Creating, Handling, and Ending Patient Relationships

ASTHMA & IMMUNOLOGY CONFERENCE

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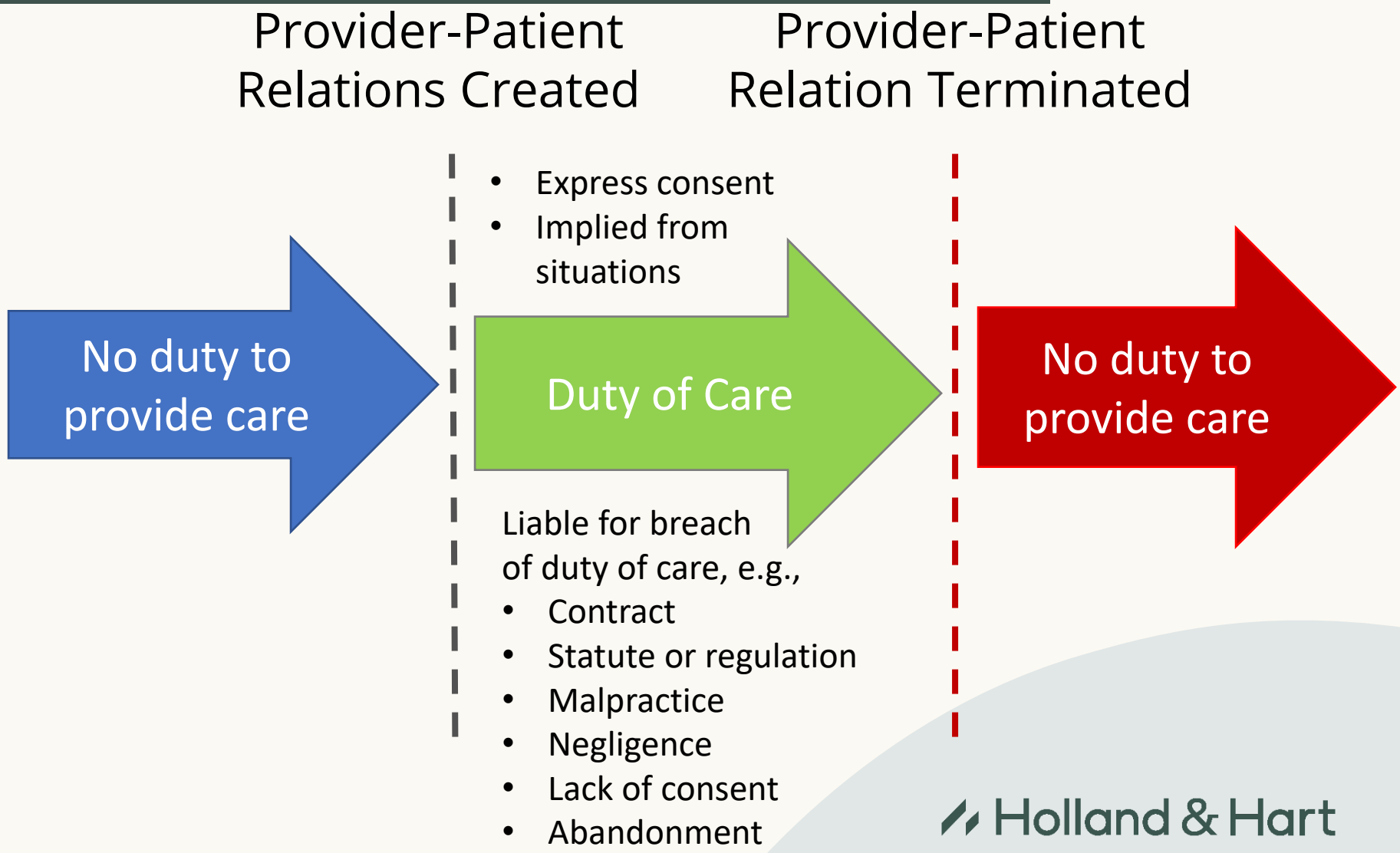
Overview

- Creating patient relationships
  - Intentional
  - Unintentional
- Maintaining patient relationship
  - Basic standards
  - Patient complaints
  - Problem patients
- Ending patient relationship
  - Limits
  - Avoiding patient abandonment
- Patient inducments

- ***Check laws for your particular state!***

Provider-Patient Relationship



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Creating Relationship

- General rule:

Patient seeks care from practitioner
\+ Practitioner consents to provide care
Practitioner-patient relationship

Refusing Patients

GENERAL RULE

- In general, practitioners can legally refuse to treat anyone they want.
  - Ethics rules may differ…

EXCEPTIONS

- EMTALA
- Anti-discrimination laws (e.g., race, religion, nationality, language, disability, sexual orientation, etc.)
- Contracts require care (e.g., Medicare, insurers, employment, etc.)
- Grant requirements
- Charity care obligations

Anti-Discrimination Laws

LAWS

- Civil Rights Act Title VI
- Americans with Disability Act
- Age Discrimination Act
- Rehabilitation Act § 504
- Affordable Care Act § 1557
  - HHS has proposed expansive new rules.
- State discrimination laws

RISKS

- Persons with disabilities
- Persons with limited English proficiency
- Sex discrimination
- Physical access
- Websites
- Service animals
  - Dogs and mini-horses
  - Probably not emotional support animals

Anti-Discrimination Laws

Persons with Disabilities (e.g., hearing, sight, etc.)

