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'Physician Transparency' Movement Advances Thanks to New York Attorney General

by Alice L. King, Hogan & Hartson LLP, New York, NY

New York Attorney General Andrew Cuomo has achieved the near impossible. Insurers, physicians, and consumer groups all agree that the "groundbreaking"[1] agreement negotiated several weeks ago by Cuomo's office and several major health insurers is a significant step forward in the drive to give consumers more information about the quality of their doctors and the cost of the care they receive. It marked the first such settlement between a state regulator and an insurer.

Cuomo had launched an investigation in the summer of 2007 when his office sent letters to CIGNA Healthcare, Inc., Aetna Health, Inc., and UnitedHealthCare, Inc. warning them that their physician-ranking programs were potentially misleading to consumers.[2] All three insurers had created tiered networks wherein certain physicians, usually specialists, were placed in a different "tier" based on meeting standards of performance and efficiency, as determined by the insurer.

According to Cuomo, Aetna's program, "Aetna Aexcel," and CIGNA's program, "CIGNA Care Network," were based on benefit designs that created financial incentives, such as reduced copayments or deductibles, to encourage use of the "preferred" network. Under these models, doctors, who routinely treated patients at a lower price than their competitors, were awarded grades or stars, and employers could then use the rankings to steer their workers to the lower-cost doctors. UnitedHealthCare's program, "Premium Designation," never got off the ground in New York because the letter from Cuomo's office ordered the insurer to refrain from introducing such a program in New York without prior consent.[3] The State based its concerns on complaints it had already received and problems with similar UnitedHealthCare programs in other states.[4]

In perhaps the fastest "negotiations" in history, Attorney General Cuomo announced on October 29, 2007 that his office had reached the historic accord with CIGNA -- less than three months after sending out its initial inquiry letter.[5] Aetna soon followed, but failed to reap the same level of press accolades and positive public relations as CIGNA did by being the first to sign on to Cuomo's physician-ranking initiatives. Since the CIGNA deal was inked on October 29, Aetna, UnitedHealthCare, Empire Blue Cross Blue Shield, Group Health, Inc./Health Insurance Plan of Greater New York, MVP Health Care/Preferred Care, and Independent Health Association of Buffalo have all agreed to Cuomo's plan.[6] In addition, CIGNA, Aetna, UnitedHealthcare, and Empire's parent, WellPoint, have all agreed to adopt the Attorney General's ranking measures nationwide.[7]

The terms of the Attorney General's settlement agreements with health plans have now been recast as a "model code" for physician ranking programs. According to the Attorney General's website, New York's legislative leaders recently announced plans to pass legislation codifying Cuomo's "Doctor Ranking Model Code."[8] As with most broad policy initiatives, "the devil is in the details." Before looking at the details of Cuomo's Model Code, it might be helpful to briefly discuss the evolution of healthcare transparency over the past few years and to discuss the elements of the physician ranking programs that were of concerns to the Attorney General's office.

Transparency and Efficient Markets

Transparency, according to the U.S. Department of Health and Human Services, "is a broad-scale initiative enabling consumers to compare the quality and price of healthcare services, so they can make informed choices among doctors and hospitals."[9] The hallmark of transparency, in healthcare or any other industry, is the promotion of efficient markets. According to economist Paul Ginsburg, "markets depend on transparency to help consumers make choices and to promote competition on price and quality."[10]

The first rounds in the transparency movement were focused almost exclusively on price transparency. California and other states have enacted laws requiring hospitals to make their chargemasters publicly available. Texas passed legislation in June that will require healthcare providers to give consumers greater access to price information for medical services and billing procedures. Ginsburg calls these attempts such as these "well-intentioned but misguided."[11] Simply giving consumers a pricelist does not help them make informed choices. First, healthcare services are not widgets, and too much focus on price transparency may ignore the complexity of the medical decision-making process.[12] Second, it should be evident to anyone who has even a basic understanding of healthcare financing that the price of a service rarely equals the cost. This price and cost-shifting game goes back many years -- at least to the beginning of my nearly 25-year career in the industry[13] -- and, despite efforts to blame everyone from providers to drug companies to big insurance companies, there is plenty of blame to go around. Finally, because utilization of healthcare services often exemplifies the Pareto principle or "80-20 rule,"[14] any measurement systems that does not account for technical challenges -- such as case-mix adjustment, attribution, sample size, and ensuring the collection of accurate clinical data -- is flawed from the outset.

