Report on "Retainer" or "Boutique" or "Concierge" Medical Practices and the Business of Insurance

MIA-2008-12-002

January 2009

In late 2008, the Maryland Insurance Administration ("MIA") received information about so-called "boutique", "concierge" or "retainer" medical practices (hereinafter "retainer practice") in which the patient pays an annual fee to a physician for certain services. To ascertain if these arrangements constitute the business of insurance, the MIA held an informational hearing on December 19, 2008. The MIA requested individuals and organizations provide information on retainer medicine in the State of Maryland as noted in Attachment 1.

This report summarizes the information provided to the MIA at its hearing regarding the economic reasons for establishing a retainer practice, the potential impact of the growth of retainer practices on physician supply, and the types of retainer practices. It also provides information on the business of insurance and a framework for ascertaining when a retainer practice is engaged in the business of insurance.

It is important to note what this report does not cover. Much of the literature on retainer practices focuses on balance billing and medical ethics.[1] These issues were not addressed at the hearing, and the MIA did not explore these issues.

Primary Care Practice

Recently, the Governor's Task Force on Physician Reimbursement documented the payment and supply issues facing primary care. Current fee-for-service reimbursement, the predominant method of paying physicians in the United States, is among the reasons for the decline in the number of primary care providers.

Under fee-for-service reimbursement, physicians are paid more for providing procedures than evaluation and management services and a physician's compensation increases the more services provided. This payment system devalues primary care physicians. Primary care physicians' principal services are evaluation and management services provided through office visits. Primary care physicians can only provide more services by increasing the number of patients seen each day, thereby reducing the time spent with each patient.

The bias in the physician payment system that pays more for procedures than evaluation and management services is exacerbated in Maryland by the prevalence of small primary care practices that find it more difficult to negotiate more favorable payment from an increasingly small number of insurers, nonprofit health service plans and HMOs (collectively "carriers").

According to testimony received at the hearing, Maryland primary care physicians have 2,500 or more patients on their panel and see 20-25 patients a day, in 15 minute appointment intervals. This makes it difficult for primary care physicians to effectively treat patients with chronic, ongoing medical needs or to provide robust preventive services.

[1] For a summary of the ethical issues, see "Luxury Primary Care – Market Innovation or Threat to Access?" *The New England Journal of Medicine* Volume 346:1165-1168. For a summary of the balance billing issues see "Is Boutique Medicine a New Threat to American Health Care of a Logical Way of Revitalizing the Doctor-Patient Relationship?" *Journal of Law and Policy* Volume 17:313-340.

Low reimbursement and less favorable working conditions is contributing to a crisis in primary care as fewer physicians are attracted to this type of practice.

Retainer practice is a response to these economic conditions. At the hearing, some pointed out that retainer practices offer primary care physicians an economically viable way to practice delivering more personalized care to a smaller number of patients.

Physician Supply

The rise of retainer medicine poses some important potential implications for the primary care physician work force. Retainer practices promise a very limited number of patients per physician; therefore, a relatively small percentage of the population could occupy the service capacity of a far greater share of the primary care physician workforce. When the primary care work force is already under considerable strain, siphoning off capacity will place even greater strain on physicians that remain in the larger system.

Because the rise of retainer medicine may adversely affect the availability of primary care physicians to consumers enrolled in preferred provider organizations (PPO), some urged the MIA to closely monitor the adequacy of PPO networks.

Retainer practice

While retainer practices can be organized in a variety of ways, two models were discussed at the hearing. These were the Annual Evaluation Model and the Bundled Fee-for-Service (FFS) Model.

Under the Annual Evaluation Model, the patient pays a fee that covers a comprehensive annual physical examination including associated laboratory tests.

In the Bundled FFS Model, the retainer practice charges an annual fee to cover a specified bundle of services: an annual physical exam, a specified number of routine office visits and blood draws and enhanced physician access. Once the patient exceeds the bundled services, he or she pays a fee for each service.

There is no data on the number of retainer practices in Maryland. There is no requirement that physicians report to any regulatory body that they have established or participate in a retainer practice.

Annual Evaluation Model

Retainer practices associated with MDVIP, Inc. (MDVIP) and Concierge Choice Physicians LLC (Concierge Choice) are examples of the Annual Evaluation Model retainer practice. The MIA obtained information about these companies from the hearing and from their respective websites.

MDVIP is a national company with about 280 affiliated physicians. Of these, 26 are in Maryland. Patients in MDVIP affiliated practices pay a membership fee of $125 to $150 a month annualized at $1,500 to $1,800. MDVIP stated that in return for this fee, patients receive an annual physical equivalent to an executive physical program and a wellness plan based on the results of the annual physical. According to MDVIP, the annual fee is based on the market value of executive physical programs.

Each MDVIP affiliated practice is limited to 600 patients. One physician affiliated with MDVIP reports he now sees 8 to 12 patients each day, of which 2 to 3 are for the annual physical exam.

Concierge Choice is a national company. According to its website, there are about 78 physicians affiliated with Concierge Choice; one is located in Maryland.