- Must provide reasonable accommodation to ensure effective communication.
  - Auxiliary aids
- Includes person with patient.
- May not charge patient.
- May not rely on person accompanying patient.

Persons with Limited English Proficiency

- Must provide meaningful access, e.g.,
  - Interpreter
  - Translate key documents
- Includes person with patient.
- May not charge patient.
- May not require patient to bring own interpreter.
- May not rely on person accompanying patient.

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Anti-Discrimination Laws

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FOR IMMEDIATE RELEASE
May 10, 2023

Contact: HHS Press Office
202-690-6343
media@hhs.gov

HHS Office for Civil Rights Settles Complaint with Florida Health Center that Failed to Provide Effective Communication for a Patient's Caregiver

Resolution agreement requires the Federally Qualified Health Center to fully comply with the non-discrimination requirements of federal civil rights laws

The U.S. Department of Health and Human Services' Office for Civil Rights (OCR), entered into a Voluntary Resolution Agreement with MCR Health, Inc., to resolve a disability discrimination complaint based on Section 504 of the

Creating Patient Relationship

- Beware cases in which relationship may not be intended.
  - Phone calls or emails w/patient
  - Telemedicine
  - Social media
  - Call for appointments
  - Consultations with colleagues
  - Courtesy or favor
  - Emergency care or call coverage
  - Health fairs or other volunteer situations
  - Testing or vaccination programs
  - IME, employer physical, sports physical etc.

➢ Each case depends on its own facts.

Creating Patient Relationship

To avoid creating unintended patient relationship—

- Be careful what you say or do.
- Don't get involved or give advice.
- Define or limit your relationship.
  - Explain non-existence or limits to your care.
  - Include disclaimers or limits in consents, registrations, websites, etc.
  - Refer to another practitioner.
- Document the parties' relationship.
  - Policies, forms, consents
  - Discharge/referral instructions
  - Letters or emails
- Check your insurance to ensure you have coverage.

Sample Disclaimer Language

"This service does not establish a practitioner-patient relationship, nor does [PROVIDER] undertake to provide additional or follow-up care for the Patient or advise Patient of the results of any exam, tests or care. The Patient is responsible for contacting their regular healthcare provider to obtain appropriate follow-up care or to address any questions or conditions that may arise."

Creating Patient Relationship

Beware telehealth!

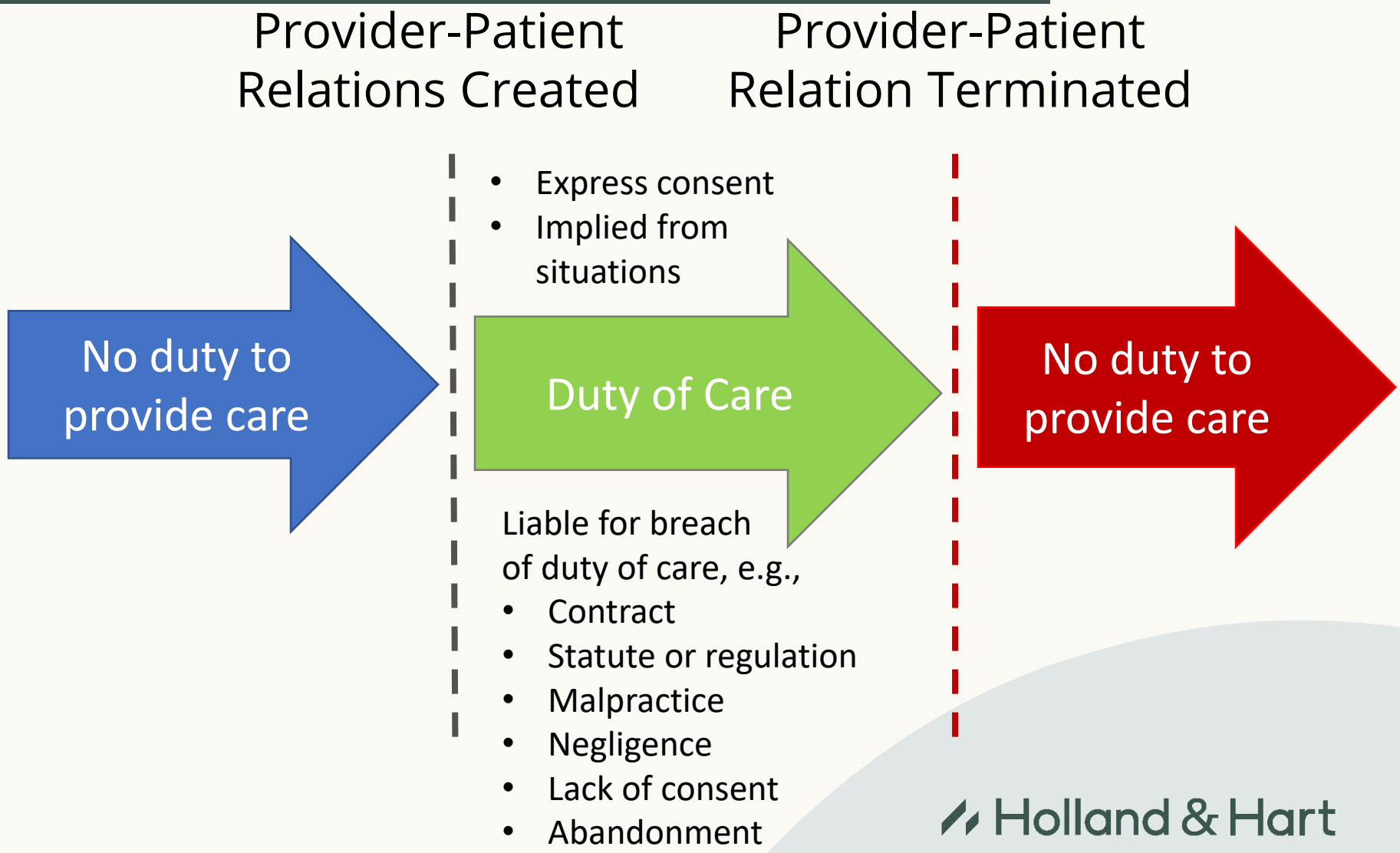
- Usually, must be licensed in state where patient is located.
- States may impose telehealth requirements, e.g.,
  - Provider-patient relationship must be established before prescribing, treating.
  - Must establish provider-patient relationship through two-way audio/visual interaction subject to limited exceptions.
  - In-person community standard of care applies.
  - Special consent rules.
  - Other rules?

