Disenrollment from Medicare: a Fourth Option?

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Medicare has always recognized two categories of physicians, "participating" and "non-participating," both of which are bound by Medicare rules, including the requirement for the physician to submit claims. Services by such physicians may be covered by Medicare. With the Balanced Budget Act of 1997 came the "opted-out" status, under which physicians are still subject to many Medicare rules, especially related to patient contracts and re-opting out requirements, and patients cannot receive reimbursement except in emergencies.

Now that physicians are being required to enroll or "revalidate" enrollment, there is increasing interest in the potential fourth option of nonenrollment or disenrollment, previously discussed in our summer 2010 issue.[1] Much of the material below was recently submitted to the House of Delegates of the California Medical Association, which has charged its legal department to analyze issues pertaining to disenrollment. The House passed a resolution submitted by the Solo Small Group Practice Forum, quoted below.

Under the U.S. Constitution, Congress has no express authority to compel physicians to enroll in a government program in order to serve their patients, or to regulate the practice of medicine. The nexus for imposing regulations has been the acceptance of government funding. AAPS has consistently advocated the policy of non-participation, for ethical reasons. As the outcomes predicted in 1966 by AAPS past president and current director Curtis W. Caine, M.D.,[2] are increasingly obvious, more physicians are interested in adopting this policy.

As Dr. Caine explains, "Non-participation is not a strike against patients. A strike is the withdrawal of services. Non-participating physicians will individually continue in the future, as they always have in the past, to expend every effort on behalf of all individuals who seek their services."[2] Likewise, Dr. Caine states, "Non-participation is not a strike against Medicare. Section 1802 specifically states that doctors may choose not to 'undertake to provide…services' under PL 89-97."[2]

Fearing punishment by Medicare for serving eligible patients outside the system, or at least a costly legal battle, physicians have been reluctant to disenroll and still offer care to Medicare beneficiaries. Additionally, patients who might otherwise choose to have a private consultation may be unwilling to pay cash for it if they cannot obtain Medicare coverage for testing or referrals ordered by their nonenrolled physician.

Resolution Passed by the CMA

In the interest of making physicians aware of the potential disenrollment option, and to clarify related issues, the California Medical Association passed resolution 202-11 on Oct 17, 2011:

> Resolved: That CMA provide an On-Call document that provides information to members about their options with respect to Medicare status, including options to "participate," "non-participate," opt-out and lawful options to be non-enrolled (i.e. never enrolled or voluntarily terminated).

Physician Status under Medicare

Three options for physicians are discussed in existing CMA materials:[3]

1. An enrolled participating physician bills Medicare for all services provided to Medicare beneficiaries, accepts assignment of patients' Medicare benefits, and agrees to accept amounts allowed by Medicare as payment in full for medically necessary, covered services as defined by Medicare.
2. An enrolled non-participating physician also bills Medicare for all services provided to Medicare beneficiaries, may choose to either accept assignment or not accept assignment of patients' Medicare benefits, and agrees to abide by all of Medicare's rules and regulations, including the fee schedule and medical necessity guidelines.
3. An enrolled physician who opts out voluntarily signs a two-year contract with Medicare agreeing that neither the physician nor his/her patients will receive any payment from Medicare for non-emergent services provided by the opted-out physician. [Extensive information on how to opt out, and links to carrier websites with lists of opted-out physicians, are available on the AAPS website, www.aapsonline.org.[4] Note that physicians who newly enroll, even just in order to opt out, must obtain an NPI.]

The opt-out requirement for physicians in order to enter voluntary contracts with Medicare beneficiaries (Sec. 1802. [42 U.S.C. 1395a] was challenged as violating several Amendments to the U.S. Constitution, as well as the Spending Clause of Article I, section 8, but the case was dismissed.[5] The dismissal hinged on the fact that the plaintiff physicians voluntarily enrolled in Medicare in order to become eligible to receive payments from the federal government and in return agreed to federal regulations that apply to all physicians enrolled in the Medicare program.

The potential fourth option is nonenrollment. A physician who chooses not to enroll is not entitled to bill Medicare at all. Such physicians bill patients directly and determine their own fees. Patients may seek reimbursement from Medicare. The following constitute the basis for this option in law:[6]

> Sec. 1802. [42 U.S.C. 1395a] FREE CHOICE BY PATIENT.
> (a) Any individual entitled to insurance benefits under this subchapter may obtain health services from any

institution, agency, or person qualified to participate under this subchapter if such institution, agency, or person undertakes to provide him such services.

