Health Care Insights

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Look Out for the RAC!

A RAC is a Recovery Audit Contractor, an organization endowed with Medicare audit authority under Section 302 of the Tax Relief and Healthcare Act of 2006 enacted by Congress.

RAC auditors participate both in a demonstration program and a permanent audit program designed to recover Medicare overpayments. They are paid on a contingency fee basis.

> **"While the temporary program has been in effect for a year or two, the permanent RAC program will be extended countrywide in 2010."**

While the temporary program has been in effect for a year or two, the permanent RAC program will be extended countrywide in 2010.

Although one may question whether aggressive federal financial bird-dogging makes sense in light of the serious budget and reimbursement problems associated with Medicare, Congress in its infinite wisdom believes that significant fraud and over-billing remains in the system and the RAC program is designed to find it.

For further information about the RAC program, feel free to contact Jennifer N. Willcox at (203) 330-2122 or by email at jwillcox@pullcom.com.

Do Transplantation Policies Need to be Changed?

The March 2008 issue of *The Public Citizen Health Research Group Health Letter,* edited by Dr. Sidney M. Wolfe, suggests that the answer to this question is "yes."

According to the *Health Letter*, "organ distribution (for transplantation) is in fact skewed in favor of those who are better able to navigate the system." Because there are many organ procurement organizations (OPO) around the country, transplant candidates may register with more than one OPO, thereby increasing the likelihood that the savvier participant will receive a transplant even though equitable considerations which are supposed to govern allocation of organs for transplantation might mandate otherwise.

Another way of gaming the system, according to the *Health Letter*, is the tendency of more sophisticated candidates to register with an OPO which has "a much higher proportion of donors to transplant candidates...." This increases the odds of receiving an organ and reduces the length of waiting times. "Indeed," the *Health Letter* advises, "there is a tenfold difference in median waiting times to procure an organ between the OPOs with the highest and lowest donor to transplant ratios."

The *Health Letter* suggests that the United Network for Organ Sharing, the nonprofit organization which is supposed to coordinate these efforts, prohibit multiple listings as being intrinsically unfair.

If you have a question about this topic, please contact Elliott B. Pollack at (860) 424-4340 or by email at ebpollack@pullcom.com.

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All Nursing Homes Must Have Sprinklers

Some time ago, the Centers for Medicare and Medicaid Services (CMS) issued regulations requiring new and renovated skilled nursing facilities to install automatic sprinkler systems. Existing homes were largely exempted.

On June 18, acting CMS administrator Kerry Weems notified the industry that *all facilities* must comply with the sprinkler requirement pursuant to the National Fire Protection Association's specifications.

Facilities have five years to comply.

One may wonder whether this requirement will speed the closure of facilities constructed in the late 1960s and early 1970s, given the inevitable squeeze on revenues that these compliance requirements will create even if state rate setting bodies offer some concessions.

Please contact Michael A. Kurs at (860) 424-4331 or by email at mkurs@pullcom.com for a copy of this regulation.

What About Arbitration Clauses?

A Florida ob/gyn patient advises "The Ethicist," the weekly column written by Randy Cohen in the *New York Times Magazine,* that her physician refuses to see patients who do not sign binding arbitration agreements in lieu of being able to bring jury claims for medical malpractice. When she inquired at other offices, she "discovered that nearly all ob/gyn practices in the area make the same demand." She asked The Ethicist whether this was an ethical request.

Although "the law may allow it," The Ethicist's considered opinion on March 30, 2008 was that this physician's "dismal policy" is wrong because it compels his patients "to surrender a basic legal right in order to receive medical care." Opining that the right to a day in court should be among the (rights which are) "inviolable," The Ethicist scorned the physician's "intolerable" demand.

The editors of *Health Care Insights* are not so sure The Ethicist's perceptions are correct. Why, in the day of escalating medical malpractice insurance premiums, may a physician not seek to limit the size of potential malpractice judgments and thereby reduce premiums by insisting on an arbitration remedy? Many courts which have considered this issue have validated this demand and, indeed, it may be a workable informal solution to hold down or at least to stabilize one of the major costs of practicing medicine today. Nursing homes are also starting to consider arbitration clauses in their admission agreements.

It might be said that access to health care is a more important "right" than the ability to seek a jury trial when a malpractice allegation is pressed. The Ethicist may be off the mark here.

For further information, please contact Christine Collyer at (860) 424-4329 or by email at ccollyer@pullcom.com.

AMA Apologizes for Racial Discrimination

In July, the American Medical Association acknowledged and apologized "for its history of excluding black physicians from membership, for listing black doctors as 'colored' and for not challenging segregated hospitals."

AMA present Ron Davis, M.D. stated "[T]he AMA failed, across the span of the century, to live up to

the high standards that define the noble profession of medicine" in a note published in the July 16 issue of *The Journal of the American Medical Association.*

Dr. Lonnie Bristol, the first black president of the AMA in 1995, applauded the comment.

The Role of Physicians' Personal Beliefs in Care Giving

Commenting on a letter written by the Bush administration to the American College of Obstetricians and Gynecologists on March 21, 2008, an editorial in the March 29 issue of *The Lancet* notes that some physicians are so concerned about abortion that they have denied services to their patients and "seem to have forgotten that the care of their patients must be their first concern."

The letter challenged an ethics opinion issued by the College last year which urged members "to refer patients in a timely manner for abortions or other reproductive procedures they did not wish to do themselves."

The role of conscientious objection to delivery of health care was discussed in the Winter 2008 issue of *Health Care Insights* in the context of pharmaceutical services. While physicians should not in most circumstances be asked to perform elective services that go against their moral grain, is it fair to people who seek an ethically controversial procedure recognized by a professional specialty to place obstacles in their way?

Please contact Michael A. Kurs at (860) 424-4331 or by email at mkurs@pullcom.com if you would like to discuss this issue.

Health Care "Quality" Discussed

Dr. Edward J. Volpintesta, who practices in Bethel, recently wrote about the ongoing efforts of health care payors and regulators to apply the concept of "quality" to health care delivery and, more particularly, to payment to caregivers. Health care quality is not "a narrow scientific value – tangible, reproducible and attainable at all times and under all circumstances," Dr. Volpintesta asserts. Being a complete physician means that "technical skill and the human connection are not at odds with each other." To pretend otherwise, he maintains, is a "myth and an enemy of truth."

In his pungent essay in the May 2008 issue of *Connecticut Medicine*, the publication of the Connecticut State Medical Society, Dr. Volpintesta also notes that linking all physician care to publicly reported metrics produces the "unintended consequence (of) discouraging doctors from taking on sicker patients."

Jennifer N. Willcox, (203) 330-2122 or at jwillcox@pullcom.com can reply to questions about this issue.

Attorney Notes

Hartford partner **Michael A. Kurs** will be installed as chair of the Administrative Law Section of the Connecticut Bar Association at the Section's September 10, 2008, meeting. We all congratulate Michael on this honor.

Elliott B. Pollack tackled the topic of obtaining stays of administrative hearing rulings in Superior Court at the Administrative Law Section's program at the Connecticut Bar Association's annual meeting on June 9, 2008.

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