

Is there a legal and ethical duty on doctors to inform patients of the likely co-payment costs should they be treated by practitioners who have contracted out of medical scheme rates?

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A hypothetical scenario is presented in which a female patient is admitted to a private hospital to undergo a mastectomy and breast reconstruction. The surgeons and anaesthetists conducting the different procedures charge three times the medical aid rates. When the patient asks what the co-payments are likely to be, she is informed by the doctors' accounts section that they can only provide this information after each procedure. The patient's medical scheme also advises her that it cannot determine the likely co-payments unless she completes the assessment form sent to her. The form requires her to include the costs reflected against the relevant ICD10 codes. The patient cannot complete the form because the doctors' accounts sections have not informed her about the proposed procedures and the likely costs of each. This article builds on a previous article discussing doctors' overarching responsibility to disclose medical treatment costs in advance. The present article outlines the legal requirements in the South African Constitution, the National Health Act and the Health Professions Act, and refers to the Promotion of Access to Information Act and Consumer Protection Act. Similar to the earlier article, this article addresses the ethical requirements of the Health Professions Council of South Africa and the internationally recognised biomedical ethical principles. Furthermore, it also refers to the National Patients Charter, the government's policy document on health care services.

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Is there an obligation at common law for a contract to contain all material terms? [See common law below]

Consider the following hypothetical situation:

A female patient is admitted to a private hospital to undergo a mastectomy and breast reconstruction. The hospital informs her that the medical scheme will cover the admission – excluding a co-payment because the hospital is not on its approved list. It informs her of the amount of the hospital co-payment. The surgeons and anaesthetists conducting the different procedures charge three times the medical aid rates. When the patient asks what the likely co-payments will be, she is informed by the doctors' accounts section that they can only determine that after the procedures have been completed. The patient's medical scheme sends the patient an assessment form to complete and informs her that it cannot tell her the co-payments unless she completes the assessment form. The form requires her to fill in the costs of various ICD10 codes listed, which is impossible because the doctors' accounts section did not provide the cost of each procedure. Further, she also does not know what the ICD 10 codes stand for.

The above scenario raises the question of whether there is a legal and ethical duty on doctors who have contracted out of medical scheme rates, to inform patients - before treating them - of the likely co-payment costs of the various procedures they might

need to perform on their patients. This article builds on an earlier article^[1] that dealt with the general duty of doctors to disclose the costs of medical treatment in advance, and again refers to the legal requirements in the South African Constitution,^[2] the National Health Act^[3] and the Health Professions Act (HPA).^[4] In addition, this article refers to the Promotion of Access to Information Act^[5] and the Consumer Protection Act (CPA).^[6] As in the earlier article, the ethical requirements in the Health Professions Council of South Africa ethical rules^[7] and the universally accepted biomedical ethical principles^[8] are also discussed. This is because, although not legally binding, these guidelines give an indication of how a reasonable practitioner ought to behave regarding the advance disclosure of medical expenses. Likewise, the National Patients Charter^[9] outlines expectations of the medical profession, but it is not legally binding.

The South African Constitution

As mentioned in the previous article,^[1] the South African Constitution^[2] has three clauses that are relevant to a discussion of whether there is a legal duty on doctors to disclose the likely costs of the various procedures they may need to perform on their patients. The Constitution states that everyone has the right of access to healthcare services (section 27(3)), and in the case of children, the right to basic healthcare (s 28(1)), and everyone has the right of access to information (s 32(1)). Furthermore, everyone has an automatic

right of access to any information that is held by the State, and in the case of information held by a body other than the State (e.g. a private medical scheme), the person seeking the access has to show that the information is required for the exercise or protection of any of their rights (s 32(1)(b)).

It is trite that, while these provisions apply to the advance disclosure to patients of the likely cost of medical expenses, they equally apply to co-payments with respect to state health or medical aid schemes.^[1] This is because, as mentioned in the previous article, the ability of patients to exercise their constitutional right of access to healthcare may depend on their access to medical care either through a state facility or via a private medical scheme.^[1] In the hypothetical scenario wherein private doctors have contracted out of medical scheme rates, they need to inform the patient prior to the consultation because the patient's right of access to health care and choice of treatment or procedure may be contingent upon their financial capacity to make any required co-payments.

The Promotion of Access to Information Act

The objects of the Promotion of Access to Information Act^[5] (Access to Information Act), include enforcing the constitutional^[2] provisions on access to information. It reiterates that everyone has the right of access to any information held by the State. Additionally, in the case of information held by a person other than the state, such access must be 'for the exercise or protection of any of their rights' (s 9(a)(ii)). Another object is 'to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably as possible' (s 9(d)).