(See, e.g., IC 54-5705)

Problem Patients

- Best way to deal with problem patients?
- Try not to take them in the first place.
  - Practice preventative medicine.
  - Check prior providers.
  - Check medical history.

Provider-Patient Relationship



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Managing Patient Relationship

Beware laws, regulations, and contracts affecting patient relationship, e.g.,

- Ethical rules
- State medical practices act or licensure rules and regulations
- Practitioner agreements and policies
- Payer agreements
- Medicare/Medicaid provider agreements and conditions of participation (“COPS”)

American Academy of PAs

- "The individual patient–PA relationship is based on mutual respect and an agreement to work together regarding medical care…."
- "The principal value of the PA profession is to respect the health, safety, welfare, and dignity of all human beings…. PAs have an ethical obligation to see that each of their patients receives appropriate care. PAs should be sensitive to the beliefs and expectations of the patient. PAs should recognize that each patient is unique and has an ethical right to self-determination."

(AAPA Guidelines for Ethical Conduct (2013))

Managing Patient Relationship

Medical practices act may prohibit:

- "Providing health care which fails to meet the standard of health care provided by other qualified … physician assistants in the same community or similar communities, taking into account his training, experience and the degree of expertise to which he holds himself out to the public."
- "Engaging in any conduct which constitutes an abuse or exploitation of a patient arising out of the trust and confidence placed in the physician by the patient."
- "Engaging in a pattern of unprofessional or disruptive behavior or interaction in a health care setting that interferes with patient care or could reasonably be expected to adversely impact the quality of care rendered to a patient. Such behavior does not have to have caused actual patient harm to be considered unprofessional or disruptive."
- "Abandoning a patient"

(Idaho Medical Practices Act, IC 54-1814)

Managing Patient Relationship

- Comply with standard of care.
- Obtain informed consent
  - ➢ Informed consent v. consent form
  - – Informed consent = patient understands risks, benefits, alternatives, providers, etc. and agrees to care.
  - – Beware
    - Reliance on form over communication.
    - Situations in which patient does not understand due to physical, mental, or language conditions or barriers.

Consent Form ≠ Informed Consent

Informed Consent = Communication	Consent form = Documentation
▪ Practitioner communicates info relevant to treatment ▪ Patient understands the material facts, e.g., benefits, risks, and likely consequence of the proposed treatment and alternatives. ▪ Patient makes informed decision to consent or refuse treatment.	▪ Supplements oral or other info given by the practitioner. ▪ Documents that the communication process took place, e.g., that practitioner communicated relevant info, patient understood info, and patient made voluntary, informed decision.

Managing Patient Relationship

- Establish and manage expectations
  - ➢ Expectations – Actual Experience = Frustration
  - – Scope of services to be provided
  - – Anticipated process and outcomes
  - – Policies and practices
    - Practice/facility policies
    - Patient rights and responsibilities
  - – Updates and ongoing communication
  - – Listen, understand, and respond professionally

Staff Behavior Triggering Complaints

- Clerical mistakes
- Impatient
- No empathy
- Apathy
- Speaks in technical terms
- Fatigue
- Angry or defensive
- Dogmatic
- Inexperienced
- Distracted
- Condescending
- Unprofessional
- Does not listen

Preventing Patient Complaints

Treat others the way you would want to be treated!

- Be friendly and sincere.
- Be alert and attentive to patient needs.
- Understand the patient's condition or circumstances.
- Respect the patient concerns.
- Respond timely to patient requests or concerns.

Responding to Patient Complaints

- If the patient doesn't feel that you have taken their concerns seriously, they'll often go to someone who will!
  - Other providers.
  - Other potential patients.
  - Online posts.
  - Licensing boards.
  - Litigation.

Responding to Patient Complaints

- Complaint may be legit and give chance to improve.
  - Better to know so you can respond.
  - Chance to turn patient into an advocate of the practice.
- Response depends on seriousness of the complaint.

Minor complaint
(e.g., inconvenience, late appointment, rudeness, etc.):

Handle on the spot through effective communication

Serious complaint
(e.g., adverse outcome, violation, etc.):

May require formal investigation and response

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Responding to Patient Complaints

- Train staff how to respond.
  - Take complaint seriously and respond promptly.
- Appoint qualified person to respond to significant concerns.
  - *All concerns are significant to the patient!*
- Remember:
  - Patient/family likely:
    - Feeling poorly
    - Scared
    - Venting
  - Have empathy.
  - Be objective.

Responding to Patient Complaints

- Keep in mind the goals of your response:

Constructive

- Learn the facts.
- Ensure patient knows you understand their position.
- Help patient understand.
- Address legitimate concerns.
- Improve performance.
- Strengthen patient relationship.

