THE UNITED STATES VIRGIN ISLANDS
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

CLAUDE EARL WALKER, ESQUIRE
ATTORNEY GENERAL

May 12, 2017

Dr. Frank Odlum
Virgin Islands Board of Medical Examiners
Department of Health
Office of Professional Licensure and Health Planning
1303 Hospital Ground, Ste. 10
St. Thomas, VI 00802-6722

Re: *Advisory Letter on allegations of the denial of medical services to Medicare and Medicaid patients*

Dear Dr. Odlum:

This advisory letter is in response to our recent discussion about allegations that have been brought to the attention of the Department of Justice ("Department") regarding certain healthcare providers who have allegedly denied medical services to Medicare and Medicaid patients.

As stated, I am deeply troubled by the nature of these allegations as one such complaint involves a physician who apparently terminated a patient's care when that patient no longer had private insurance and was placed on Medicare.

For this reason, I am informing you of the existing law, and the obligations of healthcare providers who are insured under the Government of the Virgin Islands Medical Malpractice Insurance program, so that you may conduct outreach to physicians. I also will share this letter with Dr. Michelle Davis, Commissioner, Department of Health and Felicia Blyden, Commissioner, Department of Human Services.

I. STATUTORY AUTHORITY

According to Virgin Islands law, the Commissioner of Health is authorized to procure a group insurance policy to cover the cost of professional liability insurance for healthcare providers, and those who receive coverage under this policy must reimburse the Government for their premiums. *Id.* However, those healthcare providers who are employed by the Government *shall* receive financial assistance for the payment of the liability insurance premiums. (emphasis added). *Id. See,* 27 V.I.C. § 166e(a).

Healthcare providers who are employed full-time by the Government shall have **all** of their premiums paid by the Government, but those employed by the Government, who also engage in private practice, shall have **half** of their premiums paid by the Government.

However, the law places the following condition on those engaged in private practice receiving this subsidy:

> All health care providers who, in addition to their employment with the Government of the Virgin Islands, engage in a private practice and receive financial assistance toward the payment of their medical malpractice insurance premiums under this section, **shall accept Medicare and Medicaid for payment of health care services from patients in their private practice**, and in addition must provide medical services to veterans of the United States Military Services that are covered by an insurance carrier. The Commissioner of Health, after notice to the health care provider and opportunity for a hearing, shall fine any health care provider the Commissioner determines to be in violation of this subsection $1,000 for the first violation and for a second violation shall terminate all financial assistance toward the payment of the health care provider's medical malpractice insurance premiums.

27 V.I.C. § 166e(f)(emphasis added).

When engaging in statutory interpretation, "[o]ur first step in interpreting [these][] statute[s] is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (U.S. 1997)(citations omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341. The words within each of the statutes are presumed to manifest the intentions of Legislature. *See, In re Joseph*, 2016 V.I. Supreme LEXIS 25 (V.I. 2016). As the United States Supreme Court has made clear on many occasions, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (U.S. 1992). The "words and phrases" in the statutes "shall be construed according to the common and approved usage of the English language." 1 V.I.C. § 42. It is well-established that "[i]f the language [of a statute] is clear and unambiguous, there is no need to resort to any other rule o[f] statutory construction." *In re Petition for the Expungement of Criminal Record*, 2017 V.I. Supreme LEXIS 4 (V.I. 2017)(citations omitted). "Nonetheless, in the event the words and provisions are 'ambiguous—that is, whether they are reasonably susceptible of different interpretations'—we look next at the surrounding words and provisions and also to the words in context." *Dobrek v. Phelan*, 419 F.3d 259, 264 (3d Cir. 2005)(citation omitted).

Furthermore, the words "shall" and "must" are generally considered mandatory rather than discretionary when interpreting a statute. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (U.S. 1998)(stating that the term "shall" "normally creates an obligation impervious to judicial discretion")(citation omitted); *In re Petition for the Expungement of Criminal Record*, 2017 V.I. Supreme LEXIS 4, 10 (VI. 2017)(concluding "the fact that Act No. 7742 amended section 3732 to change "may" to "must" reflects that the Legislature intended to enlarge the number of mandatory expungements.")

After applying the above-stated rules of statutory construction, it is clear that the words contained within the above-referenced statute are clear on their face and mean exactly what they state: all Virgin Islands government-employed healthcare providers receiving a subsidy from the Government towards the payment of their medical malpractice insurance premiums who also engage in private practice **shall** accept Medicare and Medicaid patients. The law does not provide for exceptions to this obligation.

Therefore, persons within this class of healthcare providers, who are currently denying medical services to Medicare or Medicaid patients, are in violation of the law, and thus, run the risk of losing their coverage in the government's medical malpractice insurance program and incurring administrative monetary penalties.

