

Q: *If I'm a non-participating physician with a third-party payer, would it be improper to waive the patient's co-payment obligation to ease the burden of higher patient costs associated with out-of-network benefits?*

A: Many managed care contracts allow the patient to seek treatment from a provider outside of the payer's network of participating providers, but in those instances the patient will generally have higher out-of-pocket expenses. A patient who sees a participating provider will be responsible for a fixed co-payment or deductible; however, under most managed care contracts, a non-participating healthcare provider will be paid a percentage of the provider's usual and customary rate (UCR), with the patient responsible for the balance.

For example, assume the physician's charge for a service is \$100. If the physician is a participating provider, the insurer will reimburse the physician based on the insurer's fee schedule as set forth in the participating provider contract. That might be \$75 for that particular service, with the patient responsible for a \$10-15 co-payment. Now let's say that the physician is out-of-network. If the

insurer believes that the UCR for that service is only \$90 and its policy is to pay 80% of the UCR, the physician would be reimbursed for \$90 x 80%, or \$72. The physician could then bill the patient for the difference between \$100 (not just the UCR rate) and \$72, or \$28.

Because this results in higher costs to patients, some physicians may be tempted to waive the co-payment or deductible amount and bill the patient on an "insurance only" basis. This could constitute insurance fraud under New York law.

The Penal Law defines insurance fraud: "A *fraudulent health care insurance act* is committed by any person who, knowingly and with intent to defraud, presents, causes to be presented, or prepares with knowledge or belief that it will be presented to, or by, an insurer . . . or any agent thereof, . . . a claim for payment, services or other benefit pursuant to such policy, contract or plan, which he knows to: (a) contain materially false information concerning any material fact thereto; or (b) conceal, for the purpose of misleading, information concerning any fact material thereto. . . ." In addition to criminal penalties, the Insurance Department can impose a civil penalty for a violation of the statute.

A physician who, as a general business practice, waives otherwise

applicable co-insurance, co-payments or deductibles, where such waiver would affect the amount the insurer would pay, would be guilty of insurance fraud. For example, if an individual were to be insured under a health insurance policy obligating the insurer to reimburse the insured 80% of the physician's usual and customary charges and were the physician to inform the insurer that his or her usual and customary charge for a procedure was \$100, the insurer would, in anticipation that the physician would require the patient to pay him or her \$20, reimburse the insured \$80. If, however, the physician agrees to waive the \$20 co-payment as a general business practice, the physician's usual and customary

charge would be \$80, and that's the amount that should be the basis for reimbursement by the insurer. Under those circumstances, the obligation of the insurer would be \$64.

However, it is not insurance fraud for a physician to *occasionally* waive a co-insurance, co-payment or deductible as a courtesy to a family member or fellow physician or for an indigent patient. In addition, a decision, in the exercise of business judgment, not to pursue the full legal remedies available to collect a debt would not constitute insurance fraud.

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