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RPA/Forum of ESRD Networks Position on ESRD Patient Solicitation

Introduction

The RPA, in cooperation with the Forum of ESRD Networks, seeks a good working environment in which physicians can competitively interact with one another without conflict, hard feelings or ill will, and in which the interests of the patient remain paramount. To that end, this statement is based on certain ground rules that have their cornerstone in medical ethics and professionalism to ensure that physician contact with patients is appropriate.

This document describes the issue, highlights relevant literature on the issues of professionalism and ethics in medicine, and provides selected examples of state statutes addressing the issue. The position statement concludes with specific principles to guide professional ethics in nephrology regarding ESRD patient solicitation.

Content

The issues which have come to the attention of the RPA and the ESRD Networks are:

- Nephrologists approaching patients under the treatment of other nephrologists with the purpose of influencing the patient to change physicians or dialysis facilities, or instructing nurses to contact patients with that intent.
- Nephrologists accessing records of patients who are cared for by a different nephrology practice with the purpose of contacting those patients to influence them to change the facility where they receive treatment.

Background Research

In seeking to develop a position on appropriate structures for addressing the issues noted above, the RPA and the Forum of ESRD Networks found that behavior of this nature is addressed both in the body of literature relevant to professional and ethical behavior in the practice of medicine, and, within the U.S., in state statute. Samples of the relevant literature and state statutes are described below.

Relevant Literature

In one contribution to the relevant literature, Bernard Lo in his book *Resolving Ethical Dilemmas: A Guide for Clinicians*, includes the following passages:

The Fiduciary Nature of the Doctor-Patient Relationship—Physicians have special responsibilities to act for the well-being of patients because patients are often impaired in significant ways by their illness. Furthermore, the stakes are high; poor decisions might place patients’ health or lives at risk.

Definition of a Fiduciary Relationship—Legally, relationships between professionals and clients are characterized as fiduciary. The term fiduciary is derived from the Latin word **fidere**, to trust. Fiduciaries hold something in trust for another. They must act in the best interests of their patients or client, subordinating their self-interest. Fiduciaries are held to higher standards than businesspeople, who use their knowledge and skill for their own self-interest, rather than for the benefit of their customers. Ordinary business relationships are characterized by the phrase caveat emptor, “let the buyer beware,” not by trust and reliance.ⁱ

The College of Physicians and Surgeons of Ontario in their “Principles of Practice” have offered an opinion on the fiduciary nature of medical practice as well, noting:

The doctor-patient relationship is the foundation of the practice of medicine. It reflects the values of compassion, service, altruism, and trustworthiness. Trustworthiness is the cornerstone of the doctor-patient relationship; without trust a good doctor-patient relationship cannot exist.

Physicians have a fiduciary duty to their patients—because the balance of knowledge and information favours the physician, patients are reliant on their physicians and may be vulnerable. The patient must always be confident that the physician has put the needs of the patient first. This principle should inform all aspects of the physician’s practice.ⁱⁱ

A pertinent paper titled “Ethics in Medicine” by the University of Washington School of Medicine addresses the difference between a profession and a business, noting that:

The line between a business and a profession is not entirely clear, since professionals may engage in business and make a living by it. However, one crucial difference distinguishes them: professionals have a fiduciary duty toward those they serve. This means that professionals have a particularly stringent duty to assure that their decisions and actions serve the welfare of their patients or clients, even at some cost to themselves. Professions have codes of ethics which specify the obligations arising from this fiduciary duty. Ethical problems often occur when there appears to be a conflict between these obligations or between fiduciary duties and personal goals.ⁱⁱⁱ

Examples of Relevant State Statutes

Every state in the U.S. has a medical practice act or similar promulgation that addresses physician professionalism, ethics, and conduct. These documents may be of more direct

importance to physicians as non-compliance with these regulations may result in disciplinary action affecting the individual physician's ability to practice medicine. Passages from two examples of the relevant regulations are included below, from Colorado and West Virginia. The Colorado document speaks in more general terms regarding physician professionalism and ethics, and, while brief, the West Virginia passage specifically addresses the issue of patient solicitation.

Colorado Medical Practice Act:

“Without regard to whether an act or failure to act is entirely determined by a physician, or is the result of a contractual or other relationship with a health care entity, the relationship between a physician and a patient must be based on trust and must be considered inviolable. Included among the elements of such a relationship of trust are:

- Open and honest communication between the physician and patient, including disclosure of all information necessary for the patient to be an informed participant in his or her care.
- Commitment of the physician to be an advocate for the patient and for what is best for the patient, without regard to the physician's personal interests.
- Provision by the physician of that care which is necessary and appropriate for the condition of the patient and neither more or less.
- Avoidance of any conflict of interest or inappropriate relationships outside of the therapeutic relationship.

The relationship between a physician and a patient is fundamental, and is not to be constrained or adversely affected by any considerations other than what is best for the patient. The existence of other considerations, including financial or contractual concerns is and must be secondary to the fundamental relationship.”

West Virginia Medical Practice Act:

“Soliciting patients yourself or by an agent is unprofessional conduct that can result in censure or loss of license.”

Summary

There is a preponderance of literature and state regulation addressing the issues of professionalism and ethics in medical practice, and while sub-issues surrounding nephrology practice are not specifically discussed, concerns regarding physician conflict of interest and solicitation of patients are addressed in detail. It may be appropriate in certain circumstances for nephrologists to recommend to an ESRD patient to change dialysis facilities if it is in the patient's best interest and can be accomplished with minimal disruption to the patient's therapy. However, in light of the literature and regulations discussed above, it is also evident that the practice of nephrologists (or

individuals under their direction) in issuing unsolicited notifications to dialysis patients not under their care to change the facility at which they receive their dialysis treatment constitutes unprofessional behavior on the part of the nephrologist or his/her representatives.

Principles of Professional Conduct

- 1. Notifications by nephrologists other than the treating nephrologists with the intent of soliciting a patient either to change physicians, change practices or change dialysis facilities constitute unethical behavior.**
- 2. If it is the patient's own nephrologist, the nephrologist could recommend transferring from one unit to another if the nephrologist believes it is in the patient's best interest, but the nephrologist must disclose if he/she has a financial interest in either unit and make this recommendation in a transparent and non-coercive manner.**
- 3. Similarly, in both the initial enrollment of a patient and if and when the patient is referred for vascular access services, the nephrologist must disclose if he/she has a financial interest in either the dialysis unit or the vascular access center, and should make this recommendation in a transparent and non-coercive manner.**
- 4. Nephrologists, their nursing staff, or other representatives must be as transparent as possible in their interactions with dialysis patients and their families and disclose potential conflicts of interest.**
- 5. Nephrologists must strive to be in compliance with their state's medical practice acts or other relevant state statutes. According to state law, nephrologists' conduct that is not in compliance with these state regulations should (or must if required by state law) be reported to the appropriate state licensing board.**

ⁱ Lo B. *Resolving Ethical Dilemmas: A Guide for Clinicians*. 4th ed. Philadelphia: Wolters Kluwer-Lippincott Williams & Wilkins, 2009, p. 32.

ⁱⁱ The College of Physicians and Surgeons of Ontario. *Principles of Practice and Duties of Physicians*. A. Individually to the Patient. Available at: <http://www.cpso.on.ca/policies/guide/default.aspx?id=1702&terms=Principles+of+Practice>. Accessed on: September 27, 2011.

ⁱⁱⁱ University of Washington School of Medicine. *Ethics in Medicine: Professionalism*. Available at: <http://depts.washington.edu/bioethx/topics/profes.html>. Accessed on: September 27, 2011.