Destructive

- Concerned only about yourself.
- "Win" the argument.
- Justify self regardless of truth.
- Assume you understand the patient.
- Trivialize the patient's concerns.
- Belittle the patient.
- Avoid addressing the real issues.

Responding to Patient Complaints

- Respect patient's concerns.
- Listen actively.
- Be open minded.
- Ask questions.
- Beware your body language.
- Be patient and empathetic.
- Avoid argument.
- Restate patient concerns to confirm understanding.
- Follow up.

Apologizing

- In appropriate circumstances, you may want to accept responsibility and apologize.
  - May help address concerns and avoid litigation.
  - May be the “right” thing to do.
- But carefully consider before doing so.
  - You may not have all the facts.
  - Consult with malpractice insurer and/or attorney.
    - Admissions may adversely affect coverage.
    - Admissions may adversely affect litigation.
  - Check state apology laws…

Sample Apology Law

- **Expressions of apology, condolence and sympathy:** "[A]ll statements … expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence, including any accompanying explanation, … which relate to the care provided to the patient, or … the discomfort, pain, suffering, injury, or death of the patient as the result of the unanticipated outcome of medical care shall be inadmissible as evidence…."
  - *"I'm sorry that you are going through this…"*
  - Be careful how you phrase it!
- **Admission of Fault:** "A statement of fault which is otherwise admissible and is part of or in addition to [an apology] identified [above] shall be admissible."
  - *"It is our fault; we made a mistake…"*

(IC 9-207)

Online Complaints

- ***Just because the patient can say it online does not mean that you can!***

Online Complaints

HHS Office for Civil Rights Reaches Agreement with Health Care Provider in New Jersey That Disclosed Patient Information in Response to Negative Online Reviews

OCR has announced a settlement with Manasa Health Center, LLC, a health care provider in New Jersey that provides adult and child psychiatric services. The settlement resolves a complaint received by OCR in April 2020, alleging that Manasa Health Center impermissibly disclosed the protected health information of a patient when the entity posted a response to the patient's negative online review. Following an OCR investigation, potential violations of the HIPAA Privacy Rule include impermissible disclosures of patient protected health information in response to negative online reviews, and failure to implement policies and procedures with respect to protected health inform ion. Manasa Health Center paid $30,000 to OCR and agreed to implement a corrective actio lan t se potential violations.

- Read the HHS Press Release
- Read the Resolution Agreement and Correction Action Plan

Online Complaints

- Do NOT disclose protected health info in online response.
  - HIPAA prohibits unauthorized use or disclosure of protected health info, including:
    - Fact that a person is or was a patient.
    - Info that could reasonably identify the patient.
  - There is no HIPAA exception for responding to a patient complaint online.
  - Patient does not waive HIPAA privacy rights by posting info online.

Online Complaints

- Options for responding:
  - Ignore it.
  - Contact patient to resolve concerns or obtain consent to respond.
  - Respond generically.
    - Do not confirm or deny that complainant was a patient or include any info about patient or encounter.
    - May explain policies or practices without reference to patient.
  - Contact online company to request removal of complaint.
  - Encourage and emphasize positive reviews.
  - If review is defamatory, may threaten lawsuit.

Writing Off Bill

- Do not bill for unnecessary or inappropriate services.
  - May violate False Claims Act.
- Generally, cannot waive or discount copays or deductibles.
  - Payer contracts.
  - Federal and state fraud and abuse laws.
- May be able to waive or discount payments if:
  - Isolated occurrence.
  - Resolution of documented patient concern.
  - Do not charge payers.
- In tactful way, confirm it is offered as an accommodation, not admitting liability.

Settling a Complaint

- If offer something to resolve complaint, consider obtaining release.
  - Benefit: proper release protects you from subsequent litigation or claims arising out of same facts.
    - Ensure the release contains appropriate terms.
    - Must be supported by consideration.
  - Risk: asking for release may prompt patient to reconsider settlement and instead purse claims.
- Check with malpractice carrier before settling a claim.

Licensing Board Complaints

- Take them seriously.
- Be professional and respectful in response.
  - Maintain credibility and be cooperative at all times.
  - Do not act impulsively.
  - Respond objectively; do not be overly defensive.
- Explain basis for your actions.
  - Remember: Board does not have all the facts.
  - Provide records, but only if necessary.
  - Answer the questions that are asked; beware raising new matters.
- Always tell the truth.
- Consider review by qualified colleague or attorney.
- Notify insurer, if appropriate.

Licensing Board Complaints

- Beware stipulations and settlements.
  - May be efficient way to resolve dispute, but…
  - May carry significant adverse consequences.
    - Report to National Practitioners Data Bank ("NPDB")
    - May adversely affect other relationships.
      - Employment
      - Payer contracts
      - Licensure in other states
      - Board certification
    - Likely must report in future applications
- Consider alternatives, e.g., hearing, informal reprimand, etc.

