Legal Expert Highlights Concierge-Care Risks

By Jennifer Silverman
Associate Editor, Practice Trends

Dallas — Of the existing “concierge-care” models, practices that offer fees for non-covered services to patients who have insurance carry the highest legal risk, attorney John Marquis said at a national conference on concierge medicine.

In light of recent actions taken by Congress, state insurance commissioners, and federal agencies, it’s clear that authorities are looking out for potential conflicts of interest with this particular care model, said Mr. Marquis, a partner with Warner, Norcross, & Judd, LLP, a Michigan law firm that specializes in concierge-care issues.

There are several models for concierge-care practices. Some opt out of Medicare and private insurance to offer a periodic fee for medical care. Others accept only cash 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 has aroused speculation on whether 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, it’s private insurers that 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. “I have had clients who’ve essentially decided to not [become an FNCS-style practice] out of fear of being terminated as a 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. “And there’s really no clear legal recourse.”

Health departments and insurance commissioners pose another credible risk to FNCS practices. In 2003, New Jersey’s health department found that physicians who already had contracts with HMOs were requiring HMO patients to pay an annual fee to get into their practices.

The conflict was that many services these FNCS providers were offering were already required to be included in any health insurance plan offered in the state.

To start your patients on RAPTIVA, contact your Genentech Field-based Clinical Specialist. Or visit www.raptiva.com or call 1-877-RAPTIVA.

Please see accompanying Brief Summary of Prescribing Information.
conditional fee argument in a one-page statement. "Under current law, physicians have some discretion regarding the patients they choose to accept. While the limiting charge provisions govern physicians' charges for Medicare-covered services, these provisions do not directly affect charges for non-covered services," according to the statement.

Insofar as the retainer fee under such an agreement is truly for noncovered 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 take 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 prohibit 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 as a prerequisite for receiving a covered item or service. These bills “never got out of committee,” Mr. Marquis said.

A bill in Massachusetts a few years back stated that any preferred-provider arrangement would have to contain a provision barring physicians from charging an access fee to a covered person. Although it did not go anywhere, such legislation would deal a “devastating blow” to FNCS practices if it were ever approved, he said.