REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS*

CEJA Report 3 - A-03

Subject: Retainer Practices

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Referred to: Reference Committee on Amendments to Constitution and Bylaws (Donna A. Woodson, MD, Chair)

At the 2001 Interim Meeting, the House of Delegates adopted Resolution 6, which called for the AMA to examine special physician-patient contracts for "non-medical services." This study was completed by the Council on Medical Service (CMS), which reported its findings at the 2002 Annual Meeting of the HOD. In its report, CMS referred to these special contracts as "retainer practices" and reviewed some of their characteristics, particularly in relation to economic, practical, and legal implications, and discussed relevant AMA policies. The CMS report concluded that retainer practices were consistent with long-standing AMA support of pluralism in the delivery and financing of healthcare. The CMS report also stated that "To the degree that an exploration of the ethical implications of retainer practices becomes warranted, the Council believes that the Council on Ethical and Judicial Affairs is better suited to undertake such a study."

Although "executive health programs," and "cash only" practices are not new, the special contracts whereby physicians offer additional special services and amenities to patients who pay additional fees as retainers has received considerable legislative and public interest. Given that they raise fundamental questions in terms of the nature of the patient-physician relationship, including issues of access and continuity of care, this CEJA report builds on the work of the Council on Medical Service in analyzing the professional and ethical implications of contracting for special services and amenities, such as longer visits, guaranteed availability by phone or pager, counseling for healthy lifestyles, and various other customized services.

ESTABLISHING A PATIENT-PHYSICIAN RELATIONSHIP

The AMA's *Principles of Medical Ethics* advocate that physicians are free to choose the environment in which to provide medical care and, except in emergencies, whom to serve. This principle is further reiterated in other AMA policies identified in the CMS Report (See policies H-165.960(5), H-165.916, H-385.985, AMA Policy Database). There is also AMA policy in support of plurality in the financing and delivery of health care (See policies H-165.960(7), H-165.913(2)).

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Trust, which is essential in a patient-physician relationship, is an important consideration in exercising this freedom. When a physician and a patient are unable to establish a trusting relationship, they should not engage in a relationship (see Opinion E-9.06, "Free Choice"). Retainer practices may be a means to facilitate the establishment of trust-based relationships beyond what is perceived to be possible in the usual context of brief and rushed visits. However, patients who do not pay fees for special services and amenities should continue to expect and receive compassionate and respectful care from their physicians, as required by the *Principles of Medical Ethics* and Opinion E-10.01, "Fundamental Elements of the Patient-Physician Relationship." The latter specifically states that all patients have the right to "courtesy, respect, dignity, responsiveness, and timely attention to his or her needs."

Voluntariness

Trust in a relationship can be accomplished when both patient and physician are clear on the terms of the relationship and agree to it. Physicians must present the terms of a retainer contract in an honest manner, being careful not to exert undue pressure on patients to pay additional fees for services they may not want or may not be able to afford. Physicians particularly should recognize that their sickest or most vulnerable patients or those in greatest need of care may feel pressured to pay the fee due to fear of abandonment. Undue pressure may also stem from contractual terms that obligate the patient to pay for future services that might be unwanted if the patient finds another physician before the end of the contract. Confronted with a choice between greater cost and greater inconvenience (such as travelling longer distances to receive medical care), many patients may feel their options are very limited.

Also, if a physician has knowledge that a patient's health care insurance coverage will be compromised by the retainer contract , the information must be discussed with the patient before reaching an agreement on the terms of the retainer contract.

Continuity of Care

Loyalty to the interests of patients is one of the essential characteristics that can be derived from the foundational trust on which the patient-physician relationship is based. It is expressed most clearly through the physician's obligation not to abandon a patient who continues to require medical care. Opinions E-10.01, "Fundamental Elements of the Patient-Physician Relationship;" E-8.11, "Neglect of Patients;" and E-8.115, "Termination of the Physician-Patient Relationship," all affirm physicians' obligation to promote continuity of care, and to arrange for the transfer of care of a patient in a manner that does not compromise the patient's well-being.