Dealing with Problem Patients

- *Document, document, document!*
  - Medical record
    - May be subject to patient's right of access.
    - May be discoverable.
    - Be objective, use quotes, etc.
  - Incident report or other peer-protected record
    - No absolute protection.
- Documentation is critical in case you need to take additional corrective action or defend our actions.
- Remember: *"If it's not in the chart, it didn't happen."*

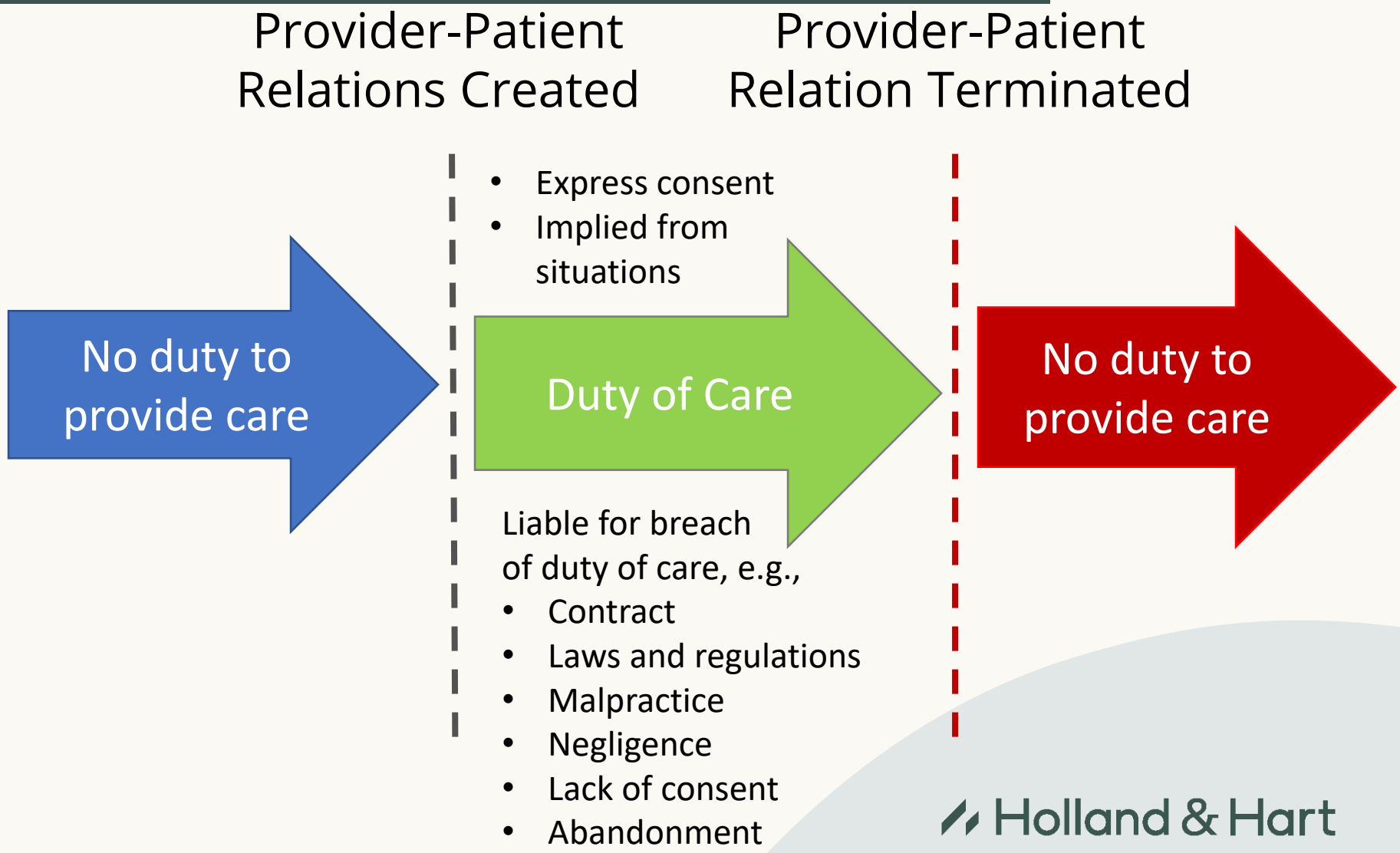
Dealing with Problem Patients

- Patient Responsibilities Document
  - Post and distribute as part of registration or otherwise.
  - Explain that patient's cooperation and appropriate conduct are essential to effective care.
  - Require, e.g.,
    - Cooperation in developing treatment plan.
    - Compliance with treatment plan.
    - Ongoing communication.
    - Professional, respectful, non-disruptive conduct.
  - Use in communications with patient.

Dealing with Problem Patients

- Patient Care Conference / Contract
  - Refer to “Patient’s Rights and Responsibilities”.
  - Explain that inappropriate conduct interferes with our ability to provide effective care.
  - Require, among other things,
    - Cooperation in developing treatment plan
    - Compliance with treatment plan
    - Ongoing communication
    - Professional, non-disruptive conduct
  - Warn that we will need to end relationship if they fail to comply.
  - Advise them that they may go elsewhere.

Provider-Patient Relationship



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Ending Patient Relationship

Do not simply kick the patient out of your practice

- Unless you want to risk liability for:
  - Malpractice.
  - Patient abandonment.
  - Civil penalties under EMTALA or COPs.
  - Participation in third party payer programs.
  - Adverse licensure actions.

Ending Patient Relationship

- Different providers may have different requirements, e.g.,
  - Hospitals
    - Discharge plan
    - Notice
    - Appeal process
  - Long term care facilities
    - Notice
    - Termination requirements
  - Physicians, physician associates and other providers
    - Standard of care
    - Patient abandonment

Patient Abandonment

Common elements for tort claim

1. An established doctor-patient relationship.
2. Provider abandoned the patient while medical attention was needed.
3. Patient was not given adequate opportunity to transfer care to another provider.
4. Patient suffered damages as a result of the abandonment.

