Verdict’s in on terminal prognoses: Doctors aren’t fortunetellers

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An appeals court has declared that it is not fraud when a physician’s reasonable medical judgment does not match that of a doctor testifying for government prosecutors. That ruling agrees with the position argued in an amicus brief filed by the AMA and others.

In this instance, the government accused a hospice company of violating the False Claims Act, claiming too many patients outlived the physician-certified, terminal prognosis of six months that made their care eligible for the Medicare hospice benefit. To prove its case, the government brought in a single physician expert witness who, based on a review of medical records, disagreed with the conclusions of the certifying physicians.

The AMA and four hospice professional organizations disputed the notion that one professional opinion pitted against another could be proof of fraud.

“For a given patient, there could be a range of reasonable prognoses,” says their friend-of-the-court brief. “Though physicians might reach differing conclusions about how long the patient will live, none of those conclusions would necessarily be false.”

The government would have had to demonstrate more than “only a reasonable disagreement between medical experts,” given that “each patient certification was supported by a meaningful set of medical records evidencing various serious and chronic ailments,” ruled the three-judge panel of the 11th U.S. Circuit Court of Appeals. The court found that it was unacceptable to leave up to the jury “which doctor’s interpretation of those medical records sounded more correct.”
The decision upheld part of the trial court’s ruling in United States of America v. AseraCare Inc. et al., which summarily dismissed False Claim Act charges post-verdict following a complicated, bifurcated trial. The appeals court sent the case back to that trial court, the United States District Court for the Northern District of Alabama, to allow the government to present additional evidence.

Defining “reasonable”

“The nature of prognoses, the nature of death, and the limitations of medical records in capturing all of the considerations that accompany a prognosis of impending death,” describe the broad wide ranges of what can be reasonable in forecasting which the brief examines in detail.

A reasonable conclusion can’t be false. The brief uses the example of a thermometer—there is no disputing when it reads 98.6 degrees. The brief contrasts that with another example—treatment based on cholesterol levels, which can easily vary. “One physician might prescribe more exercise along with medication; another physician might prescribe only more exercise. Neither physician’s prescription is wrong if the facts support both courses of action.”

There is a wide range for reasonable conclusions on individual life expectancy. “Numerous factors can influence when a person will die, including not just the terminal illness itself, but other health conditions,” notes the brief. “There is no simple formula for determining how much weight to give each factor.” It gives a detailed history of the government revising the standards, making them less rigid over the years—initially many physicians resisted certifying patients for hospice over certainty concerns.

End of life is inherently difficult to predict, notes the brief. “It entails a reasoned analysis of multiple variables. And the changing composition of hospice patients over the years has made that complex task even more difficult.”

Terminal cancer may generally be considered dependably predictable, but there is a growing percentage of hospice cases involving dementia, heart disease or lung disease. Face-to-face consultations with patients—not part of the government’s after-the-fact-reviews—can be especially important when judging how long that patient will live.
In this particular case, the government failed to prove the prognosis was false. To prove that the medical prognoses in this case were false, the government had to demonstrate that they fell “beyond the range of reasonableness. It had to show, in other words, that no reasonable physician would have certified the patients as terminally ill,” says the brief, which adds that the government failed to meet that burden.