II. P.L.I. AGREEMENT

Aside from the government-employed healthcare providers described above, there still remains the issue regarding private healthcare providers who are covered under the Professional Liability Insurance for Licensed Health Care Providers Agreement ("P.L.I. Agreement") issued under the Government's Medical Malpractice Insurance program, and Paragraph IV(6) of the P.L.I. Agreement states the following:

> **[a]ll insured**(s) covered by this policy agree and covenant that a patient will not be refused professional services solely because the patient is insured by **Medicare.** (emphasis added) (See Attached P.L.I. Agreement).

This language is clear and cannot reasonably be interpreted to mean anything other than that **all** Virgin Islands healthcare providers covered under the P.L.I. Agreement must accept Medicare patients.

III. AMA GUIDELINES

Furthermore, in reference to Virgin Islands physicians enrolled in the Government's Medical Malpractice program, in paragraph IV(8) of the P.L.I. Agreement, the following is stated:

> ***All Insured(s) covered by the policy agree and covenant to be bound by the American Medical Association's Code of Medical Ethics***, as amended, or other professional ethical code adopted by the insured's specific professional organization, such as the American Psychological Association, regardless whether insured is an active member of said professional organization. (emphasis added).

Opinion 1.1.2 of the American Medical Association's ("AMA") Code of Ethics states in relevant part that:

> As professionals dedicated to protecting the well-being of patients, physicians have an ethical obligation to provide care in cases of medical emergency. Physicians must also uphold ethical responsibilities not to discriminate against a prospective patient on the basis of race, gender, sexual orientation or gender identity, or other personal or social characteristics that are not clinically relevant to the individual's care . . . . **Physicians should not decline patients for whom they have accepted a contractual obligation to provide care. . . . Physicians may not decline to accept a patient for reasons that would constitute discrimination against a class or category of patients**. (emphasis added).

According to these AMA ethical guidelines, Virgin Islands physicians enrolled in the Government's Medical Malpractice Insurance program must comply with the law, and their ethical obligations. It is clear that a *carte blanc* denial of all Medicare patients by such physicians would constitute "discrimination against a class or category of patients."

IV. CONCLUSION

The Department hopes that this letter will be of assistance in clarifying the current Virgin Islands law on this matter, and the contractual obligations of healthcare providers, specifically, physicians, regarding their obligation to accept Medicaid and Medicare patients. The objective of the above-referenced law and policy is not to burden healthcare professionals, but to discourage practices that in essence slam the door on the poor who are in need of vital medical services. Our expectation is not that Virgin Islands healthcare professionals who are covered by the legal authorities and contractual obligations in this letter must provide free medical services to the poor, but that low-income patients, and those on fixed incomes, such as many of our senior citizens, are accorded a measure of dignity when they seek medical care in the Virgin Islands. As the AMA opined, healthcare professionals should recognize that the practice of medicine is essentially a moral activity between the patient and the healthcare provider to relieve the patient's suffering.

Please feel free to contact me with any question or concern that you may have regarding this matter.

Sincerely,

Claude Earl Walker, Esq.
Attorney General

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cc: Dr. Michelle Davis, Commissioner of the Department of Health
Felicia Blyden, Commissioner of the Department of Human Services
Nereida "Nelly" Rivera-O'Reilly, Senator 32nd Legislature, Committee on Health, Hospitals & Human Services

GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS
Professional Liability Insurance for Licensed Health Care Providers
Title 27 Virgin Islands Code Section 166e

NOTICE

This Agreement is made pursuant to the Health Care Provider Malpractice Act, Title 27 Virgin Islands Code, Subchapter IX, establishing, in part, a Self-Insurance Retention Program for licensed health care providers in the Virgin Islands.

In return for payment of a premium and subject to the terms and conditions of this policy, the Government of the United States Virgin Islands, through the Virgin Islands Department of Health's Self-Insurance Retention Program will insure the insured identified on the Certificate of Insurance issued by the Department of the Health as follows:

I. Definitions:

Throughout this policy "you" and "your" mean the insured. "We", "our" and "us" mean the Government of the United States Virgin Islands, through the Virgin Islands Department of Health's Self-Insurance Retention Program.

Other words and phrases with special meanings are defined below. They are bold faced when used in this policy (which includes any endorsements).

1. **Claim** means any written demand for money or services arising from an alleged **injury** to which this insurance applies.

2. **Damages** mean the monetary portion of any judgment, award or settlement, but does not include:

   (a) punitive or exemplary damages as excluded by title 27 Virgin Islands Code section 166b(d); and

   (b) judgments or awards considered uninsurable by law.

3. **Injury** means bodily injury including mental anguish and emotional distress sustained by any one person.

4. **Insured** means any person or entity listed on the Certificate of Insurance issued by the Department of Health to a licensed health care provider as defined by title 27 Virgin Islands Code section 166(c).