In light of this ethical norm, the conversion of a traditional practice to a retainer practice can place a burden upon patients who must seek another physician and establish a new relationship. Therefore, physicians converting their practices must facilitate the transfer of their patients, particularly those with medical conditions that require ongoing attention. This should include identifying practitioners in the community who are willing to accept patients, and personally communicating the clinical information appropriate to a smooth transition of care. It is inappropriate to charge patients an extra fee for transmission of their medical records.

DIAGNOSTIC AND THERAPEUTIC DECISION MAKING

It is important that a retainer contract for providing special services and amenities not be presented as a promise of more or better diagnostic and therapeutic services. Ethically, the standard of care cannot depend on the patient's ability to pay. It would be particularly condemnable if there were a discrepancy in diagnostic and therapeutic decisions in the context of a mixed practice (a practice consisting of patients with and without retainer contracts). Therefore, it must be clear to patients that retainer practices are not necessary to attain good medical care. However, it remains possible that more personalized attention and greater patient satisfaction may lead to better understanding and compliance with treatment recommendations, and thus improved outcomes for certain aspects of care.

Appropriateness of Care

In all settings, concern for the quality of care the patient receives should be a physician's first consideration (See Opinion E-2.09, "Costs"). However, this concern should be further guided by Opinion E-2.19, "Unnecessary Services," which addresses the appropriateness of services that are offered, stating that "Physicians should not provide, prescribe, or seek compensation for services they know are unnecessary." It is important to note that a determination of necessity under this Opinion applies to diagnostic and therapeutic care and not to special services and amenities of the kind provided under retainer contracts. Nevertheless, physicians proposing retainer contracts to their patients should ensure that no unnecessary medical treatment or procedure is provided. Specifically, medical services should not be provided only to appease a patient who wants them and is willing to pay for them; rather, they should always be based on scientific evidence, sound medical judgment, relevant professional guidelines, and due concern for economic prudence.

COMPENSATION FOR SERVICES

Retainer contracts are a means for physicians to offer special services and amenities with the expectation of appropriate compensation. These contracts fall under a general contractual view of the patient-physician relationship, in which both parties agree on appropriate fees to be charged for pre-defined services.

Also, Opinion 9.132, "Health Care Fraud and Abuse," speaks of the danger of misrepresentation to increase the level of payment or to secure non-covered health benefits. However, physicians are ethically required to be honest when billing for reimbursement. Therefore, after entering into retainer contracts, it remains paramount that physicians continue to observe relevant laws, rules, and contracts regarding reimbursement received from their patients' health care plans. Since no bright line separates special services and amenities from reimbursable medical services, it is desirable that the terms of retainer contracts separate clearly special services and amenities from reimbursable medical services. In the absence of such clarification, identification of reimbursable services will need to be determined carefully on a case-by-case basis.

ACCESS TO CARE IN A COMMUNITY

The principal concern voiced regarding retainer practices relates to access to medical care within a community. It is perceived that if these practices become widespread, the number of physicians not engaging in such contracts would be insufficient to provide medical care to all patients who are unable or unwilling to pay the additional fees. Although there have been no reports of this actually occurring, this possibility threatens medicine's professional ethos to ensure the provision of medical care to all those in need. Principle IX of the AMA's *Principles of Medical Ethics* states, "Physicians shall support access to medical care for all people." This fundamental precept is further elaborated in Opinion E-9.065, "Caring for the Poor."

Recently, the Council examined the need of individual physicians to balance the obligation to facilitate access for all patients in need of medical care with the responsibility to provide for their existing patients. Opinion E-10.05, "Potential Patients," states:

> Physicians, as professionals and members of society, should work to assure access to adequate health care. Accordingly, physicians have an obligation to share in providing charity care but not to the degree that would seriously compromise the care provided to existing patients. When deciding whether to take on a new patient, physicians should consider the individual's need for medical service along with the needs of their current patients. Treatments range along a continuum from necessary to sustain life, to necessary to sustain functioning health, to useful to sustain functioning health, to discretionary. Clearly, greater individual need for a service corresponds with a stronger obligation to treat.