Patient Abandonment

- Abandonment =
  - Failing to follow up or provide ongoing, needed care.
  - Unavailability for significant time or leaving town without securing coverage for patients.
  - Terminating relationship or closing practice without giving sufficient:
    - Notice that you are ending relationship
    - Time to find a new practitioner
    - Care until patient can transfer to new practitioner
- Penalties
  - Lawsuit by patient for damages
  - Action against license
  - Adverse employment and payer action

Avoiding Patient Abandonment

- May generally terminate relationship for any legitimate reason or no reason, but not a bad reason.
- Legitimate reasons
  - Unable to provide needed care
  - Failure or refusal to pay bills
  - Breakdown in relationship or communications
  - Disruptive conduct
  - Noncompliance with treatment
  - Missed appointments
  - Etc., etc., etc.
- Bad reasons
  - Discrimination

Avoiding Patient Abandonment

- Factors to consider before ending patient relationship:
  - Patient's current health needs
  - Availability of alternative care
  - Basis for termination (e.g., legitimacy compared to patient's health care needs)
  - Whether patient is in a protected class (e.g., age, race, disability, etc.)
  - Documentation supporting termination
  - Alternative actions
    - Warnings
    - Patient care conference
    - Behavior contract

Avoiding Patient Abandonment

- If termination necessary and appropriate:
  - Notify patient in writing and perhaps orally
  - Give sufficient time to transfer care
    - Depends on patient's condition
    - Usually 30 days, but no hard and fast rule
  - Provide necessary care in interim
  - Facilitate transfer of care
- *Retain letter in patient chart or elsewhere.*

Sample Letter to Patient

Dear [PATIENT]:

Due to recent events, I will no longer be able to continue providing your medical care; accordingly, it will be necessary for you to transfer your care to another health care provider. I will continue to provide you with any necessary care until ***[STATE DATE, USUALLY 30 DAYS OUT]***, which should give you sufficient time to transfer your care; however, after that date, you will need to obtain medical care elsewhere.

Your condition ***[MAY/DOES]*** require continued care. I strongly encourage you to take immediate action to transfer your care to an appropriate health care provider. If you need assistance, ***[IDENTIFY LOCAL REFERRAL SERVICE]*** may be able to help you find another appropriate provider. Alternatively, your insurance program, local hospitals, or acquaintances may be able to refer you to an appropriate provider.

We will make your medical records available to your new provider upon his or her request. Please have your provider contact our office to make arrangements to transfer the records.

Avoiding Patient Abandonment

- There may be situations that justify immediate termination without advance notice, e.g.,
  - Danger to patient, staff or others
  - Criminal misconduct
- Be careful before terminating without notice; consider:
  - Patient care needs
  - Availability of alternative sources for treatment
  - Statutory obligations, e.g., EMTALA or state statutes
  - Contractual obligations
  - "What would a jury think?"

Avoiding Patient Abandonment

- Once you have terminated patient relationship, be careful about resuming relationship.
  - Setting new appointments.
  - Taking new calls.
- If provide emergency or necessary care pending termination or per on-call obligations:
  - Reaffirm termination of patient relationship and/or no ongoing patient relationship.
- Flag records to avoid resuming care.
- Respond promptly if mistakenly resume care.

Patient Inducements

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Key Fraud and Abuse Laws

- False Claims Act
- Anti-Kickback Statute ("AKS")
- Eliminating Kickbacks in Referrals Statute ("EKRA")
- Ethics in Physician Referrals Act ("Stark")
- Civil Monetary Penalties Law ("CMPL")
- Healthcare criminal statutes
- State laws and regulations

False Claims Act ("FCA")

- Cannot knowingly submit a false claim for payment to the federal govt, e.g.,
  - Not provided as claimed
  - Substandard care
  - Failure to comply with applicable regulations
- Must report and repay an overpayment within the later of 60 days or date cost report is due.

(31 USC 3729; 42 USC 1320a-7a(a); 42 CFR 1003.200)

<u>Penalties</u>

- Repayment plus interest
- Civil monetary penalties of $11,803* to $23,607* per claim
- Admin penalty $22,427* per claim failed to return
- 3x damages
- Exclusion from Medicare/Medicaid

(42 USC 1320a-7a(a); 42 CFR 1003.210; 45 CFR 102.3; 86 FR 70740)

- Potential *qui tam* lawsuits

Anti-Kickback Statute ("AKS")

- Cannot knowingly and willfully offer, pay, solicit or receive remuneration to induce referrals for items or services covered by govt program unless transaction fits within a regulatory safe harbor.
  (42 USC 1320a-7b(b); 42 CFR 1003.300(d))
- "One purpose" test.
  (*US v. Greber* (1985))

Penalties

- Felony
- 10 years in prison
- $100,000 criminal fine
- $112,131* civil penalty
- 3x damages
- Exclusion from Medicare/Medicaid

(42 USC 1320a-7b(b); 42 CFR 1003.310; 45 CFR 102.3)

- Automatic FCA violation

(42 USC 1320a-7a(a)(7))

- Minimum $100,000 settlement

Eliminating Kickback in Recovery Act ("EKRA")

- Cannot solicit, receive, pay or offer any remuneration in return for referring a patient to a laboratory, recovery home or clinical treatment facility unless arrangement fits within statutory or regulatory exception.

(18 USC 220(a))

Penalties

- $200,000 criminal fine
- 10 years in prison

(18 USC 220(a))

- Applies to private or public payors.

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Ethics in Patient Referrals Act ("Stark")

- If physician (or family member) has financial relationship with entity:
  - Physician may not refer patients to the entity for designated health services ("DHS"), and
  - Entity may not bill Medicare or Medicaid for such DHS

  unless arrangement fits within a regulatory exception (safe harbor).

