Ohio Physician's Guide to Cannabis Compliance 2.0: Budding Issues for Ohio's Medical Marijuana Physicians

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Payment and Insurance Issues

When an evaluation with a physician may result in a recommendation for medical marijuana, must a physician charge a patient cash for the evaluation? What if the patient has health insurance – better yet, what if the patient is a Medicare or Medicaid patient? For physicians who dive headfirst into the medical marijuana-recommendation business, these issues need to be dealt with carefully. Physicians should understand that making a recommendation for medical marijuana has been interpreted by a federal court as being protected by the First Amendment.

While it is unclear how private insurers will deal with any sort of reimbursement for the evaluation services that involve a marijuana recommendation, physicians must be aware that patients covered by a governmental health insurance program (Medicare and Medicaid) may only be charged cash when certain requirements are met. For example, pursuant to the Social Security Act Section 1848(g)(4), a physician who is enrolled in Medicare is required to submit claims on behalf of a Medicare patient for all services the physician provides for which Medicare payment may be made under Part B of the Medicare Benefit Policy Manual (Chapter 15, Section 40). Also, they are not allowed to charge beneficiaries in excess of the limits on charges that apply to the item or service being furnished (*Id.*).

Now, I know what you are thinking: insurance is not going to pay for marijuana products (medical or otherwise). However, this is not about payment for the marijuana products themselves, this is about the potential for a payment (perhaps, Medicare Part B) for the evaluation services that may lead to a recommendation for marijuana. Indeed, New York State's Department of Financial Services circulated a letter to all insurers authorized to write

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accident and health insurance in the state, providing that "[i]f office visits are covered under the insurance policy or contract, and the insured receives services during an office visit that are covered under the insurance policy or contract, the issuer may not deny coverage for the office visit solely on the basis that the visit also resulted in the insured receiving a medical marijuana [recommendation]." The evaluation a physician performs to determine whether the patient has a qualifying medical condition under Ohio's medical marijuana law theoretically may be able to be billed under the CPT Code for a new or established patient office/outpatient visit . This may be a "covered service" regardless of the fact that the evaluation results in a recommendation for medical marijuana – which again, is protected by the First Amendment. If this is the case, a Medicare physician must evaluate whether he or she needs to present a Medicare patient with an Advance Beneficiary Notice of Noncoverage ("ABN") before charging a patient cash, especially because violations of the ABN requirement may result in Medicare program exclusion, a civil monetary penalty of up to $2,000 for each violation, and/or a 10 percent reduction of the physician's payment once the physician is eventually brought back into compliance. *See* MLN Matters, page 4. Further, recommending physicians must check the corresponding provisions under the Medicaid rules and any provider agreements they may have with private insurers to determine whether these evaluation visits will be covered to avoid payment issues.

Developing an Informed Consent Form

Ohio's medical marijuana law requires that a recommending physician obtain a patient's consent prior to completing a recommendation for treatment with medical marijuana. Additionally, if the patient is a minor, the physician must obtain the consent of the patient's parent or legal representative prior to completing a recommendation for treatment with medical marijuana. O.A.C. 4731-32-03(C)(5). In the past, the State Medical Board of Ohio developed an informed consent to treat form for physicians to utilize when prescribing opioids to minors. There was some thought that the State might prepare a similar form for medical marijuana treatment, yet that no longer appears to be the case. Consequently, it will be

up to physicians to develop a robust informed consent to treat form when recommending the use of medical marijuana to mitigate the risks presented by such a treatment.

Pursuant to the standard of care within Ohio's medical marijuana law, a recommending physician must document that he or she explained the risks and benefits of treatment with medical marijuana as it pertains to the patient's qualifying medical condition and medical history. O.A.C. 4731-32-03(C)(4). Although a physician is immune from civil liability for advising a patient about the benefits and risks of medical marijuana to treat a qualifying medical condition, an explanation of the risks and benefits should be included on the informed consent to treat form to be acknowledged as understood by the patient. O.R.C. 4731.30(H).

