

On Private Contracting

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This editorial is reprinted by permission from the AAPS News, Vol. 49, October, 1993, the newsletter of the Association of American Physicians and Surgeons (AAPS), of which Dr. Orient is the editor. Dr. Orient is in the private practice of internal medicine in Tucson, Arizona.

Many questions come to the AAPS office regarding the issue of contracting privately with Medicare-eligible patients, especially after recent articles concerning *Stewart v. Sullivan*. In addition, there is escalating intimidation. Here is one letter a physician received from a carrier:

This letter is in regards [sic] to beneficiary agreements not to use Medicare coverage.

"Some physicians are requiring Medicare Part B beneficiaries, as a condition of acceptance for or continuation of treatment, to enter into agreements with the physician not to use their Medicare coverage.

The Medicare law does not exclude services from coverage or physicians from Medicare requirements on basis [sic] of such agreements. In enacting the provisions for Medicare coverage of physician services and the Limiting Charge, Claims Submission, and other requirements that apply to physicians, Congress clearly intended that Medicare beneficiaries should be able to use their Medicare coverage and physicians who treat beneficiaries should comply with the specified statutory requirements. We view agreements of the kind described as contrary to the public policy of the United States as reflected in those provisions, and as therefore invalid. All Medicare requirements with respect to physician services continue to apply, and Medicare payment may be made to beneficiaries for covered services, notwithstanding [sic] these agreements.

Violations of these requirements are generally subject to sanctions, including civil monetary penalties and/or exclusion from the Medicare program.

Thus, if a Medicare beneficiary disregards his

agreement and complains to the Medicare carrier about the failure of the physician to submit claims, or submits his own claims, the physician may be subject to possible civil penalties for such failure.

If you have any questions, regarding this correspondence, please call us at (number given)."

(signed), Senior Supervisor, Program Monitoring

Editorial

I do have some questions:

Is it the "public policy of the United States" to encourage citizens to violate contracts and to rupture the patient-physician relationship?

Does the "public policy of the United States" as enunciated by this Senior Supervisor have the force of law? Can such statements by any public official be used as the basis for depriving persons of their liberty and property?

Has the Medicare program become an involuntary one for physicians and patients, rather than a voluntary one, despite assertions by Congress and the Courts?

Does "should be able to use" their coverage mean must use their coverage?

Your editor has not asked these questions of [this Senior Supervisor]. To paraphrase George Bernard Shaw, "to ask the question is to answer it." Furthermore, it is the editor's opinion that all public agencies should use the disclaimer cited by employees of the Arizona Revenue Service every time they answer

a question, to the effect that the agency is not bound

Your editor, along with other physicians and patients, has declared independence from the Medicare program. Contracts are based on consideration; we accept no consideration from the Medicare program. In our opinion, one becomes subject to the requirements of Medicare upon submitting a claim. One must submit a claim if one provides a covered service to a Medicare beneficiary. We provide noncovered services to non-Medicare beneficiaries.

As [the Senior Supervisor] correctly declares, a piece of paper does not exempt a person from compliance with the law. However, an assertion by a public official does not constitute law. There is no law that requires a Medicare-eligible patient to take advantage of his entitlement and thus become a beneficiary, and no law that forces a physician to accept a patient who wishes to take advantage of that entitlement. Patients are by law free to decide whether or not to accept their benefits and to consult any willing physician. (HHS encourages them to see a "participating provider;" nearly 60% of physicians "participate.")

The Health Care Financing Administration has declared physicians to be second-class citizens in refusing to recognize our legal right to enforce a contract. Likewise, Medicare-eligible persons, in the eyes of HCFA, are like minors - they are not able to enter a legally-binding contract. If a Medicare-eligible patient asks for our services and agrees to pay for them, and then renounces his agreement, we probably have no legal recourse. In fact, we may be well advised to refund any payment in an effort to avoid administrative penalties. Our only protection is the patients' morals. It is always possible that our government will choose to make an example of us, attempting to defame or bankrupt us, even if the law is on our side.

I have drafted the following statement for my patients:

I, _____, do solemnly affirm upon my sacred word of honor that I am consulting Dr. Orient as a patient and not as a government informer. The

medical history that I give is true and is presented for the sole purpose of obtaining medical counsel and treatment. Specifically, my history is not contrived for the purpose of entrapping Dr. Orient into prescribing a drug, treatment, or diagnostic test that is unnecessary, not indicated, or in possible violation of a government regulation.

Furthermore, I affirm that I am of sound mind and capable of making decisions for myself regarding my medical, financial, and general wellbeing. I promise that I will not enter any agreement, written or oral, with Dr. Orient if I consider that agreement to be to my disadvantage. I will not pay her any amount that I believe to be unreasonable or unjust. If I later regret a decision for any reason, I will speak directly to Dr. Orient herself.

If I keep my word faithfully, may I enjoy my life and prosper, respected by all men and in all times; but if I swerve from it or violate it, may the reverse be my lot.

I do hereby enjoin any person purporting to represent me to refrain from any action that, if undertaken by me personally, would dishonor my word.

Signed day of _____ 20__.
Witnessed by God and _____.

I recognize that I am at risk. My colleagues and this Association might or might not be willing or able to come to my aid if the government attacks me. I have become particularly wary of any patient who lists a government agency as his employer. Distrust works both ways, and it is possible I will offend some patients. But the purpose of the above agreement is not so much to protect myself (today, there are no guaranteed legal protections) as to educate patients about how far we have moved in the direction of tyranny.

Those interested in knowing more about the Association of American Physicians and Surgeons may write: AAPS, 1601 N. Tucson Blvd., Suite 9, Tucson, AZ, 85716, or phone (800) 635-1196.