Sec. 1866. [42 U.S.C. 1395cc] (a)(1): AGREEMENTS WITH PROVIDERS OF SERVICES; ENROLLMENT PROCESSES (1) Any provider of services (except a fund designated for purposes of section 1395f (g) and section 1395n (e) of this title) shall be qualified to participate under this subchapter (Medicare) and shall be eligible for payments under this subchapter *if it files with the Secretary an agreement*… [emphasis added].

In *Garelick v. Sullivan* the U.S. Court of Appeals for the Second Circuit[7] addressed the payment options of anesthesiologists who claimed they were compelled to treat Medicare beneficiaries and who submitted bills to Medicare as non-participating physicians. The Court rejected a constitutional challenge to the limiting charge provision, holding that there was no "taking" prohibited by the Fifth Amendment of the United States Constitution. In reaching its holding, the court reasoned that physicians are *under no legal duty to provide services to the elderly and to submit to price regulations*. This holding did not address the circumstance in which a physician does not enroll in Medicare, does not thereby agree to submit to price regulations, and does not bill Medicare. This holding also does not address the circumstance in which a beneficiary pays a physician and seeks reimbursement from Medicare after refusing to permit the physician to bill Medicare.

Frequently Asked Questions

In background information submitted to the CMA House of Delegates, physicians posed some of the following questions, with suggested answers. The complete draft is posted on our website, including a redacted copy of an Explanation of Benefits (EOB) received by the patient of a nonenrolled physician who had filed a form 1490S (see #8 below).[8] Some of this information is also posted by America's Medical Society at http://americasmedicalsociety.com, along with additional material. The following is a compendium, partly from materials submitted to the CMA, of points I believe to be correct and most relevant, with referenced addenda from official sources.

1. Why do many physicians choose to enroll in Medicare?

Many physicians enroll in Medicare because they want to bill Medicare directly for services. For instance, some physicians who provide emergent care have difficulty collecting payments from their patients. Additionally, many physicians have contracts with entities such as some hospital medical staffs and Medicare Advantage that require Medicare enrollment.

Medicare enrollment is a process whereby physicians qualify to submit claims for payment to Medicare for both assigned and unassigned claims. In return for the *privilege* to *bill* Medicare and to *receive payment* from Medicare, an enrolled physician agrees to accept Medicare's fee schedule (allowed amount) as payment in full. The basic requirements for enrollment, which *permits physicians to submit claims* for payment to Medicare, are described at 42 C.F.R. §424.505. For the physician to receive payment from Medicare (on an assigned claim) for covered items or services, or for a beneficiary to receive payment from Medicare (on an unassigned claim), a provider or supplier must be enrolled in the Medicare program. Once enrolled, the provider or supplier receives *billing privileges* and is issued a valid billing number.

The purpose of enrollment is to prevent fraud. See the attestation on form CMS-855i ("Medicare Enrollment Application for Physicians and Non-Physician Practitioners"), Section 15, number 9, which clarifies the purpose of Medicare enrollment: "I further certify that I am the individual practitioner *who is applying for Medicare billing privileges*" [emphasis added].

2. Is Medicare enrollment the same as applying for an NPI?

No. To obtain an NPI, physicians may apply online at https://NPPES.cms.hhs.gov. For more information about NPI enumeration, visit www.cms.hhs.gov/NationalProvIdentStand. Also see CMA ON-CALL document #1608, "National Provider Identification Numbers," which is available online to CMA members only.

3. Do physicians who choose not to enroll in Medicare need to apply for an NPI?

The proposal submitted to the CMA simply says "no."

An NPI is required for submitting Medicare claims. Physicians who do not submit Medicare claims, however, may choose to obtain an NPI for other reasons, for example, facilities' refusal to perform services referred by a physician who does not provide an NPI.

4. Do the Social Security Act Amendments of 1994 apply to physicians who choose not to enroll in Medicare?

No. The Social Security Act[9] refers to a nonparticipating physician who is enrolled in Medicare, not to an individual physician who is not enrolled:

(g) Limitation on Beneficiary Liability. (1) Limitation on actual charges. (A) In general.—In the case of a nonparticipating physician or nonparticipating supplier or other person (as defined in section 1842(i)(2)) who does not accept payment on an assignment-related basis for a physician's service furnished with respect to an individual enrolled under this part, the following rules apply: (i) Application of limiting charge.—No person may bill or collect an actual charge for the service in excess of the limiting charge described in paragraph (2) for such service. (ii) No liability for excess charges.—No person is liable for payment of any amounts billed for the service in excess of such limiting charge.

