

PHYSICIANS AND PATIENTS' RIGHT TO FREEDOM OF CHOICE

Elizabeth E. Hogue, Esq.
15118 Liberty Grove
Burtonsville, Maryland 20866
Office: 301-421-0143 Fax: 301-421-1699
E-mail: ehogue5@comcast.net

Providers are increasingly concerned that physicians may violate patients' right to freedom of choice of providers.

First, it is important to note that longterm care, home health, home medical equipment (HME) and hospice services are provided under the supervision of physicians based upon specific orders from them. Because physicians supervise these types of services, they are at risk for legal liability, along with providers and staff members, if applicable standards are not met by providers that physicians supervise.

Consequently, physicians have a clear interest in assuring the quality of care rendered by other providers to their patients. Physicians may, therefore, choose to designate in their orders which providers will render services to their patients in order to help assure quality of care and manage their risks of liability.

Nonetheless, all providers, including physicians, are required to abide by patients' right to freedom of choice of providers. There are two (2) sources of this right that apply to physicians:

(1) All patients have a common law right based upon court decisions to control the care provided to them, including who renders it. Thus, when patients, regardless of payor source or type of care, voluntarily express preferences for certain providers, their choices must be honored.

(2) Federal statutes of the Medicare and Medicaid Programs guarantee Medicare beneficiaries and Medicaid recipients the right to freedom of choice of providers. (Medicaid recipients may have waived this right if they participate in waiver programs.) Consequently, when Medicare patients and non-waiver Medicaid patients voluntarily express preferences for providers, these choices must be honored.

Consequently, physicians' orders based upon quality of care concerns for specific providers should be implemented unless patients express preferences to receive services from different providers.

If, however, patients voluntarily express preferences or choose providers other than providers ordered by their attending physicians, patients' choices "trump" physicians' orders and must be honored.

Physicians may then choose whether or not they wish to supervise services and assume the risk of services provided by providers different from those they ordered.

It is at this point that physicians and their office staff members must be especially cautious. If try to "strong arm" patients into receiving services from providers physicians' prefer instead of providers chosen by patients, consent to such services may not be voluntary. Statements by physicians or their employees, for example, that the doctor will no longer care for them if they do not accept services from the provider the doctor ordered may amount to duress which invalidates any consent by patients to such services.

Attempts to force patients to accept physicians' choices also has ethical implications. Patients' right to act autonomously may be compromised by the insistence of physicians or staff members.

From a very practical point of view, physicians who are serious about quality of care and sound risk management should talk to patients about their preferences for providers before they write orders for specific providers. Patients will then have an opportunity to understand physicians' preferences, to express their own choices and/or to resolve any differences between physicians and patients.

Practitioners who deal with physicians who insist on writing orders for specific providers may use a variety of strategies to encourage patients to choose them or physicians to write orders for them instead of other providers. These strategies include pre-op or preadmission visits, use of preferred provider agreements and use of consulting physician agreements.

Providers who encounter instances in which physicians and their employees put inappropriate pressure on patients to use providers chosen by physicians should carefully document violations of patients' right to freedom of choice. Documentation should preferably be in the form of signed statements from patients. These statements should be forwarded to physicians with a letter from providers/case managers. A word to the wise should be sufficient!

Practitioners who encounter physicians who persist in pressuring patients despite their letters providers and documentation from patients may wish to report violations to both the central and regional offices of the Centers for Medicare and Medicaid Services (CMS). Such reports should include documentation from patients.

The competition among post-acute providers continues to "heat up." The rights of patients, however, cannot be trampled despite fierce competition among providers.

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Elizabeth E. Hogue, Esq.

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