Concierge Medicine and Legal Compliance: Are They Mutually Exclusive?

For several years now, physicians have been trying to preserve their independence as they have watched their revenues decline, and ever more of their referral sources join large health systems and are referring their patients within those health systems. Concierge care models can afford practitioners additional revenue from membership fees, and under an out-of-network model, can provide them with independence from the ever-increasing administrative requirements of health care plans and decreasing reimbursements. Moreover, practitioners may find higher levels of patient satisfaction when patients feel like they are receiving enhanced care or services in exchange for the membership fee and are receiving more personalized care without the time constraints common to in network practices that depend on high volume. Regardless of the model you wish to employ to operate a concierge practice, careful legal planning is necessary to ensure that your concierge model is legally compliant. The following represent some issues that practitioners must be cognizant of before pursuing a concierge model for their practices:

Fee vs. Insurance Premium: Concierge practices are subscription based medical practice where patients pay a fee to receive certain services. These can range from having a physician on call, to receiving more personalized or enhanced services. Concierge fees can be paid monthly or annually and can range from a couple thousand dollars to more, depending on the level of services provided. The professional medical and ancillary services provided by a concierge provider to a subscriber generally must be paid for by the patients separate from the subscription fee, in order to avoid the risk that the concierge practitioner will be deemed to be operating as a non-licensed health insurance company which can subject the practitioner to fines or worse.

Breach of Commercial Health Plan Participating Provider Agreements: A concierge practice that is in-network should take care not to breach any participating provider agreement with health insurance plans. Under participating provider agreements, the participating provider agrees to provide covered health care services to insured patients in exchange for payment by the health insurance plan of the agreed upon reimbursement fee and the participating provider is generally prohibited from charging or accepting any money from patients for covered services beyond the co-payment or other co-insurance obligations of the insured. As you may be aware, “covered services” are those professional services that the health insurance plan will pay for such as annual well visits, sick visits and the like. It is vital that a concierge practice avoid engaging in “double dipping” which might occur if a patient is charged a membership fee in exchange for any covered services. This most often occurs with concierge agreements that require payment of a membership fee in exchange for things like an “executive” or “VIP” physical, extra time during office visits, nutritional counseling, or for referrals to specialists. The foregoing are generally covered services that are reimbursable by health insurance plans and a practitioner who charges extra for such things may be found to be in breach of participating provider agreements which can result in termination of the participation agreement for cause.

Potential Professional Misconduct: In addition to the foregoing, concierge providers who participate with health insurance plans cannot condition an insured person's access to care on the insured person's payment of a subscription fee to the concierge practice. Similarly, offering concierge plan members priority scheduling for patient care during regular office hours can subject an in network provider to risk. Not only could such conduct be a breach of the provider's participation agreement based on discriminatory care, but such conduct could also form the basis of professional misconduct charges. For this reason, many concierge practices will opt to be out of network, have a smaller roster of patients than their in-network colleagues and will only see patients who are members of their concierge plan. For practitioners who wish to convert their practices to concierge care practices, care must be taken when shrinking the patient roster by properly terminating their participation contracts and providing adequate notice to patients who do not want to be members of a concierge practice. Ignoring this step can result in breach of contract and/or professional misconduct charges of patient abandonment.

Medicare: Double-dipping is a greater concern for providers who accept assignment. Any physician who accepts assignment may not charge a Medicare beneficiary anything for covered services. To the extent that the concierge provider who accepts assignment, truly provides a non-covered service, that provider must first provide the Medicare beneficiary with an Advanced Beneficiary Notice that puts the Medicare beneficiary on notice that the services are not covered by Medicare and that the Medicare beneficiary will be financially responsible for the cost to provide such non-covered services. Physicians who do not accept assignment may charge a Medicare beneficiary more than the approved amount for Medicare covered services subject to the 15% limiting charge. Physicians who opt out of Medicare, must remember to have their patients sign a contract with them for their care and acknowledging that if they choose to be seen by an opted-out concierge provider, they cannot seek reimbursement from Medicare for professional services rendered by the concierge provider.

Corporate Practice: There are companies that have established membership networks and offer those networks to physicians seeking to establish a concierge practice. These contracts should be carefully reviewed by counsel to ensure against the foregoing as well as the risks of violating the corporate practice doctrine and New York State Education Law prohibition on fee splitting, among other things.

HIPAA and patient privacy: With 24/7 access to a provider presented as a key inducement to convince patients of the value of a concierge membership, providers must take care that all platforms for access comply with HIPAA and state patient privacy laws. Email is generally considered to be insecure under almost all circumstances. To the extent that a provider uses email to communicate with patients after regular office hours, an appropriate consent must be signed by the patient to accept emails but the provider should still seek to avoid sharing protected health information via email. When sharing protected health information via text or telehealth platforms, providers should be sure to use HIPAA compliant platforms and that transmission of protected health information should be encrypted in transit and when stored. Any practitioner who uses digital communication tools to enhance patient access should also make sure the practitioner's cyber insurance covers data breaches and business interruption. To the extent that the concierge practice wishes to keep payment card information on file to ensure payment of the membership fees, the practice should also take care to comply with payment card data security standards.

Membership Contract: Properly structuring the membership contract with the patient is vital to mitigate regulatory risks and to avoid reputational damage in the event of any misunderstandings with patients. Membership contracts should accurately state the scope of services covered by the membership contract, the enrollment period, pricing, renewal terms, and termination provisions. Equally important is to ensure that the membership contract explicitly confirm those services that are not covered by the membership contract and the fee paid by the member. This is of particular importance for those practitioners who choose to operate a concierge practice while remaining in network. For those practitioners, explicit language excluding all covered services is vital to protect the practitioner from allegations of breach of contract with health insurance plans and breach of contract with patient members.

Concierge medicine can offer practitioners the opportunity to have greater autonomy in how they manage their patients. However, there are myriad legal pitfalls if the concierge practice is not structured properly and if the contract is not structured correctly. Involving healthcare counsel early in the process of either purchasing a practice that already operates a concierge practice or converting a traditional practice into a concierge practice will enable the practitioner to ensure a compliant concierge practice. Please feel free to contact me with any questions regarding concierge medicine.

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