(42 USC 1395nn; 42 CFR 411.353 and 1003.300)

Penalties

- No payment for services provided per improper referral.
- Repayment w/in 60 days.
- Civil penalties.
  - $27,750* per claim
  - $174,172* per scheme

(42 CFR 411.353, 1003.310; 45 CFR 102.3)

- Likely FCA violation
- Likely AKS violation

Civil Monetary Penalties Law ("CMPL")

- Prohibits offering remuneration to a Medicare/Medicaid beneficiary if know or should know that it is likely to influence such beneficiary to order or receive services from a particular provider or supplier.

(42 USC 1320a-7a(5); 42 CFR 1003.1000(a))

Penalties

- $22,427* per violation.
- Exclusion from Medicare and Medicaid

(42 CFR 1003.1010(a); 45 CFR 102.3)

- Likely also an Anti-Kickback Statute violation

Common State Laws and Regulations

- False claims acts
- Anti-kickback statutes
- Self-referral prohibitions
- Fee splitting prohibition
- Disclosure of financial interests
- Insurance statutes
- Medicaid conditions
- Fraud or misrepresentation
- Consumer protection laws
- Bribery
  - May trigger Travel Act claims
- Others?

Penalties

- Civil penalties
- Criminal penalties
- Adverse licensure action
- Other

Beware:

- May apply to private payers in addition to govt programs.
- May not contain the same exceptions or safe harbors as federal statutes

Common Risk Areas

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Free or Discounted Items or Services to Patients

- Gifts to patients (e.g., gift basket, gift card, basket of products for new mothers, etc.)
- "Refer a friend" incentive
- Free screening exam or service
- Free equipment, supplies, or drugs
- Free meals or lodging
- Free transportation
- Reward or incentive to comply with treatment
- Parking reimbursement
- Waiver or discount of copay or deductible
- Write offs
- Paying patient premiums
- Anything else of value that does not reflect fair market value ("FMV")

Potential violations of
- AKS
- EKRA
- CMPL
- State laws
- Others?

Free or Discounted Items or Services to Patients

May generally offer free or discounted items to govt patients if:

- Remuneration is not likely to influence the patient to order or receive items or services payable by govt healthcare program.
- Fit within an AKS or CMPL safe harbor.

(42 USC 1320a-7a(a)(5); see also 42 USC 1320a-7b(b))

Free or Discounted Items or Services to Patients

May generally offer free or discounted items to govt patients if:

- Item or service is of low value, i.e.,
  - Each item or service is less than $15, and
  - Aggregate is less than $75 per patient per year.

  (OIG Bulletin, *Offering Gifts and Inducements to Beneficiaries* (8/02); 66 FR 24410-11; OIG Policy Statement Regarding Gifts of Nominal Value (12/7/16))
- No similar AKS rule, but OIG has indicated that it would not challenge gifts of "nominal value." *(See, e.g., OIG Special Fraud Alerts dated 2/19/94)*

Free or Discounted Items or Services to Patients

May generally offer free or discounted items to govt patients if:

- Demonstrated financial need
  - Either (i) good faith determination that beneficiary has financial need or (ii) after reasonable collection efforts have failed;
  - Not offered as part of any advertisement or solicitation;
  - Not tied to provision of other federal program business; and
  - Reasonable connection between item or service and medical care of beneficiary.

(42 CFR 1320a-7a(i); 42 CFR 1003.110; *see also* OIG Bulletin, *Hospital Discounts Offered to Patients Who Cannot Afford to Pay Their Hospital Bills*)

Free or Discounted Items or Services to Patients

May generally offer free or discounted items to govt patients if:

- Promotes access to items or services payable by Medicare/ Medicaid and does not:
  - Interfere with clinical decision making;
  - Increase costs to federal program or beneficiary; or
  - Raise patient care concerns.

(42 USC 1320a-7a(i); 42 CFR 1003.110)

- No similar AKS safe harbor, but risk is probably small if satisfy CMPL exception.

Free or Discounted Items or Services to Patients

May generally offer free or discounted items to govt patients if:

- Promotes delivery of preventative care, i.e.,
  - Pre-natal or post-natal well-baby service, or listed in *Guide to Clinical Preventive Services*;
  - No cash or instruments convertible to cash; and
  - Not tied to other Medicare services.
- Certain other situations.

(42 USC 1320a-7a(i); 42 CFR 1003.110)

- No similar AKS safe harbor, but risk is probably small if fit within the CMPL exception.

Free Tests or Screening Exams

- OIG has approved free screening services (e.g., free blood pressure check) where:
  - Not conditioned on use of any items or services from any particular provider;
  - Patient not directed to any particular provider;
  - Patient not offered any special discounts on follow-up services; and
  - If test shows abnormal results, visitor is advised to see his or her own health care professional.

  (Adv. Op. 09-11, but note that *Advisory Opinions are not binding)*
- May use independent foundation but be careful.

Free Transportation

Local Transportation

- Set forth in policy applied uniformly.
- Not determined based on volume or value of referrals.
- Not air, luxury, or ambulance-level transport.
- Not publicly marketed or advertised.
- Drivers not paid per beneficiary.
- Only for established patients within 25 miles or, in rural area, 75 miles.
- Costs not shifted to payors or individuals.

Shuttle on Set Schedule

- Not air, luxury, or ambulance-level transport.
- Not publicly marketed or advertised.
- Drivers not paid per beneficiary.
- Only within provider's local area, i.e., within 25 miles or, in rural area, 75 miles.
- Costs not shifted to payors or individuals.

