Physician-Patient Relationships

States have various criteria for establishing proper physician-patient relationships, one of which is an evaluation or examination of a patient by the treating physician. This is important when a physician is prescribing medications and cannot physically evaluate new patients face-to-face before writing prescriptions. Some states (e.g., Arkansas) explicitly require a face-to-face examination or evaluation before a physician may engage in any online prescribing. Other states (e.g., Missouri), while requiring a physical examination or evaluation, do not explicitly use terms such as “in-person” or “face-to-face” to describe the nature of such exams, but medical boards in these states have interpreted the applicable laws to mean that the treating physician must conduct a face-to-face encounter with the patient. A growing number of states (e.g., Maryland, Virginia) explicitly allow physical examinations or evaluations to be performed by electronic means or via telemedicine technologies. Employers need to understand how the relevant rules work in the state(s) in which they are located.

Privacy and Security

Compared to face-to-face encounters, telemedicine encounters are more vulnerable to risks such as third-party interference, signal errors, and data transmission outages. These risks may result in loss of data, interrupted communications, or alteration of important clinical information and, in turn, make telemedicine encounters extremely vulnerable to breaches of protected health information. The federal Health Insurance Portability and Accountability Act’s privacy and security regulations are extremely relevant to telemedicine encounters and the various types of electronic data they generate. State by state, analogous privacy and security laws must be carefully considered. The Federal Trade Commission also is taking a more active role in the area of health information breaches.

Medical Liability

Adapting existing principles of malpractice liability to telemedicine is a challenging task, especially the question of what constitutes an appropriate “standard of care.” There are many unresolved issues and questions regarding malpractice liability as it relates to telemedicine, including the nature of physician-patient relationships, informed consent, practice standards and protocols, supervision, and availability and provision of professional liability insurance coverage.

Employers seeking to explore the use of telemedicine must carefully analyze the legal and regulatory risks and limitation implicated by telemedicine.

Managing Antitrust Risk in Communications

How Providers Can Avoid “Bad” Documentation and Communication Pitfalls in Antitrust Risk Management

Robert McCann
Drinker Biddle & Reath LLP
robert.mccann@dbr.com

One of the critical issues in antitrust risk management is understanding the pitfalls of “bad” documents and communications. The federal antitrust enforcement agencies make no secret of the fact that a party’s own documents are frequently one of their most productive sources of information when investigating or challenging a proposed transaction. Litigated health care antitrust cases are rife with examples of providers whose transactions were torpedoed by their own words.

For example, in the Federal Trade Commission’s successful 2011 challenge to the acquisition of St. Luke’s Hospital (SLH) in Toledo, Ohio, by ProMedica, the FTC’s Administrative Law Judge cited numerous St. Luke’s documents to the effect that, “An SLH affiliation with ProMedica has the greatest potential for higher hospital rates. A ProMedica-SLH partnership would have a lot of negotiating clout.” More sensational, the Judge also cited comments by members of St. Luke’s due diligence team, that a ProMedica affiliation could “stick it to employers, that is, to continue forcing high rates on employers and insurance companies.”

The Judge in the ProMedica case also cited a ProMedica bond rating agency presentation to support the conclusion that ProMedica holds a “dominant position” in the market. This is an excellent illustration of how documents prepared and used in an entirely different context can become relevant in an antitrust investigation. It would be expected that a health system would make the strongest case possible for its competitive strength in order to obtain a favorable bond rating. However, such contentions may well constrain future arguments that consumers in the market have significant competitive alternatives.

Another troubling example of the FTC’s use of party documents came in the agency’s well-publicized 2004 post-merger challenge to Evanston Northwestern Healthcare’s (ENH) 2000 acquisition of Highland Park Hospital. That case was premised in large measure on price increases paid by contracting health plans subsequent to the merger, and party documents played a
significant role in establishing that price increases were an intended objective of the transaction. For example, the Initial Decision of the Administrative Law Judge cited various CEO communications prior to the merger recommending “strengthen[ing] negotiating positions with managed care through merged entities and one voice.” In a similar vein, the ALJ cited a report by ENH’s CEO that the Highland Park merger would “increase our leverage” with health plans. The Initial Decision also cited presentations to the ENH Board indicating that the merger would foreclose the possibility of Highland Park’s acquisition by another large system, which ENH feared would increase competitive pricing pressures on it.

In the current environment, where potential mergers and strategic alliances among providers are almost a daily topic of conversation, it pays to educate provider organization leadership on the ins and outs of managing communications from an antitrust perspective. Among the more of these points are the following:

1. The first rule is one of common sense. No one in the organization should create a communication that would embarrass the author or the organization if it were to be read by a competitor, a government investigator, or a judge. Assume everything you write will be read by the FTC.

2. Keep communications objective. There are two corollaries to this advice. First, speculation about the meaning of particular data or information should be reserved to those whose job it is to do so. Second, there is no place for dramatic, hyperbolic, or disparaging statements, which can distort the meaning and intent of an otherwise ordinary communication.

3. In that regard, word choices matter. Words of aggression convey bad intent. Words such as: crush, defeat, defend, dominate, clout, leverage, force, and pressure are inevitably associated with the “bad guy.” Even when used in jest, the humor is usually lost in retrospect.

Of course, not all statements of competitive animus are troublesome. Intent to harm or displace one’s competitors, standing alone, affords no basis for antitrust liability, as such an outcome is as likely to result from strong competition as from anticompetitive methods. However, where aggressive statements are directed toward a provider’s customers (e.g., health plans) or are made in a context suggesting an intent to harm competitors by means other than competition on the merits, they may be considered probative by an investigator or a court.

4. Use words that have competitive meanings carefully. Used inappropriately, such words can be used to impeach an organization’s position in an antitrust matter. For example, it is not uncommon to find hospital strategic planning documents that refer broadly and indiscriminately to other hospitals as “competitors” even when they are not.

5. Re-read and edit communications before sending. Visualize how a communication might be misunderstood. Don’t be cute. Unless instructed otherwise by counsel, do not save drafts.

6. Consult counsel if there is concern about communicating a sensitive issue.

7. Use the telephone (but not voice mail) to communicate without creating a “document.”

8. Keep the focus of transaction-related communications on the benefits to stakeholders (patients, employers, payors), such as the opportunities to improve efficiency, quality, and access. Whether correctly or not, a singular focus on profitability can be equated with an intent to raise prices and reduce competition.

9. Remember that antitrust investigations are all-encompassing. A request for “documents” from an antitrust investigator could include files and communications stored on personal devices (such as home computers, personal email accounts, social media, smartphones, tablets) or in the “cloud,” as well as those stored in a company location. Communications cannot be shielded by calling them “personal.”

How Providers Should Address Disruptive Physicians

Why Simply Establishing a Code of Conduct and a Response Process is Not Enough

Wendy Keegan
Husch Blackwell
wendy.keegan@huschblackwell.com

Dr. Right throws open the door of the operating suite, barking orders and cutting off the head nurse as she begins the preoperative check. “Let’s go! I have a full schedule today and you’re wasting my time. I have patients to see and lives to save.” Dr. Right glances at the surgical tray and shouts at the scrub tech, “Why can’t you ever get it straight?! I always use the right-handed changle clamp and you never have it ready. I have it on my preference card for Pete’s sake!” Dr. Right snatches the scalpel from the tech and plunges into the six hour case. The OR staff collectively roll their eyes and sigh—another