Given these challenges, a system that accepts (and perhaps accounts for) certain flaws in clinical quality data may be the current state of play for physician transparency. As one commentator notes, the compromise that is being hammered out (between consumer groups, insurers, and provider organizations) is leaning towards the "good" rather than the "perfect," which reflects the importance of information to consumers -- even flawed information.[15] Robert Galvin, Director of Global Healthcare for General Electric Co., points out a number of problems with healthcare data: (i) there is insufficient data about common conditions, (ii) quality measures are often not meaningful to consumers, and (iii) information is poorly presented to consumers. One of the reasons that Cuomo's Model Code has found so many supporters and so few detractors is that there is almost universal agreement that Cuomo's transparency initiatives are a good start, but the

healthcare system's performance on transparency still has a long way to go.[16]

Concerns About Physician Rankings and Tiered Networks

The conceptual framework of the Attorney General's letters to insurers was stated simply -- its commitment "to fostering transparency on behalf of consumers."[17] According to the letters, the goal of transparency is defeated if information provided is inaccurate or misleading or based on flawed data. In addition, it should be noted that the Attorney General relied on statutory authority to support his investigation of health insurers. Under New York Public Health Law § 4406-d(4) and New York State Insurance Law § 4803(d), health plans must (i) ensure that in-network physicians are regularly informed of information used to evaluate performance; (ii) consult with physicians in developing methodologies to collect and analyze provider profiling data; (iii) disclose how profiling data used to evaluate performance has been measured against stated criteria and physicians with comparable populations; and (iv) ensure that a physician is given an opportunity to discuss the unique aspects of his practice or population that might have impact on the physician's profile.

The Attorney General identified several specific areas of concerns. The first area of concern was the reliability of the claims data and whether the claims data used to rank physicians included all relevant clinical information. The Attorney General recommended that insurers conduct an audit or otherwise validate the accuracy and completeness of the claims data. Another concern was that the claims database used by insurers was too small to generate reliable rankings. This concern could be addressed through the use of an aggregated database created by an independent data aggregator. Concerns regarding sample size and attribution were also addressed by the Attorney General. The sample of patients per physician was too small to yield meaningful results, and, because several physicians in a patient in a group practice treat the same patient during the course of treatment, care rendered by one may be unfairly attributed to the entire group.

An additional area of concern was the lack of disclosure. Because data used to rank the physicians was not disclosed to either the doctors or the consumers, there was no opportunity to bring errors to the health plan's attention so that they could be corrected. Accuracy rates also were not disclosed, which, according to the Attorney General, meant that the plans steered consumers to doctors based on faulty and incomplete data. Finally, the Attorney General expressed concern that the health plans' profit motive caused a conflict of interest because higher quality doctors cost the health plan more money.

The Settlement Agreement / Model Code

The settlement agreements entered into by CIGNA[18] and other insurers eventually became Cuomo's Doctor Ranking Model Code. It was created in consultation with the American Medical Association and the Medical Society of the State of New York, along with a host of consumer advocacy groups including the Consumers Union and the National Partnership for Women & Families. Under the agreement, insurers are required to make the basis of their physician ranking programs transparent to members, base those rankings on nationally recognized quality standards, and submit their programs to outside evaluation. The insurer must retain an oversight monitor,

known as a Ratings Examiner, who will oversee compliance with all aspects of the agreement and report to the Attorney General every six months. Insurers must use independently developed quality criteria, to be shared with physicians if they want to appeal their rankings. The companies are prohibited from using cost data to rank doctors, and the insurers are required to pay for a third-party ratings examiner, subject to Cuomo's approval, to ensure the companies comply with the agreement.

Providers seem to have thrown their full support behind the Model Code. The Code is likely to address one of their major complaints -- that insurers, in their rush to provide patients and employers with quality information, are each asking for different quality measures. Although the Code requires insurers to use nationally recognized quality standards, including those endorsed by the National Quality Forum, providers are hopeful that standardized protocols will soon emerge.