As some physicians have pointed out,[6] ambiguity arises because of Medicare's use of the term "nonparticipating."[9]

(2) The term "participating physician" refers, with respect to the furnishing of services, to a physician who at the time of furnishing the services is a participating physician (under subsection (h)(1)); the term "nonparticipating physician" refers, with respect to the furnishing of services, to a physician who at the time of furnishing the services is not a participating physician; and the term "nonparticipating supplier or other person" means a supplier or other person (excluding a provider of

services) that is not a participating physician or supplier (as defined in subsection (h)(1)).

(h)(1) Any physician or supplier may voluntarily enter into an agreement with the Secretary to become a participating physician or supplier. For purposes of this section, the term "participating physician or supplier" means a physician or supplier (excluding any provider of services) who, before the beginning of any year beginning with 1984, enters into an agreement with the Secretary which provides that such physician or supplier will accept payment under this part on an assignment-related basis for all items and services furnished to individuals enrolled under this part during such year. In the case of a newly licensed physician or a physician who begins a practice in a new area, or in the case of a new supplier who begins a new business, or in such similar cases as the Secretary may specify, such physician or supplier may enter into such an agreement after the beginning of a year, for items and services furnished during the remainder of the year.

The key point is that ***before the issue of participating or non-participating is reached, a physician must have already voluntarily enrolled***.

Sec. 1842. [42 U.S.C. 1395u] (h)(1) defines a "participating" physician as one who agrees to accept payment from Medicare on an assignment-related basis for all items and services. Although Sec. 1842 is silent on the prerequisite enrollment requirement, Sec. 1866 (vide supra) makes it clear that only a physician who chooses to file an agreement with the Secretary is qualified to participate in Medicare and is eligible for payments from Medicare.[6]

5. Why do some physicians choose not to enroll in Medicare?

Some physicians, for instance pediatricians, are unlikely to provide medical care to Medicare beneficiaries.

Some physicians want to maximize their patients' Medicare Part B benefits. Medicare beneficiaries forfeit their Part B benefits if their physician opts out of Medicare, so many physicians who contract privately with their patients desire a different relationship with Medicare than enrolling and then opting out.

Some physicians want to give patients the extra time and attention they need through home visits and other special services.

Some physicians want to protect their patients' privacy. For instance, many psychiatrists consider production of medical records for third-party review an unethical breach of patient confidentiality. Since Medicare reserves the right to review medical records of physicians enrolled in the system, some physicians choose not to enroll in Medicare.

Some physicians believe Medicare's bureaucratic hassles are too time-consuming. Some physicians believe that the federal government does not have the authority to conscript every single physician into a centrally planned health system and punish those physicians who refuse by taking away their patients' Medicare benefits.

Some physicians cannot enroll in Medicare in a timely manner. In order to provide medical care during a protracted enrollment process, some physicians bill their patients and then assist these patients to seek reimbursement directly from Medicare.

Some physicians are employed by the Department of Veterans Affairs, Public Health Service, Department of Defense, or by Medicare-enrolled Federally Qualified Health Centers, Rural Health Clinics, or Critical Access Hospitals so they do not need to enroll in Medicare.

Physicians who are in a fellowship program do not need to enroll in Medicare.

A physician who has disenrolled may be able to enroll and accept employment more quickly than one who has opted out for two years and wishes to change his status.

6. Can a physician who chooses not to enroll in Medicare submit any bills to Medicare for any services?

No.

7. May a physician who chooses not to enroll in Medicare provide medical care to a Medicare beneficiary and collect his or her usual, reasonable, and customary fee?

A physician who chooses not to enroll in Medicare does not have any contractual obligation to Medicare that requires the physician to adhere to regulations such as Medicare's limiting charge requirements. There is, however, some ambiguity about whether a physician becomes subject to the mandatory claims filing requirement and price controls simply by serving a patient who is enrolled in Medicare (see question #16).

8. Will Medicare reimburse a beneficiary who pays for covered medical services provided by a physician who chooses not to enroll in Medicare?