5. **Incident** means any negligent omission, act or error in the providing of **professional services** by an **insured** or any persons for whose omissions, acts or errors an insured is legally responsible.

6. **Locum Tenens** means a licensed health care provider temporarily employed by the **insured** and serving in the place of an insured, provided that the substitute does not provide **professional services** at the same time as the **insured** being replaced.

7. **Policy period** means the period of time shown on the Certificate of Insurance issued by the Department of Health unless the policy is effectively cancelled prior to the stated expiration date pursuant to the cancellation provision stated herein. This policy is effective beginning on the date specified on the Certificate of Insurance at 12:00 a.m. Atlantic Standard Time and ends on the date specified on the Certificate of Insurance at 12:01 a.m. Atlantic Standard Time.

8. **Professional services** means services which are within the scope of practice of the **insured** as a licensed health care provider in the Territory of the Virgin Islands of the United States.

II. Coverage Provided:

1. We will pay on behalf of the **insured** all sums that the **insured** shall become legally obligated to pay as **damages** because of an **injury** as limited by title 27 Virgin Islands Code section 166b. The **injury** must be caused by an **incident** arising during the **policy period**. The **injury** must also be caused by an **insured** under this policy.

2. **Locum Tenens** temporarily employed by and serving in the place of an insured. Coverage for **locum tenens** for any one **insured** will not exceed sixty (60) days per policy period. An **insured** must submit an application for the **locum tenens** and obtain approval from the Department of Health before coverage for any **locum tenens** will be provided. Further, an endorsement to this policy adding the **locum tenens** as an additional **insured** will be required for coverage of the **locum tenens**.

3. In addition to the limit of our liability as shown on the Certificate of Insurance and as set forth in title 27 Virgin Islands Code sections 166b, 166e, and other provisions, we will also pay for all expenses incurred by us when defending any **claim** or suit covered by this policy, including all court costs taxed against the **insured** in any **claim** or suit defended by us.

4. If your health care entity is covered under this policy as the insured, any licensed health care providers employed by your entity that you want covered must be included as an insured either in this policy or in an endorsement. This means, for example, if your employees change while this policy is in effect, an endorsement will be required to add said employee. It is up to you to ensure that all of your employees who are licensed health care providers are listed as an ensured in this policy or in the endorsement.

III. Defense and Settlement:

1. We shall have the right and duty to defend any **claim** against the **insured** seeking damages for an **incident**, even if any of the allegations of the **claim** are groundless, false, or

fraudulent. We shall not be obligated to pay any **damages** or expenses or continue to defend any **claim** after the applicable limit of our liability has been exhausted by payment of **damages**.

2. We have the right to appoint counsel to defend and investigate any **claim** brought against an **insured**; however, an **insured** may engage additional counsel solely at the **insured's** expense to associate in the defense of any **claim** covered hereunder.

3. We have the right to settle any **claim** or suit without consent by the **insured**.

4. An **insured** will not do anything that may prejudice our defense of any suit or **claim**.

5. An **insured** will not enter into any oral or written contracts that in any way impair or waive our right of defense.

IV. Conditions:

1. The medical malpractice insurance afforded by this policy applies to **incidents** during the **policy period** for which a **claim** is made against the **insured**.

2. Duties of the **Insured** in the Event of a **Claim** or **Incident**: Upon the **insured** becoming aware of any **incident** that could reasonably be expected to be the basis of a **claim** covered hereby, written notice shall be given by the **insured** to the Medical Malpractice & Risk Unit of the Department of the Justice together with the fullest information obtainable. If a claim is made against the **insured**, the **insured** will immediately forward to the Director of the Medical Malpractice & Risk Unit of the Department of Justice or its authorized agent every demand, notice, summons, or other process received by the **insured** or the **insured's** representative.

3. Assistance and Cooperation of the **Insured** in the Event of a **Claim**: Upon request, the **insured** will cooperate with the Department of Justice's Medical Malpractice & Risk Unit and the Department of Health in defending any claim covered by this policy. The **insured** will attend depositions, hearings, and trials, and assist in securing and giving evidence and obtaining the attendance of witnesses in the defense of any claim. In the event, the **insured** is uncooperative, we retain the right to withdraw representation of the **insured** and terminate this policy for cause relieving the Government of the United States Virgin Islands, Department of Health and other agencies from any further obligations or responsibilities to the insured.

4. Other Insurance: If an **insured** has other insurance that is applicable to any claim, suit or incident covered under this policy, then the **insured** has a duty to inform the Director of the Medical Malpractice & Risk Unit of such other insurance.

5. Subrogation: If any payment is made under this policy, we shall be subrogated to all the **insured's** rights of recovery against any person or organization. The **insured** shall execute

and deliver instruments and papers and do whatever is necessary to secure such rights. The **insured** shall do nothing to prejudice those rights.