Concierge Choice is a hybrid program. Physicians divide their practice between a traditional practice and a retainer practice. The retainer practice is limited to about 150 patients.

The annual fee covers a comprehensive annual preventative health examination, annual lifestyle counseling and preventive health assessment. The annual fee ranges from $1,600 to $1,800.

Bundled FFS Model

No physician with an established Bundled FFS Model retainer practice testified at the hearing. The MIA's inquiry was triggered by a medical practice which proposed to offer unlimited services and access in exchange for a fixed fee. This practice has abandoned this proposal.

An attorney testified that he advises physicians interested in establishing a Bundled FFS Model retainer practice to:

- Limit the number and type of services covered under the annual retainer fee;
- Specify the number and type of services covered under the annual retainer fee in a written agreement with the patient;
- Set the annual retainer fee based on the fair market value of the services specified in the written agreement;
- Personally perform the services specified in the written agreement;
- Not submit a claim to a third party for reimbursement of the services specified in the written agreement;
- Allow the patient and physician to terminate the agreement at any time;
- Provide for a refund of the retainer fee on a pro-rata basis if there is a termination of the written agreement;
- Establish a maximum patient panel that is based on the assumption the physician may provide all the services specified in the written agreement to each patient; and
- Avoid the substantial financial risk for the cost of services performed by other providers.

It seems reasonable to assume there are some physicians engaged in a Bundled FFS Model retainer practice; however, because there is no registration requirement we do not know if such practices exist and/or their prevalence.

Business of insurance

Section 1-101 (s) of the Insurance Article, *Annotated Code of Maryland*, defines insurance as "a contract to indemnify or to pay or provide a specified or determinable amount or benefit on the occurrence of a determinable contingency." Similarly, "insurer" is defined to include "each person engaged as indemnitor, surety, or contractor in the business of entering into insurance contracts." Md. Code Ann. Ins. Art. § 1-101 (v).

Health care providers may be engaged in insurance "by insuring the provision of health care benefits on the occurrence of certain determinable contingencies, for the payment of a premium in the form of a *capitation payment.*"[2] *See* 75 Opinion Attorney General 319, page 327, emphasis added

The primary indicators that a retainer practice may constitute the unauthorized business of insurance in Maryland include the following:

- Annual retainer fee covers unlimited office visits or a limited number of services that the physician cannot reasonably provide to each patient in his or her panel;
- No limitations on the number of patients accepted into the practice;
- Annual retainer fee does not represent the fair market value of the promised services;
- Physician has substantial financial risk for the cost of services rendered by other providers; or
- The retainer agreement is non-terminable during the contract year and/or does not provide for pro-rated refunds.

Retainer practices meeting the description of the Annual Evaluation Model do not appear to be engaged in the business of insurance. In this type of retainer practice, the physician agrees to contractually provide an annual physical exam. There is no determinable contingency and no capitation payment made by patients.

The status of retainer practices following the Bundled FFS Model regarding the business of insurance is more ambiguous. In its most extreme form, the Bundled FFS Model retainer practice provides an annual physical and unlimited office visits. Assuming the retainer practice serves 600 patients, it is not physically possible for a physician to provide an annual physical and unlimited office visits to each patient. Moreover, each patient does not need unlimited office visits. The annual fee would be difficult to derive except by assuming an average number of

[2] A capitation payment is usually a fixed amount of money per month paid to a health care provider for specified covered services. The total payment made is dependent on the number of patients who select the physician to be their doctor. Payment is fixed without regard to the volume of services that the patient requires. It is typically calculated based on the average cost for a defined population group.

visits and an average cost per visit, making the annual fee equivalent to a capitation payment. This type of arrangement, in the MIA's view, would constitute the business of insurance.

In a less extreme form, the Bundled FFS Model retainer practice provides an annual physical and a limited number of office visits that each patient is expected to use. The annual fee charged by the retainer practice is based on the market value of the defined services, the fee-for-service equivalent that the patient would pay for the specified services. If the specified number of office visits exceeds what an average patient is expected to use each year, then even this type of Bundled FFS Model retainer practice begins to take on the characteristics of the business of insurance, with the annual fee approaching a capitation fee.[3]

This statement of general principles, seeking to define the outer boundaries of what is insurance (payment of a fixed fee in return for a promise of unlimited access) from what is not (pure fee for service), is subject to an important qualification that "the devil is in the contract." That is, to make a practice-specific determination whether a practice is (or is not) engaged in the business of insurance (as well as in the business of medicine), the MIA would need to examine written agreement between the physician and his or her patients. In the interest of resolving issues before they become problems, the MIA would urge medical practices considering the establishment of retainer practices to approach the matter with care, to obtain appropriate professional advice and guidance, and to consult with the MIA in advance.

Conclusions

Given the current economic realities of primary care practice, retainer practice is likely to remain an attractive alternative to some primary care physicians. Physicians interested in establishing a retainer practice can take certain steps to avoid engaging in the business of insurance.

For the Annual Evaluation Model retainer practice, the annual fee should not exceed the market value of the services included in the annual physical exam. An annual fee in excess of the market value of the services included in the annual physical exam may approach a capitation payment, triggering a finding that the retainer practice is engaged in the business of insurance.