According to the proposal submitted to the CMA, the answer is "yes," qualified by the following:

> If a beneficiary receives services from a provider or supplier that refuses to submit a claim to the A/B MAC or carrier, on the beneficiary's behalf, (for services that would otherwise be payable by Medicare), and/or refuses to enroll in the Medicare program, the beneficiary should: (1) Notify the contractor in writing that the provider or supplier refused to submit a claim to Medicare and/or refused to enroll in Medicare, and (2) Submit a complete Form CMS-1490S with all supporting documentation. The contractor shall process and pay the beneficiary's claim if it is for a service that would be payable by Medicare were it not for the provider or supplier's refusal or inability to submit the claim and/or enroll in Medicare. Claims shall be adjudicated based on whether the service provided is covered or non-covered/excluded rather than on the provider's enrollment status. If for a covered service, the claim shall be processed and the allowed amount reimbursed to the beneficiary, if appropriate. If for a non-covered/excluded service, the claim shall be processed and denied with an appropriate MSN [Medicare Summary Notice] message.[10]

The patient must complete form CMS-1490S, which may be downloaded from https://www.cms.gov/cmsforms/downloads/cms1490S-english.pdf; write on form CMS-1490S, "My physician is

not enrolled in Medicare"; and send the completed form to the local Medicare intermediary.[11] When form CMS1490S is used, an itemized bill must be submitted with the claim. Inasmuch as form CMS-1490S has no provision for an ICD-9 [or ICD-10] code, the ICD-9 code is not required at the time of claim submission (Section 70.8.4, Medicare Claims Processing Manual.[10] Further, there is no provision for use of CPT codes.

The itemized bill is supposed to contain the provider's NPI. If it does not, the contractor is supposed to look it up in the NPI Registry. "If the contractor determines that the provider or supplier was not a Medicare enrolled provider with a valid NPI, the contractor shall follow previously established procedures in order to process and adjudicate the claim."[10]

The form CMS-1490 was the original Part B claims form, which was replaced by form CMS-1500, sometimes called the AMA form, to be filed by physicians and suppliers.[10]

Medicare will typically forward a CMS 1490S claim to the beneficiary's supplemental insurer. If Medicare does not forward a claim, the beneficiary may complete form CMS-1500 and send it to the supplemental insurer, which may also reimburse the beneficiary.

9. How much will Medicare reimburse a beneficiary for services performed by a physician who chooses not to enroll in Medicare?

Medicare contractors typically pay Medicare's allowable amount if the claim is for a service that would be payable by Medicare were it submitted by a physician enrolled in Medicare.[10]

Some Medicare explanations of benefits (EOBs) state that a physician who chooses not to enroll in Medicare is prohibited from billing the beneficiary more than the allowed amount. We are not aware of any legal documentation to support this assertion.

According to the Medicare Claims Processing Manual, section 70.8.8.8, [Claims Submission] Violations That Are Not Developed for Referral, implemented Jan 31, 2005, "Claim submission violations are not being developed on beneficiary-submitted Form CMS-1490S claims…in the following situations… [including] cases in which a physician does not possess information essential for filing a MSP [Medicare Secondary Payer] claim."[10]

10. Must a young physician or immigrant physician entering private practice enroll in Medicare?

No. A physician who does not want to enroll in Medicare, i.e. does not want to bill Medicare for services provided to Medicare beneficiaries (either as assigned or unassigned claims for payment), does not have to complete form CMS-855i ("Medicare Enrollment Application for Physicians and Non-Physician Practitioners").

11. Is a physician who is currently enrolled in Medicare required to re-enroll?

No. A physician who decides not to submit any more bills to Medicare does not need to re-enroll. New Medicare rules will require every physician who wishes to continue to submit bills to Medicare (both assigned and unassigned claims) to re-enroll periodically.

If a physician does not re-enroll, Medicare will revoke his/her billing privileges. Although Medicare may reimburse its beneficiaries for services provided by a physician whose billing privileges have been revoked, it might be preferable for a physician to resign by completing the relevant sections of CMS-855i. Medicare does not reimburse its beneficiaries for medical care provided by a physician who has been sanctioned or excluded from Medicare for reasons such as fraud.[6]

12. May a physician who is currently enrolled in Medicare as a participating provider or a nonparticipating provider choose to unenroll?

Yes. Complete the following sections of form CMS-855i: Section 1A (basic information); Section 13 (contact person); Section 15 (certification statement). In Section 1, under "REASON FOR APPLICATION," check the box that states, "You are voluntarily terminating your Medicare enrollment."

