Tips for Assessing Malpractice Lawyers

BY SHERRY BOSCHERT

Poor communication, neglect, and unclear billing policies top the list of complaints.

There are several models for concierge-care practices. Some opt out of Medicare and private payers to offer a periodic fee for medical care. Others accept cash only for their services. What seems to attract most of the legal action is the “fee for non-covered services” or FNCS model. These practices accept patients with private insurance or Medicare but also charge a flat fee monthly, quarterly, or annually, he said at the conference, sponsored by the Society for Innovative Medical Practice Design.

In return, patients are promised a smaller patient base, greater access to the physician, and other amenities. For some time, this approach worked. But nowadays, many legal experts are warning that the physician might be double billing for Medicare patients.

Exactly what the periodic fee pays for is the gray area that incites legal action, Mr. Marquis said. The fact that certain FNCS practices offer preventive care is not a complete answer to the legal issues, given that Medicare covers certain preventive care services, he said. Home visits are another problem; in many cases, they’re also a covered service under Medicare.

Although Medicare is usually the 800-pound gorilla in these situations, it’s private insurers that currently pose the biggest risks to these practices.

They can tell a practice, “We don’t like what you’re doing—boom, you’re out,” Mr. Marquis said. For an FNCS-style practice counting on insurance reimbursement, “this could be devastating,” he said. “I have had clients who’ve essentially decided not to become an FNCS-style practice” out of fear of being terminated at the result of notifying the insurance companies of what was going on.”

The rub is that insurance companies don’t need any cause to terminate a plan, he said. “It’s a pretty business decision that they appear to make, and there’s really no clear legal recourse.”

Health departments and insurance commissioners pose another credible risk to these practices. FNCS-style practices out of fear of being terminated have charged them a “poll tax”—a conditional payment that says, “Either pay me $1,100, or I will not render Medicare services to you.”

Several years ago, Rep. Henry Waxman (D., Calif.) targeted an FNCS practice, MDVIP, in a letter to Tommy Thompson, then secretary of the Department of Health and Human Services. “There should be a substantial overlap between services that were covered by Medicare and for which MDVIP was asking patients to pay,” Rep. Waxman wrote. Moreover, MDVIP physicians were providing Medicare services to patients but charging them a “poll tax”—a conditional payment that says, “Either pay me $1,100, or I will not render Medicare services to you.”

Secretary Thompson disposed of the conditional fee argument in a one-page statement. “Under current law, physicians have some discretion regarding the patients they choose to accept. The limiting charge provisions govern physicians’ charges for Medicare-covered services, these provisions do not directly affect charges for non-covered services.”

Insofar as the retainer fee under such an agreement is truly for non-covered services, such fees would not appear to be in violation of Medicare law, Mr. Thompson continued.

An alert issued by HHS’ Office of Inspector General in 2002 reminded physicians that they could “have a problem” if they proposed services to patients in exchange for a flat fee that would otherwise be covered by Medicare. The OIG’s chief counsel later clarified that the alert did not specifically target a position on concierge medicine but only addressed fees for covered services and was consistent with the position previously taken by Secretary Thompson.

“At least now we know that the Thompson letter is being enforced—that there are such things as non-covered services, and if we charge for those, that should be okay,” Mr. Marquis said.

Several bills have been introduced in Congress that would either give physicians from charging a membership fee to a Medicare beneficiary or would forbid physicians from requiring a Medicare beneficiary to purchase a non-covered item or service for receiving a covered item or service. These bills “never got out of committee,” Mr. Marquis said.