Thus, patients that belong to a State medical scheme have an automatic right of access to information, which would include the cost of any co-payments they have to make for treatment or surgery. Patients that belong to a private medical scheme would have to show that they are exercising or protecting their right of access to healthcare by ensuring that they can afford any co-payments required for a particular treatment or surgical programme. In either case, before medical records are released, the doctor handling the case may be consulted first to ensure that the release of the patient's records will not harm the patient's 'physical or mental health or well-being' (s 30(1)).

In the hypothetical scenario, the patient would have no difficulty in establishing that she was exercising her right of access to information concerning the co-payments she would have to make. The consulting doctors and medical scheme would also not be able to argue that disclosure of the information will 'harm her physical or mental well-being'. On the contrary, the disclosure of such information is likely to allay any fears that the patient may have about how much she will be required to pay as a co-payment, or whether she should approach the public sector if she cannot afford such payments.

The National Health Act

As mentioned in the previous article,^[1] the National Health Act^[3] was introduced, among other things, to implement the provisions of the Constitution regarding access to health care within available resources (s 2(c)), and in the case of children their right to basic health care (s 28(1)). The National Health Act requires a health care provider to inform 'users' (patients and persons acting on their behalf), not only about

'the range of diagnostic procedures and treatment options generally available' but also about 'the benefits, risks, costs and consequences associated with each option' (s 6(1)(b) and (c)). In addition, healthcare providers 'must inform patients of their right to refuse health services and the implications, risks, obligations of such refusal' (s 6(1)(d)).

Thus, in the hypothetical scenario, in terms of the National Health Act,^[3] the medical scheme and doctors have to inform the patient of the treatment or surgical procedure options available to the patient in a treatment plan, the cost of each treatment or procedure (s 6(1)), or part thereof, and the likely co-payment costs for each.

The Health Professions Act

The previous article^[1] mentions that the HPA^[4] establishes the Health Professions Council of South Africa (HPCSA) (s 2), and provides that unless it is impossible, practitioners must inform their patients (or the person responsible for them) of the fee to be charged before providing professional services (s 53(1)). This is qualified by stating that information about fees must be given when requested by the person concerned. That article^[1] further points out that when the practitioner's fee exceeds that usually charged, the HPA requires the doctor to 'inform the patient – without the person having to request it – of the usual fee'. The 'usual fee' is not defined in the HPA, but the earlier article^[1] suggests that it means 'the fees used by a professional board as the norm' as set out in the HPA (s 53(3)(d)).

Therefore, when the fees charged exceed those usually charged, such as in the hypothetical scenario where the fees were three times the medical scheme rates, the doctor should disclose the usual fee to the patient without the patient having to request the information. It submitted that it should not be impossible for a medical scheme administrator or the financial assistant of a doctor or a hospital to give the patient an idea of the medical scheme rates and the usual fees charged by such doctors. The estimate does not have to be completely accurate, but it should give the patient an idea of what the co-payments are likely to be for them to decide if they can afford the treatment.

The Consumer Protection Act

The CPA was introduced 'to promote and advance the social and economic welfare of consumers in South Africa by ... establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible' (s 3(1)(a)). A 'consumer' is defined as anyone who has been supplied with or has used goods or services supplied by any person in the supply chain (s 1). A 'service' is defined as including 'any work or undertaking performed by one person for the direct or indirect benefit of another' (s 1) and would include health care services.^[10] If there are inconsistencies between the CPA and other Acts that affect consumers, an interpretation that favours the rights of consumers in the relevant Act must prevail (s 2(9)). For instance, if the CPA conflicts with other concurrent healthcare legislation, e.g., the HPA or the Medical Schemes Act,^[11] the provisions of the Act that give greater protection to consumers should apply.^[10] In addition, the CPA must not be interpreted as preventing consumers from claiming any rights they have under the Common law (s 2(10)).

The CPA provides that consumers are entitled to know the price or estimated price of goods and services – provided the consumer has not waived such an estimate (s 23) and defines price as:

[T]he consideration for any transaction, [which] means the total amount paid or payable by the consumer to the supplier in terms of that transaction or agreement, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation (s 1).

It has been argued that the CPA applies to health care providers,^[10] because the word 'supply' in the CPA in 'relation to services, means to sell the services, or to perform or cause them to be performed or provided' (s 1). Therefore, 'practically all interactions between patients, healthcare providers and medical schemes will fall within the ambit of a CPA transaction'.^[10] Furthermore, 'when ordering goods from another supplier, patients and other health care providers may qualify as either 'consumers' or 'suppliers'.^[10] However, entities that have assets or a net turnover exceeding R2 million do not qualify as 'consumers' (s 5(2)(b)); hence, this would likely exclude medical schemes.^[10] Nevertheless, such medical schemes would still be 'suppliers' of healthcare services.