13. Can a physician who is not enrolled in Medicare refer Medicare beneficiaries for other services such as laboratory tests?

Yes. However, the facility to which the patient is referred might refuse to perform the tests or procedures because it expects that Medicare will not pay and it fears Medicare sanctions if, as enrolled provider, it accepts cash payment from a Medicare Part B-enrolled beneficiary.

14. Will Medicare pay for services ordered by a physician who chooses not to enroll in Medicare?

The proposal submitted to the CMA lists two ways that a performing facility such as a laboratory, physical therapist, or radiology facility might get paid for services ordered by a physician who chooses not to enroll in Medicare.

Section 6405 of the Patient Protection and Affordable Care Act states that physicians who order items or services under Medicare are required to be Medicare enrolled. However, there is a special form, CMS-855O for physicians who wish to enroll in the Medicare program for the sole purpose of ordering or referring items or services for Medicare beneficiaries.[12] The physician *must* include a cover letter with the application stating that enrollment is for the sole purpose of ordering items or services for Medicare beneficiaries. Note that an NPI is required for enrollment.

CMS provides additional information on this limited enrollment.[13,14,15]

Alternatively, a physician who chooses not to enroll in Medicare may suggest that the patient select Option Two on an Advance Beneficiary Notice (ABN),[16] asking the facility performing a service not to bill Medicare but instead to bill the patient personally. The Medicare beneficiary may then seek reimbursement directly from Medicare by submitting form CMS-1490S with a letter explaining that the service was ordered by a physician who chooses not to enroll in Medicare.[6]

One physician suggests: "A physician who is not enrolled in Medicare may wish to give form CMS-1490S along with an explanatory letter to a patient who is referred for services. The

referring physician might complete the form for the patient to approve and sign and provide an addressed envelope for the convenience of both the patient and the facility performing the requested study."[6]

15. Where can physicians and their patients find complete information explaining reimbursement for services provided or ordered by a physician who chooses not to enroll in Medicare?

CMA has been asked to work with Medicare to develop such information. Since Medicare does not have any contract with—and does not regulate—physicians who choose not to enroll in Medicare, it is not necessary for Medicare to develop policies regarding unenrolled physicians. However, CMA has identified an opportunity to assist Medicare beneficiaries who receive care from physicians who are not enrolled in Medicare to receive the full benefits of the Medicare safety net.

16. Will Medicare punish a disenrolled physician if his patients file claims?

After the CMA meeting, we learned that at least one physician has received a letter from Palmetto, the Medicare carrier for California, stating:

> Palmetto GBA monitors compliance with the mandatory claims filing requirements. Failure to follow this requirement may result in sanctions being imposed, as outlined in section 1848(g)(4) of the Act….[9] To meet the mandatory claim submission requirement, you must enroll as a Medicare provider.

This physician has not filed a Medicare claim for 18 years, and billing privileges are deactivated, under §424.540, if no claims are submitted for 12 consecutive months.[17] Most of the services provided by this physician are categorically not covered, but the evaluation might be. The situation came to attention because a patient filed a claim and complained to Medicare. Because of the high prevalence of an entitlement mentality in patients, who may be very offended if a physician chooses not to be a Medicare provider, some physicians implement might what might be called Option 4(a) or Option 4(b). That is, (a) they may disenroll from Medicare and decline to serve any Medicare-eligible beneficiaries, or (b) they may disenroll and obtain an Advance Beneficiary Notice with Option 2 selected from all possibly Medicare-eligible patients (vide infra).

Many things have changed since the mandatory claims filing requirement passed circa 1990, and because of the sheer number of enrollment rules, procedures of CMS contractors may not be consistent with each other, or with CMS.[18]

When Medicare was enacted in 1965, "there was a concern among policymakers that buy-in among the medical community was needed, and that placing significant conditions on enrollment would put the viability of the Program in jeopardy," note attorneys Dresevic and Romano. "As a result, until fairly recently, there were very few barriers to enrolling in Medicare as a provider or supplier."[18] But since 1996, CMS has required all new providers and suppliers to enroll by submitting a form 855, and the Medicare Modernization Act of 2003 added section 1866(g), which required the Secretary of HHS to establish an enrollment process for *all* providers and suppliers in order to obtain and maintain "billing privileges." Since 2006, CMS has required an NPI on form 855.[18]

The Patient Protection and Affordable Care Act adds still more restrictions on enrollment, even the prospect of "temporary" moratoria, and more requirements, including a mandatory compliance plan, which could increase providers' cost significantly.[18]

Several observations may be made:

- Medicare is now restricting the number of providers, which could lead to serious access problems if beneficiaries are not allowed to purchase services outside the system. There are no explicit provisions in the law to forbid them to do so.
- Billing Medicare is a "privilege," and a privilege cannot logically be a requirement.
- Not all physicians are providers; only enrolled physicians can be. There is no express law requiring physicians to enroll in Medicare, or to punish them for not doing so.
- It is a contradiction in terms to require the same thing that is forbidden (filing a claim if not enrolled).

