

The Regulatory Implications of Concierge Medicine

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In recent years there have been significant attacks on managed care as it relates to the provision of health care benefits. Class action litigation has skyrocketed, regulatory scrutiny has increased and public opinion of managed care has generally deteriorated. As a corollary to this attack on managed care, some physicians have become more creative in an attempt to recapture some of the fundamental elements of the physician/patient relationship.

One of the creative methods being utilized by some physicians to engender more significant physician/patient relationships has been termed “concierge medicine”. While the details of concierge medicine vary from practice to practice, the concept generally entails the payment of an additional fee by a patient for services not covered by private insurance, Medicare or Medicaid. For example, a patient may prepay a physician \$5,000 annually in exchange for a Concierge Medicine Agreement (“Agreement”). Under the Agreement, the patient would be given 24 hour a day, 7 day a week access to the physician or his or her equivalent medical designee. Additionally, the Agreement may allow for the patient to be seen within 48 hours of the initial contact with the physician’s office. Detailed physical examinations and nutrition/supplement consultation may also be part of the Agreement.

Concierge medicine is appearing in many states but has been most prevalent in the States of Florida and Washington. As concierge medicine becomes more popular, it necessarily gains the attention of both state and federal regulators.

One of the initial regulatory inquiries is whether the practice of concierge medicine constitutes the transaction of insurance. The State of Washington has concluded that under certain circumstances, concierge medicine may be considered the transaction of insurance because it is substantially similar to the operation of a health maintenance organization. That is, a consumer prepays specific consideration in exchange for enumerated medical services.ⁱ

Each states’ laws vary on the subject and definition of the transaction of insurance.ⁱⁱ However, a physician seeking to establish a concierge medicine practice is well advised to seek the advice of regulatory counsel in order to avoid a cease and desist order from a state Department of Insurance.

In Arizona, like Washington, the applicable statutory provisions would be those relating to health care services organizations.ⁱⁱⁱ Essentially, in Arizona it is necessary to review the Agreement proposed by a physician to determine whether that Agreement implicates the prepaid healthcare statutes found in the Health Care Services Organization Statutes at A.R.S. § 20-1051 *et seq.* The relevant provisions of Arizona law read as follows:

- A. A person shall not establish or operate a health care services organization in this state or sell or offer to sell or solicit offers to purchase, or receive advance or periodic consideration in conjunction with a health care plan without obtaining and maintaining a certificate of authority pursuant to this article.

A.R.S. § 20-1052(A).

The term “health care services organization” is defined as:

7. “Health care services organization” means any person that undertakes to conduct one or more health care plans. Unless the context otherwise requires, health care services organization includes a provider sponsored health care services organization.

A.R.S. § 20-1051(7)

The Arizona Insurance Code goes further to define the term “health care plan” as follows:

5. “Health care plan” means any contractual arrangement whereby any health care services organization undertakes to provide directly or to arrange for all or a portion of contractually covered health care services and to pay or provide reimbursement for any remaining portion of the health care services on a prepaid basis through insurance or otherwise. A health care plan shall include those health care services required in this article or in any rule adopted pursuant to this article.

A.R.S. § 20-1051(5)

As is apparent, Arizona law on the subject of prepaid health care services is not the paragon of clarity. Additionally, the definitions are sufficiently broad enough to encompass many types of concierge medicine practices. However, in Arizona, like many other states, the operation of a health care services organization is generally expected to include the provision of all basic health care services.^{iv} Alternatively, concierge medicine is typically designed to provide for limited services that are expressly excluded from private insurance, Medicare and Medicaid. Additionally, most concierge medicine practices do not provide for all basic medical services in exchange for a prepaid sum.

In addition to the foregoing considerations of state law, a concierge medicine practice also needs to consider applicable federal statutes and regulations. The most salient set of applicable federal statutes and regulations relate to Medicare.^v Specifically, physicians are generally prohibited from charging the patient for services that are reimbursed under the Medicare Program.^{vi} Recently, in response to various complaints, Tommy Thompson, the Secretary of Health and Human Services stated that, “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.”^{vii} Thus, any regulatory attorney called upon to assist a physician in setting up a concierge medicine practice is well advised to clearly delineate the services that will be provided in the Agreement to ensure that they are not covered under the Medicare Program.

Another issue to consider in the context of concierge medicine is the existence of network provider agreements. Many physicians have existing network provider agreements that require them to see patients within a specified time period or that may generally overlap the services provided in the Agreement. Once again, caution must be exercised in the process of assisting with the establishment of a concierge medicine practice to ensure that any Agreement does not collide with existing contractual responsibilities of the physician.

Last, a concierge medicine practice must ensure that ample notice is provided to existing patients so that they can transition to a new medical provider in the event they are unable or unwilling to participate in the concierge practice. This will insulate the physician practice from arguments that patients have been abandoned which may result in ethical and malpractice issues for the physician.^{viii}

As health care costs continue to rise health care providers will continue to develop creative ways to address the physician/patient relationship. In doing so, physicians will undoubtedly wander into areas fraught with regulatory implications. As they do, they will need guidance to avoid regulatory minefields that could result in consent orders, civil penalties and complaints to peer medical examination boards.

ⁱ *See* Washington Department of Insurance Draft Technical Assistance Advisory, *Engaging in Activities Requiring a Certificate of Registration*, July 29, 2003; WAC 284-43-320(2)(a).

ⁱⁱ *See* A.R.S. § 20-106; *see also*, National Association of Insurance Commissioners Model Laws, Volume V, Pg. 850-1.

ⁱⁱⁱ The Arizona Insurance Code utilizes the term “health care services organization” in lieu of “health maintenance organization.” However, the Arizona Department of Insurance treats such terms synonymously.

^{iv} In Arizona, in order to obtain a certificate of authority for an HCSO, an applicant must establish that it can provide basic health services to targeted populations. *See* Arizona Application for Certificate of Authority for a Health Care Services Organization.

^v 42 U.S.C. §§ 1395 *et seq.*

^{vi} 42 U.S.C. 1395cc(a)(1)

^{vii} *See* May 1, 2002 letter from Tommy G. Thompson, Secretary of Health and Human Services to The Honorable Henry A. Waxman.

^{viii} *See generally*, A.R.S. § 32-1451.