(42 CFR 1001.952(bb))

Waiving or Discounting Copays or Deductibles

May waive or discount govt copays or deductibles if:

- Good faith determination that (i) beneficiary is in financial need or (ii) unable to collect after reasonable collection efforts;
- Not offered as part of any advertisement or solicitation; and
- Not offered routinely.

(42 USC 1320a-7a(i)(6); 42 CFR 1003.110; IC 41-348; *see also* Adv. Op. 12-16)

- Document factors such as local cost of living; patient's income, assets and expenses; patient's family size; scope and extent of bills; etc.
- Periodically review evaluation.

Waiving or Discounting Copays or Deductibles

- Generally, may not waive or discount copays and deductibles or engage in "insurance only" billing for private payers.
  - Likely violates private payor contracts.
  - May violate state laws, e.g., insurance statutes, state AKS, insurance fraud, etc.
- Payers may not complain if write off after failed collection efforts.
- Check your payor contract or contact your private payors.

Writing Off Entire Bill

- Writing off entire bill for service is safer than waiving copays.
  - Payors usually don't complain if not billed.
- Document legitimate purpose, i.e., not intended to generate referrals, e.g.,
  - Unable to properly bill, e.g., not medically necessary, substandard care, no documentation, failure to satisfy conditions for payment, etc.
  - Resolution of legitimate dispute or claim.
  - Financial need or unsuccessful attempts to collect.

(*See* 42 CFR 1320a-7a(i); 42 CFR 1003.110; OIG Bulletin, *Hospital Discounts Offered to Patients Who Cannot Afford to Pay Their Hospital Bills*)

Professional Courtesy

Beware professional courtesies to govt patients.

- No AKS or CMPL safe harbor.
- Consider whether intent is to induce referrals.
- Don't waive copays or deductibles or engage in "insurance only" billing.
- Consider whether other exceptions or safe harbors apply.

Professional Courtesy

- Professional courtesy to physicians, their family members, or their staff implicates Stark if the physician refers DHS payable by Medicare/Medicaid.
- Stark safe harbor requires:
  - Provider has formal medical staff.
  - Courtesy offered to all physicians on medical staff or in the service area regardless of referrals.
  - Services are of a type routinely provided by the entity.
  - Written policy approved in advance by governing body.
  - Not offered to govt patients unless good faith showing of financial need.

(42 CFR 411.357(s); 72 FR 51064)

Free or Discounted Items to Employees

If govt payers or private insurance is involved:

- Offering free or discounted services to your own employees likely does not violate AKS, EKRA, or Stark if not tied to referrals.
  - Fits within bona fide employee safe harbor.
- Waiving copays or other cost-sharing or "insurance only" billing likely violates CMPL and private payor contracts.
  - See prior discussion.
- Offering free items or services to employees may implicate tax or employee benefit laws.
  - Benefits to employees are usually taxable.
  - May be structured to fit within employee benefit plan but ensure compliance with ERISA or similar laws.

Prompt Pay Discounts

Govt patients

- OIG has approved prompt pay discounts for govt patients if:
  - Amount of discount reflects avoided collection costs, not an incentive to obtain services.
  - Offered to all patients for all services without regard to patient's reason for admission, length of stay, or DRG.
  - Not advertised so as to solicit business.
  - Notified private payors of program.
  - Costs not passed to Medicare, Medicaid or other payors.

(56 FR 35952; Adv. Op. 08-3)

Prompt Pay Discounts

Private payors

- Generally, may not discount copays and deductibles without violating insurer contracts unless payor agrees.
- May adversely affect "usual and customary charges" and payor's reimbursement under contract.
- Payors may claim the benefit of the discount if the insurer pays within the relevant time.
- Check your payor contract or contact your private payors.

Self-Pay Discounts

- In most states, providers may charge different amounts to patients and payers, i.e., not required to charge all persons the same amounts.
  - Payment is a matter of contract between provider and patient or payor.
  - Providers often negotiate different rates for different payors.
  - Provider may negotiate different rates or discounts for self-pay patients.
- But beware limitations....

Self-Pay Discounts

- Some states limit ability to charge different rates.
  - Charging insurers more than self-pay patients.
  - Charging self-pay patients more than insurers.
- Maybe facilities that submit cost reports.
  - *See* Provider Reimbursement Manual 15.1 at § 2203 (charge structure should be "applied uniformly").
  - Check with entity that prepares cost reports.
- FQHCs.
  - *See* MLN, *Federally Qualified Health Centers* , ICN 006397 (1/18) ("Patient charges must be uniform.").
- In some states, payor contracts may contain "most favored nation" clauses requiring providers to give their best rates.
  - Self-pay or other discounts may affect "usual and customary" charges.

Medicare "Substantially in Excess" Rule

- OIG may exclude provider who charges Medicare "substantially in excess" of the provider's usual charges.

(42 USC 1320a-7(b)(6); 42 CFR 1001.701(a)(1)).

  - Test: whether the provider charges more than half of its non-Medicare/Medicaid patients a rate that is lower than the rate it charges Medicare.
    - Presumably applies to specific charge or service.
  - OIG has stated that it would not use the rule to exclude any provider or supplier that provides discounts or free services to uninsured or underinsured patients.

(*See* OIG Adv. Op. 15-04; OIG Letter dated 4/26/00, available at http://oig.hhs.gov/fraud/docs/safeharborregulations/lab.html)

Questions?

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