MEDICAL TRAVEL:
The Role of Law in a Dynamic Environment

© Stephen M. Weiner, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo. P.C.

Medical Tourism in Turkey Conference
March 13, 2010
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