6. All **insured(s)** covered by this policy agree and covenant that a patient will not be refused **professional services** solely because the patient is insured by Medicare.

7. Duties of the **Insured** in the Event the **Insured** Leaves the Territory: If an insured no longer performs **professional services** within the jurisdiction of the United States Virgin Islands, the **insured** will provide the Department of Health with a forwarding address and a telephone number and an email address where he or she may be contacted in the event a claim is made regarding an **incident** which occurred during a time where the insured was covered by a policy or Certificate of Insurance issued by the Department of Health. Insured will continue to provide his or her current contact information for two years after **professional services** in this jurisdiction cease.

8. All **insured(s)** covered by the policy agree and covenant to be bound by the American Medical Association's Code of Medical Ethics, as amended, or other professional ethical code adopted by the insured's specific professional organization, such as the American Psychological Association, regardless whether insured is an active member of said professional organization.

9. Changes. The terms and conditions of this policy may only be changed by an endorsement signed by the Commissioner of Health or her designee. Oral or written notice of changes by the **insured** to the Territorial Risk Manager or Director of the Medical Malpractice and Risk Unit will not cause any change of this policy.

V. Exclusions:

This policy does not apply to any **incident** or **claim** arising out of, based upon, or attributable to any of the following:

1. An act or omission violating any federal or territorial law governing the commission of a crime;

2. The providing of or failure to provide **professional services** while you or any other insured for whose acts or omission you are legally responsible, is under the influence of intoxicants or drugs;

3. The providing of **professional services** for which you are not licensed to practice or the providing of **professional services** outside of the jurisdiction of the United States Virgin Islands;

4. Libel, slander, defamation, discrimination, false arrest, false imprisonment, invasion of privacy, transmission of any communicable disease, sexual impropriety, sexual intimacy, sexual assault, sexual harassment;

5. Premises liability;

6. Pollution, contamination or waste disposal;

7. Any obligation of the insured related to worker's compensation, unemployment compensation, employee retirement benefits law, disability benefits law, FICA/FUTA or other tax reporting and filing;

8. Property damage due to windstorm, fire, or other calamity or act of God;

9. The intentional infliction of injury;

10. Any alteration of medical records under your custody or control which do not comply with nationally accepted standards for addendums.

11. The loss or destruction of medical records under your custody or control, which is not caused by a natural disaster or unforeseen event.

12. Any claim alleged to be caused by: (a) your breach of a fiduciary duty; (b) your actual gaining of personal profit, or advantage to which you are not legally entitled; (c) remuneration paid to you if such payment is held by the courts to be a violation of the law; or (d) your alleged or actual involvement in any anti-trust law violation or agreement or conspiracy to restrain trade.

    For purposes of this exclusion, fiduciary duty means the duty that arises when the business transacted, money or property handled, is not your own or for your benefit, but for the benefit of another person, to whom you stand in a relationship implying and necessitating confident, trust and good faith, whether or not that duty arises by matter of law, contract or otherwise.

VI. Cancellation:

1. Cancellation by the Insured:

    (a) This insurance may be cancelled at any time by written notice to the Territorial Risk Manager thirty (30) days before the effective cancellation date.

    (b) We will refund the paid premium less the earned portion within sixty (60) days of the effective cancellation date.

    (c) The earned portion of the premium will be computed on the customary short-rate basis of 90% of the premium.

2. Cancellation by Us for Non-Payment of Premium:

This insurance may be cancelled by us for the non-payment of premium by sending written notice to the insured at least thirty (30) days prior to the date of such cancellation.

3. Cancellation by Us Other Than For Non-Payment of Premium:

   (a) In the case of cancellation due to a reason other than non-payment of premium, we may cancel this policy be sending to the insured set forth in the Certificate of Insurance, by first class, registered or certified mail, at the insured's last known address to us not less than ninety (90) days written notice, stating the specific reason for such cancellation and when the cancellation will be effective. Proof of mailing will be sufficient for proof of notice.

   (b) Cancellation by us for other than non-payment of premium, will only be effective if based on one or more of the following reasons:

      A. The policy was obtained through a material representation that was relied on by us and such policy would not have been issued by us under the same terms and conditions if correct information had been disclosed;

      B. Material failure to comply with policy terms, conditions or contractual duties;

      C. Alteration, loss or destruction of medical records in your custody and control not caused by a natural disaster or unforeseen event. Alteration includes corrections or additions made after you have notice of a **claim** or suit. Any corrections or additions to the medical records must comply with nationally accepted standards for addendums.

      D. The risk originally accepted has measurably increased; or

      E. Loss of the Department of Health's Self-Insurance Retention Program.