Mediating Disputes in Accountable Care and Value-Based Healthcare Settings

This roundtable discussion is brought to you by the Alternative Dispute Resolution Affinity Group of the Healthcare Liability and Litigation and Long Term Care, Senior Housing, In-Home Care, and Rehabilitation Practice Groups.

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Presenters

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Mediating Disputes
In Accountable Care Settings

- New paradigm of health care delivery
  - New types of disputes
  - Mediating new types of disputes
    - Mediation = negotiation facilitated by third party who assists the parties in moving to resolution
Drivers of Accountable Care

- Providers, not insurers, who are best placed to make the changes
- Cost/quality problems resulting from system of fragmented care
- Variation in practice patterns
- Volume-based payment systems
- Current lack of integration
- Resources flowing from decisions physicians make with patients account for major portion of overall health care regardless of care setting
Evolution of payment reform

Past and Emerging Models of Accountability in Provider Payments

<table>
<thead>
<tr>
<th>Supporting Better Performance</th>
<th>Paying for Better Performance</th>
<th>Paying for Higher Value</th>
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<td>Pay for reporting. Payment for coordination. Case management fee based on practice capabilities to support preventive and chronic disease care (e.g., medical home, interoperable HIT capacity).</td>
<td>Pay for performance. Provider fees tied to one or more objective measures of performance (e.g., guideline-based payment, nonpayment for preventable complications).</td>
<td>Shared savings with quality improvement. Providers share in savings due to better care coordination and disease management.</td>
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<td>Partial or full capitation with quality improvement. Systems of care assume responsibility for patients across providers and settings over time.</td>
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Issues Prone for Dispute in ACOs

- Compliance with ACO adopted metrics/quality benchmarks
- Compliance with ACO adopted clinical practice guidelines
- Compliance with evidence-based medicine standards
- Allocation/distribution of MSSP savings/pay for performance
- Allocation/distribution of losses/pay for performance
- Distribution of Shared Savings
Issues Prone for Dispute in ACOs

- Citizenship scoring
  - Disruptive physician – citizenship score
- Efficacy of evidence-based medicine standards.
- Traditional quality of care disputes/disciplinary actions.
Reasons Mediation Preferable to Alternatives

● Avoid litigation and fair hearings

● Mediation will be generally be much quicker and less expensive than fair hearing requirements (which are frequently time-consuming and expensive, and produce “winners” and “losers”).

● Mediation can provide predictability because parties are able to resolve case on their own as opposed by a third party decisionmaker

● Mediation will help ACO participants to preserve ongoing working relationships
Reasons Mediation Preferable to Alternatives

- Promote continuity of good patient care
- Minimize disruptions in operations and governance
- Promotes fairness and morale
- Privacy
- Compliance with accreditation standards and State law
- Help ACO-issuers to satisfy Medical Loss Ratio
Mediating Disputes In Accountable Care Settings

- Overview
  - Nuts and bolts of ACO goals, operations, and peer review
  - Types of disputes which will most frequently arise in ACOs
  - Added Value of Health Care Attorney-Physician Co-Mediators
  - Critical role mediation will play in ACOs
Principles of Accountable Care

● What is an ACO?

● An ACO is a local health care organization and a related set of providers that can be held accountable for the cost and quality of care delivered to a defined population

● The goal of the ACO is to deliver coordinated and efficient care for patients across the continuum of care

● Support comprehensive, valid and reliable measurement of its performance
Clinical Performance Measurement is Fundamental

- Clinical performance measures are derived from evidence-based practice guidelines.
- They can be used for quality improvement, public reporting, accountability or pay for performance.
- Reporting allows for group, regional and national comparison data.
- In most cases, optimal performance is not known because we have not been measuring.
Misunderstandings about Clinical Measures

- “My patients are sicker.”
- Physicians often focus on their most difficult patients when evaluating a measure.
- The “right answer” for a measure should be 100 percent.
- There should be plenty of exclusion criteria so that everyone can do well.
- I want to be able to eliminate the non-compliant patients.
Example: Dashboard

BAYSTATE HEALTH FY 2006 - 2008 STRATEGIC PLAN METRICS
AS OF SEPTEMBER 2006 YTD (UPDATED 2/9/2007)

CLINICAL QUALITY

EFFECTIVENESS
BH Clinical Composite Score
(higher is better)

SAFETY** (Lower is Better)

BH Mortality
(Lower is Better)

PATIENT SATISFACTION
(% Excellent Overall Quality of Care)

OPERATING EXCELLENCE

OPERATING MARGIN %

DAYS CASH ON HAND

GROWTH RATE IN NET ASSETS
Mediating Disputes In Accountable Care Settings

- To improve care and contain costs by aligning the interest of health care providers working collaboratively with each other.