17. What are the advantages and disadvantages of opting out compared with disenrolling?

There is explicit provision in the law for opting out, and opted-out physicians are able to refer and order tests that are covered by Medicare. Carriers provide lists of opted-out physicians, which make it convenient for patients who desire an opted-out physician to find one. There are, however, administrative hassles, such as the need to renew opt-out every two years, the need to have Medicare-compliant contracts on every patient, and the need to enroll if not already in the system. The physician is committed to a full two years.

The status of disenrollment is ambiguous, and Medicare and intermediaries appear to be opposed to the concept. Government agencies and contractors, even if acting ultra vires, can cause significant, costly problems for physicians. Patients theoretically can receive their benefits, and there are reports that some patients have been paid, but most patients are not well equipped to struggle with a bureaucracy, and the value of this benefit remains to be seen. There is likely to be opposition to the concept because of powerful special interests that profit from code sets and compliance materials, which would not be needed by disenrolled physicians. It appears that both disenrollment and re-enrollment can be accomplished more quickly than opting out of Medicare.

Patient Enrollment in Medicare

Social Security beneficiaries are automatically enrolled in Medicare Part A, and under current policy cannot disenroll without forfeiting Social Security benefits, and returning all that have previously been paid.[1] Social Security beneficiaries may, however, decline to enroll in Part B, and some do. Physicians who treat them are not bound by Medicare rules (William J. Mangold,

Jr., M.D., Noridian contractor medical director, oral communication, 2011), and of course no claims can be filed by them or for them. As more physicians decline to accept Medicare patients, more patients may elect to disenroll from Part B and Medicare supplementary policies, save the funds they would have spent on premiums, and pay directly for care as needed. It is, however, costly to re-enroll, and there is at present no market for private substitute coverage. It is difficult to compete with the 75 percent taxpayer subsidy for Part B premiums.

The fact that a person has insurance does not mean that he is obligated to file a claim for every loss. Before legislation was passed circa 1990 that required physicians to file claims, many physicians had patients file their own. Patients did not file all potential claims, for a variety of reasons. They may not have met the deductible; they felt that the reimbursement was not worth the effort; or perhaps they simply wanted to preserve their privacy.

The question of whether patients could opt out on a case-by-case basis by simply not having a claim filed was raised in 1992 in the case of *Stewart v Sullivan*, which was dismissed for lack of ripeness.[1] As noted above, the current Advance Beneficiary Notice of Noncoverage offers Option 2: "I want the [service] listed above, but do not bill Medicare. You may ask to be paid now as I am responsible for payment. **I cannot appeal if Medicare is not billed**" [emphasis in original]. Use of this option by patients of enrolled physicians would have to be clearly a patient initiative, lest the physician be accused of applying coercion or engaging in disparate treatment of patients based on whether they used their Medicare benefits.

Conclusion

Most physicians are currently enrolled in the Medicare program, but more and more are finding it necessary to restrict services to Medicare beneficiaries to remain financially viable. Some have opted out in order to be able to serve patients better outside the constraints of Medicare, but this does deprive patients of Medicare reimbursement to which they might otherwise be entitled. The option of disenrolling could preserve the patient's ability to seek Medicare reimbursement for the services of nonenrolled physicians, while introducing potential but probably surmountable problems of access to items or services ordered by a nonenrolled physician.

Rights that are not exercised are likely to be soon lost. If physicians and patients await unambiguous declarations of their rights from either a court or the Medicare bureaucracy or intermediaries, their right to practice or to receive private medicine may never be established.