Thus, in terms of the CPA, the patient in the hypothetical scenario would be entitled to know from both the health care providers and the medical scheme, the prices of the different services and goods to be supplied in terms of the treatment plan.

Health Professions Council of South Africa (HPCSA) Ethical Rules

The Ethical Rules of the HPCSA,^[7] previously addressed in the preceding article,^[1] though not primary legally binding legislation like the HPA,^[4] are binding on members of the medical profession. Violations of these rules may lead to disciplinary action by the HPCSA. The Ethical and Professional Rules of the HPCSA^[5] reiterates the provisions of the National Health Act (s 6) by stating that: 'A practitioner shall explain to the patients the benefits, costs and consequences associated with each service option offered' (rule 7(6)).

The Rules also state that practitioners 'shall at all times:

[P]rovide adequate information about the patient's diagnosis, treatment options and alternatives, costs associated with each such alternative and any other pertinent information to enable the patient to exercise a choice in terms of treatment and informed decision-making pertaining to his or her health and that of others' (rule 27A).

The HPCSA Ethical Guidelines for Good Practice in the Health Care Professions,^[12] which are merely guidelines regarding the interpretation of the Rules, when dealing with informed consent provided that patients have the right to know the '[d]etails of costs or charges which the patient may have to meet' (para 3.1.3.10). They also repeat the National Health Act provision (s 6) that patients have the right to know 'the range of diagnostic procedures and treatment options generally available' (para 5.2.1) and '[t]he benefits, risks, costs and consequences generally associated with each option' (para 5.2.2).

Thus, where the doctors in the hypothetical scenario charge three times the medical rates, their patient has the right, in terms of the HPCSA Rules, to details about the co-payments she will have to pay in respect of each available 'service option'.

National Patient's Rights Charter

The National Patient's Rights Charter^[9] (the Charter), which is a policy document that is not legally binding but gives guidelines to patients and healthcare providers, states that:

'A member of a health insurance or medical aid scheme is entitled to information about that health insurance or medical aid scheme and to challenge, where necessary, the decision of such health insurance or medical aid scheme relating to the member' (para 2.4).

The Charter reflects the policy of the government regarding the rights of patients. Much of it is similar to what the Constitution^[11] and National Health Act^[3] provide in broad terms. In addition, '[e]veryone has a right to be given full and accurate information about the nature of one's illnesses, diagnostic procedures, the proposed treatment and risks associated therewith and the costs involved' (para 2.8).

The Charter goes on to state that every patient has the responsibility to 'enquire about the related costs of treatment and/or rehabilitation and to arrange for payment' (para 3.9).

For example, if doctors in the hypothetical scenario, who have contracted out of medical scheme rates, do not answer the patient's questions about the co-payments, they will be in breach of the Charter, because they may not be able to arrange for such payment.

The ethical principle of patient autonomy

As mentioned in my earlier article,^[11] the biomedical ethical principles, which are not legally binding, provide useful guidelines to healthcare providers. The principles require doctors to respect their patients' autonomy as well as to apply the other principles of non-maleficence, beneficence, fairness and justice.^[11] The principle of patient autonomy and the other principles are consistent with the Constitution^[2] and the National Health Act^[3] and could be used to justify why doctors who have contracted out of medical scheme rates should disclose their fees, including medical scheme co-payments, to patients when obtaining an informed consent. Such consent goes to the very root of patient autonomy, as well as ensuring that the other bioethical principles apply, for instance, patients' best interests are not harmed; that doctors and medical schemes are acting to the benefit of the welfare of their patients; and are acting fairly and justly.

Where doctors have contracted out of medical scheme rates, it becomes impossible for their medical patients to give informed consent for a treatment option that involves a co-payment, particularly when they do not know the co-payment amounts for the various options and whether they can afford them. Patients, such as the one in the hypothetical scenario, need to know the costs of their treatment because, as mentioned in the earlier article, this may affect their future medical scheme coverage; the expenses incurred for the treatments not covered by their medical scheme and whether they should approach the public sector for treatment.^[1]

Conclusion

In light of the above, it is submitted that based on the Constitution,^[2] and relevant legislation, such as the National Health Act,^[3] Promotion of Access to Information Act,^[5] HPA^[4] and CPA,^[6] there is a clear duty on healthcare providers and medical schemes to disclose costs to patients in advance of their treatment plans. This includes the costs of their services and goods and likely co-payments required to make up for any shortfalls by medical schemes. This requirement is also reinforced by the bioethical rules and policy guidelines of the HPCSA^[12] and the universally accepted biomedical ethical guidelines,^[8] in line with government health policy.^[9]

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