Therefore, it should be recognized that when physicians convert their practices to provide care solely to a small panel of patients able and willing to pay for special services and amenities, overall patient care in a community may be compromised. Prior to converting their practices, physicians should attempt to ascertain that other physicians not engaging in such contracts are available to provide medical care to patients who do not enter into retainer contracts. If it is apparent that the conversion of a practice would result in patients losing access to care that had been available to them until that time, the physician's decision to convert a practice could undermine the ethical obligation set forth in the *Principles of Medical Ethics* that a physician shall support access to medical care. If no other physicians are available to care for non-retainer patients in the local community, the physician may be ethically obligated to continue caring for such patients. Physicians who establish retainer practices should remain attentive to their professional obligation to attend to those in urgent need of care, regardless of ability to pay.

CONCLUSION

Individuals are free to select and supplement insurance for their health care on the basis of what appears to them to be an acceptable tradeoff between quality and cost. Retainer fees for special services and amenities, therefore, appear to be consistent with a system based on pluralistic means of financing and delivery of medical care. Whether this trend should be promoted is a question to which there is not yet a definite answer. However, the following observations should help orient this inquiry. First, when a physician significantly reduces a panel of patients, other physicians in a

community should be able to absorb those patients now seeking to receive care from someone else. Beyond concerns at the community level, contracting for special services and amenities must comply with the ethical concept of voluntary action on the part of patients and minimize discontinuity of care. Finally, these practices must respect existing guidelines on the medical appropriateness of treatments or procedures, as well as reimbursement rules.

RECOMMENDATIONS

The Council recommends that the following be adopted and the remainder of the report be filed:

> Individuals are free to select and supplement insurance for their health care on the basis of what appears to them to be an acceptable tradeoff between quality and cost. Retainer contracts, whereby physicians offer special services and amenities (such as longer visits, guaranteed availability by phone or pager, counseling for healthy lifestyles, and various other customized services) to patients who pay additional fees distinct from the cost of medical care, are consistent with pluralism in the delivery and financing of healthcare. However, they also raise ethical concerns that warrant careful attention, particularly if retainer practices become so widespread as to threaten access to care.

1. When entering into a retainer contract, both parties must be clear about the terms of the relationship and must agree to them. Physicians must present the terms of the contract in an honest manner, and must not exert undue pressure on patients to agree to the arrangement. If a physician has knowledge that the patient's health care insurance coverage will be compromised by the retainer contract, the information must be discussed with the patient before reaching an agreement on the terms of the retainer contract. Also, patients must be able to opt out of a retainer contract without undue inconveniences or financial penalties.

2. Concern for quality of care the patient receives should be the physician's first consideration. However, it is important that a retainer contract not be promoted as a promise for more or better diagnostic and therapeutic services. Physicians must always ensure that medical care is provided only on the basis of scientific evidence, sound medical judgment, relevant professional guidelines, and concern for economic prudence. Physicians who engage in mixed practices, in which some patients have contracted for special services and amenities and others have not, must be particularly diligent to offer the same standard of diagnostic and therapeutic services to both categories of patients. All patients are entitled to courtesy, respect, dignity, responsiveness, and timely attention to their needs.

3. In accord with medicine's ethical mandate to provide for continuity of care and the ethical imperative that physicians not abandon their patients, physicians converting their traditional practices into retainer practices must facilitate the transfer of their non-participating patients to other physicians, particularly their sickest and most vulnerable ones. If no other physicians are available to care for non-retainer patients in the local community, the physician may be ethically obligated to continue caring for such patients.

4. Physicians who enter into retainer contracts will usually receive reimbursement from their patients' health care plans for medical services. Physicians are ethically required to be honest in billing for reimbursement, and must observe relevant laws, rules and contracts. It is desirable that retainer contracts separate clearly special services and amenities from reimbursable medical services. In the absence of such clarification, identification of reimbursable services should be determined on a case-by-case basis.

5. Physicians have a professional obligation to provide care to those in need, regardless of ability to pay, particularly to those in need of urgent care. Physicians who engage in retainer practices should seek specific opportunities to fulfill this obligation.

(New House/CEJA Policy)