In addition, it is recommended that physicians provide some guidance to their patients regarding the legal nuances of medical marijuana. The last thing a physician would ever want is for a patient to try and place blame on the physician for failing to advise the patient that, for example, possession of marijuana on federal land is still a federal offense. Patients should be instructed on the conflict between federal and Ohio law, and the physician should push the obligation to continue monitoring any applicable legal developments on to the patient.

Employment matters are also something that a recommending physician should consider including on the informed consent to treat form. Ohio's medical marijuana law does not require an employer to permit or accommodate an employee's use or possession of medical marijuana in the workplace; nor does it prohibit an employer from taking an adverse employment action against employees because of their utilization of medical marijuana. Finally, if an employee's use of medical marijuana was in violation of an employer's drug-free workplace policy, his or her resulting termination is considered "just cause" for purposes of unemployment benefits. Patients need to be told that they may risk their employment when it comes to obtaining and utilizing medical marijuana, and a physician will want to provide that explanation upfront. This will help avoid the awkward conversation that is inevitable when the first Ohio patient loses his or her job due to

their use of medical marijuana.

Waiver of Liability

In line with an informed consent to treat form, recommending physicians will want to consider a waiver of liability when treating a patient with medical marijuana. Since marijuana is still illegal federally, studies on its efficacy and safety have been severely limited. However, some scientific data does show that it may have some unwanted and unintended clinical effects, such as anxiety and paranoia, that can land a patient in the emergency room. Further, a patient may subject himself/herself or others to harm if the patient operates any heavy equipment or a motor vehicle while on medical marijuana. Physicians can limit any liability associated with the unfortunate results of a medical marijuana recommendation through a waiver of liability.

The Ohio Supreme Court has determined that a waiver of liability is only effective if its intent is stated in clear and unequivocal terms. *See Bowman v. Davis, 48 Ohio St.2d 41, (1976)*. A release of liability signed between a patient and a physician is not a "usual run-of-the-mill contract," according to *Guido v. Murray*, 1985 WL 10387, ¶ 1 (Ohio Ct. App. 1985). The physician is the one who is skilled in an area about which the patient knows little or nothing, yet the patient still places his health, appearance and maybe even his life in the hands of the physician. *Id.* This makes the patient-physician relationship a fiduciary one, which requires a duty of good faith and fair dealing from the physician, "not only as to the professional obligations of the physician, but also as to other transactions between the parties." *Id.* Ohio courts have long held that from this fiduciary relationship comes the imperative obligation of full disclosure. *Id.* at ¶ 2. Therefore, if a physician wishes to secure a general release of liability from a patient, the fiduciary relationship creates an obligation for the physician to "fully disclose to the patient the effect of such release and to ascertain as fully as possible that the patient understands the consequences thereof." *Id.* at ¶ 4.

Consequently, a recommending physician may develop a release of liability form for patients, but in order for it to be effective, the form must state in clear and unequivocal terms that the patient is releasing the physician from all liability for recommending that the patient use medical marijuana. The physician may also attempt to expand the protection by including language regarding foreseeable harm to third persons. In general, warning a patient about such third-party risk is sufficient to protect the physician from third-party liability even if the patient ignores the physician's advice. Douglas B. Marlowe, *Malpractice Liability and Medical Marijuana*, The Health Lawyer 29, 10 (2016). These forms should be developed carefully to attempt to secure as wide – yet specific – a range of protections for a recommending physician as possible. While it may be difficult to forecast all of the adverse reactions or consequences of a patient's utilization of medical marijuana, an attempt should be made with a waiver of liability form for the physician.

Conclusion

Once you have your Certificate to Recommend, and you are ready to begin to see patients to determine whether they have a qualifying medical condition, pump the brakes. Do not be goaded into seeing patients without full preparation. You will receive calls – instantly – from prospective patients and vendors that will make you think you need to start seeing patients immediately. However, use the patience you developed in your countless years of medical school to assess whether you have all your bases covered before developing your medical marijuana practice. If you have questions, contact a member of Frost Brown Todd's Health Care Innovation Team. You can also visit our Health Law Matters blog for more insight into legal issues impacting the health care industry.

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