For the Bundled FFS Model retainer practice, the MIA recommends:

- Limiting the services provided in the year for an annual fee to an annual physical exam, a follow-up office visit and a limited number of other office visits;
- Establishing the annual fee by reviewing the market value of the annual physical exam and a follow-up office visit as well as each office visit, with the annual fee equal to sum of the market value for each specified service;
- Defining the services to be provided in a written agreement;
- Allowing a consumer or the physician to terminate the retainer agreement for any reason and provide for the pro rata reimbursement of the retainer fee if the written agreement is terminated; and

[3] The U.S. Preventive Services Task Force recommends an average of 37 minutes for children with primary care physicians per year and 40 minutes for adults. Assuming a 15 minute office visit, this is 2.5 to 2.6 visits per year, or approximately 3 office visits per year.

- Placing a cap on the number of patients based on the physician's ability to provide all the services specified in the written agreement to each patient on the panel.

The MIA reiterates that the "devil is in the contract." In the interest of resolving issues before they become problems, the MIA urges physicians and medical practices considering the establishment of retainer practices to approach the matter with care and to consult with the MIA in advance. And, for those currently engaged in retainer medicine, the MIA encourages these practices to contact the MIA to share their written agreements to be sure these retainer practices are not inadvertently engaging in the business of insurance.

There are other ethical and legal issues physicians should keep in mind when establishing a retainer practice. These include continuity of care for those patients electing not to participate in the retainer practice and balance billing. Although not a subject of our review, the MIA strongly encourages physicians who are interested in establishing a retainer practice and who currently contract with insurers and/or participate with Medicare to carefully review the statutory, regulatory and contractual prohibitions on balance billing. And, because of the ethical and legal issues surrounding retainer practices, the MIA believes physicians should seek appropriate professional and legal assistance when establishing a retainer practice.

It is not clear how many primary care physicians have established retainer practices. The growth of retainer practices may decrease the number of primary care physicians available to those who cannot afford to pay an annual fee. Because any significant growth in retainer practice raises substantial policy issues regarding access to primary care services, the General Assembly may wish to explore requiring retainer practices to register with a state agency. In addition, the General Assembly may wish to consider the broader (non-insurance) public policy implications of the establishment of retainer practices on health care delivery in Maryland.

BEFORE THE *

INSURANCE COMMISSIONER * **MIA-2008-12-002**
525 ST. PAUL PLACE
BALTIMORE, MARYLAND 21202 *

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NOTICE OF INFORMATIONAL HEARING
RE: "Retainer" or "Boutique" or "Concierge" Medical Practices

TO: All Interested Parties

Pursuant to § 2-210 of the Insurance Article, the Maryland Insurance Administration ("MIA") will hold an informational hearing on December 19, 2008, starting at 9:30 A.M., at the Maryland Insurance Administration, Fraud Conference Room, One Calvert Plaza, 201 E. Baltimore Street, Baltimore, Maryland 21202 to receive information regarding emerging models or structures of medical practices which may, depending upon the organization and structure of the practice, trigger obligations for the practice to operate as an authorized insurer. The MIA has received information regarding so-called "retainer" or "boutique" or "concierge" medical practices in which the patient pays an annual fee ($2,000, for example) in exchange for the practice's agreeing to provide medical services. The details of the agreements between patients and medical providers, including the range of services provided (everything from a limited set of services and a limited number of annual office visits to unlimited services and an unlimited number of annual office visits), vary considerably.

Attachment 1

Participants in this hearing are welcome to present information on any relevant aspect of this new trend in medical practice. Without limiting the scope of the hearing, issues on which the MIA requests information are as follows:

1. detailed factual descriptions of how these medical practices are organized, specifically including the contractual agreement(s) between the patient and the practice (specific identification of practices involved is not required);

2. information regarding the basis for setting the practice's annual patient fee, including evidence of the relationship between the amount of the fee, and the type and cost of the services which the practice is agreeing to provide;

3. information regarding the number and demographic characteristics of patients enrolled in the practice and whether enrollment is capped;

4. whether the annual fee is a "capitation fee" (a fixed per capita amount paid for each person served irrespective of the volume of services an individual patient uses), "case rate" (payment covers a combination of services for an episode of care), or another type of payment.;

5. whether the annual fee covers cost for services rendered by other providers such as laboratory tests or imaging; and

6. the relationship between the health risks of the patient population served, the annual fee charged and the financial viability of the practice.

Persons wishing to participate in this hearing who are unable to appear at the hearing may submit written testimony electronically to rtyler@mdinsurance.state.md.us

or by mail to Ralph S. Tyler, Maryland Insurance Administration, 525 St. Paul Place, Baltimore, MD 21202, by December 19, 2008. Persons who appear to testify at the hearing are asked, if possible, to provide at the time of their testimony 20 copies of their testimony or a summary of their testimony.

Notice issued this 1st day of December 2008.

Signature on file with original

Ralph S. Tyler
Insurance Commissioner