Summary

While it is tempting to apply the New York Model Code with a broad brush, it should be remembered that the Code has limitations based on both its content and its context. First, its context is the laws of the State of New York which specifically require health plans doing business in New York to follow certain rules with regard to physician measurement. Second, the content of the settlement agreements specifically applies to *tiered* networks wherein consumers are steered to providers based on cost or quality rankings. Much of the criticism about cost measurements used in ranking programs is that they use "cost-efficiency" measures that contain an undisclosed component of subjectivity. Evaluating the Code more narrowly, it could arguably be viewed as applying to some, but not all, health plans and to some, but not all, cost measures.

Although flawed data in any context is likely to cause confusion, it is arguable that the Code does not apply to a health plan that publishes flawed performance data but does not use such data as a steering mechanism. Similarly, it is hard to imagine that purely objective cost measures could be forbidden, even if they are misleading -- a hospital's chargemaster or a physician's fee schedule, for example. The danger arises when an objective cost factor is converted to a ratio or otherwise manipulated so that it contains subjective elements.

The Attorney General's Model Code is an important step. It may even prove to be a watershed moment in the physician transparency movement, but don't doubt for a moment that there is still a long way to go to provide consumers with useful tools and meaningful data, and, ultimately, to gain greater value from our healthcare system.

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[1] "AMA: Physician Ranking Programs Must Put Quality First," Medical News Today (Oct. 31, 2007), http://www.medicalnewstoday.com/articles/87148.php.

[2] See Press Release, Office of the New York State Attorney General Andrew Cuomo, Cuomo Warns Major Health Insurers About Promoting Potentially Deceptive Physician Ranking Programs (Aug. 16, 2007) http://www.oag.state.ny.us/press/2007/aug/aug16a_07.html. (containing links to the letters sent to UnitedHealthCare, Aetna, and CIGNA).

[3] See id. http://www.oag.state.ny.us/press/2007/aug/aug16a_07.html (UnitedHealthCare letter).

[4] Id.

[5] Press Release, Office of the New York State Attorney General Andrew Cuomo, Attorney General Cuomo Announces Agreement with CIGNA Creating a New National Model for Doctor Ranking Programs. (Oct. 29, 2007), http://www.oag.state.ny.us/press/2007/oct/oct29a_07.html.

[6] Press Release, Office of the New York State Attorney General Andrew Cuomo, Attorney General Cuomo Announces Agreement with CIGNA Creating a New National Model for Doctor Ranking Programs. (Dec. 12, 2007), Attorney General Cuomo Announces Doctor Ranking Agreement With Independent Health, http://www.oag.state.ny.us/press/2007/dec/dec12a_07.html.

[7] Id.

[8] Press Release, Office of the New York State Attorney General Andrew Cuomo,. Attorney General Cuomo Announces Doctor Ranking Agreement With Independent Health (Dec. 12, 2007), http://www.oag.state.ny.us/press/2007/dec/dec12a_07.html.

[9] U.S. Department of Health and Human Services, www.hhs.gov/valuedriven/ (last visited Jan. 18, 2008).

[10] Paul Ginsburg, "Markets Can't Do It Alone: For Transparency to Work, Insurers Need to Take the Lead," Modern Healthcare, Nov. 19, 2007, *available at* **Error! Hyperlink reference not valid.**.

[11] Id.

[12] Id.

[13] It should be noted that my years of healthcare industry experience is primarily as a business person rather than as a lawyer.

[14] The Pareto principle states that 80% of the effects come from 20% of the causes. In healthcare speak, that means that 80% of the costs come from 20% of the population.

[15] Robert Galvin, "A Historic Change: Now We Have to Make Transparency Meaningful," Modern Healthcare, Nov. 19, 2007, *available at* **Error! Hyperlink reference not valid.**.

[16] Id.

[17] See AG's letter to insurers at http://www.oag.state.ny.us/press/2007/aug/aug16a_07.html.

[18] See Press Release, Office of the New York State Attorney General Andrew Cuomo, Attorney General Cuomo Announces Agreement with CIGNA Creating a New National Model for Doctor Ranking Programs. (Oct. 29, 2007), http://www.oag.state.ny.us/press/2007/oct/oct29a_07.html. to view the CIGNA settlement agreement in its entirety.