non-US privacy and security jurisprudence
- Role of facilitator
- Role of health information technology



PROVIDER/PATIENT ISSUES

What if Malpractice Occurs

- Can foreign provider be protected against lawsuit in US?
 - Consent form: disputes to be resolved under law of provider's jurisdiction
 - Patient agreement not to bring suit elsewhere
 - General consent to use of provider
 - Specific consent with regard to specific procedures
 - Consents to be interpreted under law of provider jurisdiction



PROVIDER/PATIENT ISSUES

What if Malpractice Occurs (cont.)

- Will patient seek to sue destination provider in US courts?
 - US v. non-US malpractice jurisprudence
- Obstacles
 - Agreements and consents
 - Long-arm theories - what basis for US local jurisdiction
 - Role of internet marketing or other contacts with US jurisdiction
 - Forum non conveniens
 - Lex loci delicti
- Alternative dispute resolution procedures



CONCLUSIONS AND QUESTIONS