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Legal Issues Concerning the Concierge Practice

### CONCIERGE MEDICINE

Concierge medicine is a growing phenomenon and it seems likely will play a significant part in the future delivery of professional medical services. There are; however, significant legal issues concerning these arrangements. Welcome to The Clinicians Roundtable, I am Dr. Larry Kaskel, your host. Joining me today is Mr. Robert Portman, a partner with a law firm, Powers Pyles Sutter & Verville who represents physician's hospitals and other healthcare providers.

**DR. LARRY KASKEL:**

Mr. Portman, welcome to the show.

**ROBERT PORTMAN:**

Well, thank you Dr. Kaskel, I am delighted to be here.

**DR. LARRY KASKEL:**

It seems that many primary care physicians are going concierge or performing retainer practices, VIP medicine whatever you want to call it, but are there differences between the types of practices or are they all pretty much the same structure?

**ROBERT PORTMAN:**

Well, these concierge practices, they are often called boutique practices, boutique medicine, retainer practices. They really come in all shapes and sizes and that's actually one of the reasons why I personally think they are a good thing for medicine. They are indicative of the wide variety in which medicine is being delivered in this day and age and really a necessary evolution of medical practice in this day and age based on the various pressures that are being put on medicine you know, as you know reimbursement has become a very big issue for physicians. Every now and then you hear about that that every year Congress is playing games with physician reimbursement, private payers are rationing down reimbursement, and at the same time you've got pressures with medical malpractice and higher administrative cost for physicians, so there are all sorts of pressures on them and they are looking for ways to provide better services

and also to maintain a decent living.

**DR. LARRY KASKEL:**

Let's say a physician is thinking about considering going concierge, must he terminate his or her contracts with all commercial third party payers?

**ROBERT PORTMAN:**

Actually no. Certain types of practices would have to consider doing that and when we talk about just to sort of define our terms a little bit, when we talk about concierge practice again, they come in all shapes and sizes, but the commonality of them is that they all tend to charge an upfront fee, sort of a subscription fee and they provide a certain level of services. Now the key is what kind of services are they providing. Most of them are going to be providing better access, more frequent access, 24-hour calling access, e-mails, some are providing spa-like amenities or even come in and get special kinds of treatment whether it is massages or other kinds of things and then many of them are actually providing a defined level of medical service. If the practices that are providing the defined medical service that may have to terminate their contracts with third party payers whether its Medicare or private payers, if those services are overlapping with services that are already covered by those payers.

**DR. LARRY KASKEL:**

Now when you create a contract with your new patients, is that something that you recommend is necessary and if so what really should be in that patient-doctor agreement?

**ROBERT PORTMAN:**

Well actually you do have to have an agreement if you are going to be charging an upfront fee, you have to have an agreement that makes it very clear that the patient understands that they are being charged that fee and what they are getting for that fee and that the patient needs to understand whether or not you are accepting insurance and you know what the exact terms of the arrangement are and so you really do need to define that upfront and make sure that the patient understands what they are getting into, that is extremely important.

**DR. LARRY KASKEL:**

I have at times terminated patients or fired them from my practice and can you talk a little about the risks that concierge doctors will run into when they start kind of narrowing their practice what they need to do to avoid abandonment issues?

**ROBERT PORTMAN:**

Sure and that is a really important issue and another major feature of concierge practices is that they typically involve a smaller pool of patients just as an aside. The typical primary care physician may have a patient inventory of 3000 patients that they see on a regular basis. A typical concierge practice may be anywhere between 300 and 600 and so you can imagine there could be a substantial number of patients that are not going to want to join the practice or not going to be invited to join the practice as a member, but yes every state has abandonment laws where physicians generally do not have an obligation to take a patient on, but once they do they have an

obligation not to abandon them particularly not in the middle of a serious episode of care. So, you have to make sure that the patient is stable and isn't actually in need of your care on a daily basis; for example, someone who is in the hospital receiving followup of care from surgery, that would be not be a good time to tell him you are not going to see them anymore, but a patient who is you know coming in on a sort of periodic basis once a year or a couple of times a year and you determine that they are not going to be part of the practice, you need to send them a letter and explain what the changes are in your practice and why you are no longer able to see them and hopefully give them some options for where they can go for alternative care; so make sure they are stable and there is not an emergent condition and second make sure they understand that you are not going to be able to see them anymore and give them some options.

**DR. LARRY KASKEL:**

I am Dr. Larry Kaskel and my guest today is attorney, Robert Portman. We are talking about the legal issues of a concierge practice.

Mr. Portman, what if a doctor goes concierge and still wants to see some of his non-concierge patients. Does he have to create two separate corporations?

**ROBERT PORTMAN:**

Not necessarily, although there is some precedent for doing so and that is again you know we talk about all shapes and sizes, there are practices that are exclusively concierge and others that will see other patients and just have a <\_\_\_\_> for their subscription based patients and that can be done within a single practice. There are some presidents for practices setting up two groups, one that is a PC that provides the normal medical services and another that would be in one case an LLC, which is another form of corporate structure to just provide the concierge services and the reason that that has been done in the past is again there is we may get into this later, but one of the legal issues involved in providing concierge medicine is that we have to be very careful not to provide services that are already being covered by insurance. So this is a way of really clearly bifurcating your practice into those services that are covered by insurance and those that are not. So you put those that are not covered by insurance in one part in one corporation and those that are covered in another. Problem is it is not always so easy to put them each into separate boxes, so it is something that some practices have done. It is not absolutely necessary though.