We have been unable to find any express statutory prohibition on providing services to Medicare-eligible patients outside the Medicare system, and receiving direct compensation from patients, nor do we see any constitutional authority for such a prohibition. We find no express statutory authority at present to deny Medicare benefits to patients who choose a nonenrolled physician, and indeed there is a process by which they can claim such benefits. Some patients have reportedly been paid, although no consistent policy has been articulated by CMS or intermediaries. Physicians who receive explanation-of-benefits forms or relevant correspondence from patients are invited to send redacted copies to AAPS so we may monitor trends, and consider legal action. We are seeking clarification from the Department of HHS.[19]

We applaud CMA members for helping to elucidate the potential fourth option, and urge California physicians to contact the CMA and encourage it to pursue this. For more information about CMA's Solo Small Group Practice Forum, write to contact@ssgpf.com. We also hope that physicians will encourage other state medical societies to address this issue.

Physicians of course should always consult their own attorney for legal advice.

REFERENCES

1 Orient JM. Is Medicare voluntary? *J Am Phys Surg* 2010;15:47-50.
2 Caine CW. Letter to Mississippi physicians, May 1, 1966. Available at: http://www.aapsonline.org/caine-letter1966.pdf. Accessed Nov 3, 2011.
3 CMA. ON-CALL Document #0151; January 2011.
4 AAPS. How to Opt Out of Medicare. Available at: http://www.aapsonline.org/index.php/article/how_to_opt_out_of_medicare/. Accessed Nov 8, 2011.
5 *United Seniors Association v. Shalala* (DC Cir. 1999) 182F.3d 965. Available at: http://law.justia.com/cases/federal/appellate-courts/F3/182/965/627467/. Accessed Nov 3, 2011.
6 Dorin A. Honoring the 13th Amendment: physician rights, Medicare, and you. America's Medical Society, Oct 23, 2011.
7 *Garelick v. Sullivan* (2d Cir. 1993) 987 F.2d 913.
8 Proposal: A Physician May Choose Not to Enroll in Medicare. Available at: www.aapsonline.org/cma-draft-4th-option.pdf. Accessed Nov 8, 2011.
9 Social Security Online. Compilation of the Social Security Laws. Provisions Related to the Administration of Part B. Available at: http://www.ssa.gov/OP_Home/ssact/title18/1848.htm. Accessed Nov 4, 2011.
10 Chapter 1. General billing requirements. Medicare Claims Processing Manual, revised Sep 2, 2011. Available at: www.cms.gov/manuals/downloads/clm104c01.pdf. Accessed Nov 4, 2011.
11 Medicare.gov. How to file a claim. Available at: www.medicare.gov/navigation/medicarebasics/understanding-claims/how-to-file-a-claim.aspx. Accessed Nov 4, 2011.
12 Medicare Enrollment Application for Eligible Ordering or Referring Physicians or Non-Physician Practitioners. Available at: www.cms.gov/cmsforms/downloads/cms855o.pdf. Accessed Nov 4, 2011.
13 CMS. Eligible physicians and non-physician practitioners who need to enroll in the Medicare program for the sole purpose of ordering and referring items and services for Medicare beneficiaries. *MLN Matters* MM 7097, revised Sep 6, 2011. Available at: http://www.cms.gov/MLNMattersArticles/downloads/MM7097.pdf. Accessed Nov 4, 2011.
14 Medicare Enrollment Guidance for Physicians that Infrequently Receive Reimbursement from the Medicare Program. Available at: https://www.cms.gov/MedicareProviderSupEnroll/Downloads/SpecialEnrollmentFactsheetInfrequentPhysicianReimbursement.pdf. Accessed Nov 4, 2011.
15 CMS. Chapter 15. Medicare enrollment. Medicare Program Integrity Manual. Available at: www.cms.gov/manuals/downloads/pim83c15.pdf. Accessed Nov 4, 2011.
16 Advance Beneficiary Notice. Available at:www.advancebeneficiarynotice.net/downloads/Form%20CMS-R131.pdf. Accessed Nov 4, 2011.
17 CMS. §424.540 Deactivation of Medicare Billing Privileges. Available at: http://edocket.access.gpo.gov/cfr_2010/octqtr/pdf/42cfr424.540.pdf. Accessed Nov 9, 2011.
18 Dresevic A, Romano DH. The Medicare enrollment process—CMS's most potent program integrity tool. *Health Lawyer* 2011;23:1-27. Available at: www.thehealthlawpartners.com. Accessed Nov 9, 2011.
19 AAPS. Letter to Hon. Kathleen Sebelius and Hon. Eric Holder, Nov 10, 2011. Available at: www.aapsonline.org/aaps-sebelius-11-10-2011.pdf.