- Why ACOs?
Principles of Patient Centered Medical Home

- Personal Physician trained to provide continuous, comprehensive care
- Physician-Directed Medical Practice
- Whole Person Orientation
- Patient Centered Criteria
- Coordinated Care
Principles of Patient Centered Medical Home

- Enhanced Access to Care
- Payment appropriately recognizes added value provided to the overall system
- Quality and Safety
Principles of the Patient Centered Medical Home/Accountable Care/Clinical Integration

- Personal Physician trained to provide continuous, comprehensive care
- Physician-Directed Medical Practice
- Whole Person Orientation
- Coordinated Care
- Quality and Safety
- Enhanced Access to Care
- Payment appropriately recognizes added value provided to the overall system
- “Better patient care for the best price”
ACO Composition

- Medicare Pioneer ACOs
- Medicare Shared Savings Plan ACOs
- Non-Medicare ACOs
- ACOs that are approved by CMS may receive waivers from Anti-Kickback Statute, the Stark Law, and Gainsharing CMPs
ACOs and PPACA Section 3022

- PPACA gives secretary of HHS the authority to waive provisions of the Anti-Kickback statute, Civil Monetary Penalties statute, and any provisions of Title VIII (including Stark) deemed necessary to implement various components of the program.

Integrating Care through ACOs

Illustrative ACO

- Specialty Group
- PCP Group
- Hospitals
- Other Providers

Other Providers Operating Outside the ACO

- Home Health Services
- Mental Health Facility
- Other Providers

Community Services & Supports (e.g., transportation, translation services)

Wellness Initiatives (e.g., smoking cessation, nutrition)
ACO Metrics and Benchmarks

- Common metrics incorporated into all ACOs:
  - Productivity
  - Outcomes compared to standards
ACO Metrics and Benchmarks

- Patient experience scores
- Citizenship score
ACO Metrics and Benchmarks

- CMS: 33 core quality measures to score ACOs
- Adoption of processes to promote evidence-based medicine and patient engagement, report on quality and cost measures
- CMS can terminate ACO if it fails to meet quality performance standards.
How Do ACOs Complement Medical Homes?

ACCOUNTABLE CARE ORGANIZATION

- Inpatient Care Efficiency
- Use of Lower-Cost Treatments
- Adverse Events
- Preventable Admissions
- Management of Complex Cases
- Use of Lower-Cost Settings & Providers

MEDICAL HOME

- Prevention and Early Diagnosis
- Practice Efficiency
- Unnecessary Testing and Referrals
- Preventable ER Visits and Admissions

**Chronic Care Model (CCM)**

- **Health System**
  - Health Care Organization
  - Clinical Information Systems
  - Decision Support
  - Delivery System Design
  - Self-Management Support

- **Community**
  - Resources & Policies

- **Improved Outcomes**
  - Informed, Activated Patient
  - Productive Interactions
  - Prepared, Proactive Practice Team

Slide from E. Wagner
Evolution of Expectations for Physicians—Clinical Integration

- Team-based care
- Focus on the top of license/training & interest
- Improved communication
- Improved data flow & access
Evolution of Expectations for Physicians—Clinical Integration

- Right patient at the right time
- Patient-centered aligned incentives—outcomes, quality, cost
- External accountability—outcomes, quality, cost
Issues Prone for Dispute in ACOs

- Compliance with ACO adopted metrics/quality benchmarks
  - Disagreements respecting risk-adjustment/related data
- Compliance with ACO adopted clinical practice guidelines
- Compliance with evidence-based medicine standards
- Allocation/distribution of MSSP savings/pay for performance
- Allocation/distribution of losses/pay for performance
Issues Prone for Dispute in ACOs

- Distribution of Shared Savings
- Citizenship scoring
  - Disruptive physician – citizenship score
  - Efficacy of evidence-based medicine standards
- Traditional quality of care disputes/disciplinary actions
  - Evolution of standard of care subsequent to adoption of practice guidelines
Costs and Disruption of Litigation

- Expense of litigation
- Disruption to team-based health care delivery
- Disruption to governance and operations
- Advocate Health – Chicago Lawsuit
- Expense of fair hearings
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● Value of mediation recognized by California Covered Care in its model Qualified Health Plan between Covered Care, the California Health Benefit Exchange and __________ (“Contractor”), May 21, 2013.

● Section 12.01(a) of draft Agreement states, in part, as follows:

● If the parties agree, a neutral third party mediator may be engaged to assist in dispute resolution at either the line employee level or the executive level, or both.
Added Value of Physician As CO-Mediator

- Use of a physician with practice experience and expertise in clinically-integrated, value-based medicine as co-mediator with health care attorney
- Physician co-mediator can help parties better understand the dynamics and context of their dispute, and better respond to many new clinical and practice matters at issue
- Credibility between physician colleagues
Confidentiality of Mediation

- Evidence Code ("EC") §1119(a): No evidence of anything said for the purpose of, in the course of, or pursuant to a mediation is admissible or subject to discovery in any arbitration, administrative adjudication, [or] civil action in which, pursuant to law, testimony can be compelled to be given.

- EC §1119(b): Same written mediation communications.

- EC §1119(c): All mediation communications are confidential.
Confidentiality of Mediation

- EC §1121: Mediator may not submit any report, evaluation or finding of any kind to a court or other adjudicative body unless the parties expressly agree.

- EC §703.5: A mediator shall not be competent to testify in any subsequent or civil proceeding as to any statement, conduct or decision at a mediation, except to extent statement/conduct could give rise to civil/criminal contempt or constitutes a crime.
Chaos Is Part of the Process

- 1 Late Status Quo
- 2 Resistance
- 3 Chaos
- 4 Integration
- 5 New Status Quo

Performance

Time
The Bottom Line

Value = Quality

         Cost
MEDICAL HOME
FAMILY COUNSELING

I HAVE AN IDEA...
LET'S ALL HAVE A
BIG GROUP HUG!!!
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