**DR. LARRY KASKEL:**

Talk to me a little bit about what happens with medicare patients. Do you have to opt out and what does opting out even mean?

**ROBERT PORTMAN:**

The question about whether you have to opt out is one that requires a little bit of background and that is that Medicare gets real sticky about the services that are provided to their patients and what physicians can charge. Doctors actually have to sign an agreement as most of your physician listeners know have to sign an agreement with Medicare in order to provide the services and there are certain levels of care that are provided or commitment that are made to the system, but the general rule is that the physicians can't charge more than a certain amount to Medicare patients and they have to submit all their claims to Medicare even if they are not part of the system. So it is a very rigorous highly regulated system and if you are doing concierge practice with Medicare patients and you are providing medical services as part of the concierge fee that you consider not be Medicare services, you have to be really careful that Medicare agree this and doesn't think that you are providing coverage services because if you are, they can really slam you with penalties and exclude you from Medicare, so if you are in a concierge practice that wants to provide medical services, the safest thing to do is to opt out of Medicare as you mentioned and opting out of Medicare requires the physician to opt out for 2 years, sign an affidavit that says – "I will not submit any claims to Medicare, I will not, you know, seek reimbursement for any claims, I will not treat any Medicare patients

without telling them that I am out of Medicare, so you have to sign that affidavit and the patients also have to sign a contract that says that they understand that their physician is not a Medicare physician, that they are responsible for all the charges, that they will not be able to submit their claims to Medicare or to Medigap for that matter; so its a big decision and its one that you have to live with for at least 2 years.

**DR. LARRY KASKEL:**

Rob, where is your law firm located?

**ROBERT PORTMAN:**

We are in the Heart of Washington DC.

**DR. LARRY KASKEL:**

How many docs are you seeing actually do the conversion?

**ROBERT PORTMAN:**

The numbers right now are relatively low. Its like less than 1% of the practices are actually making this conversion, but they are growing. So we are looking at several hundred at this point out of, you know, several hundred thousand physicians are actually doing this, but I think what you are seeing is that in increments, practices are doing innovative things whether it is going completely concierge or providing additional services that they consider to be non-uncovered, almost every doctor is now looking for ways to get around some of the troubles that they are finding with reimbursement systems and alike.

**DR. LARRY KASKEL:**

You talked earlier about the fears of penalties. So has anyone been penalized, is their case pending, or has there been any cases settled that have gone after a physician in a concierge practice?

**ROBERT PORTMAN:**

As far as we know, there is only one case involving the office of inspector general of HHS, the Department of Health and Human Services where they actually did go after a concierge practice claiming that that practice had charged patients additional fee, a retainer fee for the office of inspector general considered to be covered services and they had settled for an undisclosed amount. The thing that was really disturbing about that case is that it wasn't really clear what the OIG meant by covered services, mainly we were talking about things that were as innocuous as you know providing extra time for the patient well, you know, is that covered or not; you know, so that particular case has really caused a lot of uncertainty about whether concierge practices can treat Medicare patients and provide them with medical services in addition to what is covered by insurance.

**DR. LARRY KASKEL :**

You are in the capital. Are you aware of any federal legislation that is pending that has to do with concierge medicine?

**ROBERT PORTMAN:**

There isn't any now. There have been several bills that have been introduced trying to limit or prohibit the charging of additional fees to Medicare patients. Nothing outside of Medicare, but there has been some legislation that was submitted about 2 or 3 years ago in both the senate and the house, but so far nothing has gone beyond the introductory stage and nothing is pending right now.

**DR. LARRY KASKEL :**

What you advise your clients that are thinking about doing this? Do you ever say listen just charge the retainer fee and don't even deal with the insurance companies anymore?

**ROBERT PORTMAN:**

That is certainly something that you are finding happening throughout medicine now and I know from personal experience in switching plans and trying to find a new doctor that will accept health insurance at this point is getting to be a very difficult proposition, so certainly that is a growing trend that doctors practices are just not accepting insurance.

**DR. LARRY KASKEL :**

To me even part of the desire to go concierge would be to not have to deal with the headaches of filing claims and chasing down money, so its seems a little crazy these hybrids were they are charging a retainer and they are still billing insurance and so they are not really getting out of that insurance racket?

**ROBERT PORTMAN:**

It does seem counter intuitive, but at the same time I think you can attribute that to the general good-natured character of physicians and their commitment to their patients. It is not an easy proposition to tell half of your patient hello, you are not going to see them anymore, so this I think it is a transitional phase for some practices and for others its just a personal compromise that they make that in the non-legal sense, I do not want to abandon my patients. I feel commitment to them, but I also feel like it is within my obligation and also my discretion to have a higher level of care for those who want to pay for it. So I think that is how you would explain the hybrid practices.

**DR. LARRY KASKEL :**

Well, Robert Portman of Powers Pyles Sutter & Verville, thank you very much for coming in the show today.

**ROBERT PORTMAN:**

Its been a pleasure. Thank you for having me.

I am Dr. Larry Kaskel and you have been listening to The Clinicians Round Table on ReachMD XM. We would love to hear from you, so please visit our web site at [www.reachmd.com](http://www.reachmd.com), which features our entire library of shows with on-demand pod casts and thanks for listening.