Grant Outcomes Report

Designing an Arbitration-Based Medical Injury Dispute Resolution System for New York Health Systems

KEY INFORMATION:

GRANTEE
Common Good

GRANT TITLE
Designing an Arbitration-Based Medical Injury Dispute Resolution System for New York Health Systems

DATES
August 2009–April 2011

GRANT AMOUNT
$149,405

FUNDING
2009 Cost Containment RFP

The Problem:

The existing system for medical liability litigation increases the cost of providing effective, quality health care in New York State and the nation. Litigation affects care and costs by encouraging the practice of defensive medicine and decreases patient access to care, especially in obstetrics. Most patients who suffer an injury during the course of medical care are not compensated, and only a small proportion of injured patients choose to file a claim. For those patients who are injured and do file a claim, the length of time until the claim is resolved averages five years. When patient claims are successful, more than half of the dollars paid are consumed by overhead costs.

At the time the grant was awarded to Common Good, no attempts to reform the medical liability system had succeeded in New York State, and there was a desire to identify and test alternative approaches to litigation, particularly those that would not require State legislation. One alternative approach is arbitration whereby individuals pursue dispute resolution in a consensual, private, and adjudicative manner. The provider or hospital would inform them early on of any medical injury and offer to pay the patient. If the patient declined the offer, the dispute would be submitted to arbitration. Arbitration is a final and binding decision, and no court litigation is permitted after that decision is made. Arbitration was successfully implemented in Colorado, Michigan, and Kentucky, as well as by Kaiser Permanente (in California), and the Duke University Medical System. Results showed that patients were participating and being compensated and litigation costs were reduced.

Grant Activities & Outcomes:

The goal of this planning grant was to develop an arbitration-based dispute resolution pilot that could be tested in New York State. Key project activities included:

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1. Conducting legal analysis of the feasibility of implementing an arbitration-based dispute resolution system, including whether legislation or regulatory actions would be required.
2. Securing hospital partners to design the structure of the arbitration system, including protocols for patient and provider participation.
3. Developing patient enrollment materials, including patient consent forms.
4. Developing guidance on implementation and an evaluation of a pilot.

Working with Manatt, Phelps, & Phillips, the legal analysis indicated that arbitration agreements are relatively easy to integrate into physician practices (based on more than 15 years of experience in California and Utah) and most patients who visit such practices sign the agreement. The physician-patient treatment relationship is not affected if the patient does not sign the agreement, and technical assistance provided to physician practices by key insurers and physician liability organizations is critical to implementation of such agreements.

Most important, through the legal analysis of previous New York State court cases, the team found that signed consent forms to the arbitration process are very likely to be upheld when challenged. The team also found that previously enacted New York State legislation relating to arbitration consent in the health management organization (HMO) enrollment process identified steps for obtaining patient consents to arbitration and established specific procedures for conducting these proceedings. While this law is not in effect now, portions of this legislation serve as a compelling guidepost and provide support for an arbitration-based dispute resolution and process that could be implemented without further legislative action.

It took longer than expected to engage actual hospital partners, which were crucial to working through the operational details of the arbitration system design. Iroquois Healthcare Alliance, which represents five hospitals in upstate New York, participated in the design of the pilot's administrative components, such as identifying which hospital department(s) is best suited for such a pilot, and when—during the patient

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engagement process—consent forms would be solicited. For example, some hospitals believe that initial implementation should begin with certain departments (such as cardiology and radiology), whereas other hospitals believe that hospital-wide implementation would be more effective. Staff training on the arbitration and patient consent process, particularly by the intake staff, was agreed upon by the hospitals as a key element to this process. The Medical Liability and Mutual Insurance Company (MLMIC), which insures numerous physicians and some hospitals, also provided comments and insights during this project.

The project team also considered data elements that would be needed to evaluate a potential pilot. These data include the number, type, disposition, and cost of malpractice claims, and a profile of the patient population, which would be used to establish a baseline against which to measure the cost and quality effectiveness of an arbitration-based system.

Additional efforts would be needed to ultimately take the project to an implementation phase. These include determining the cost of a pilot; developing physician and staff training; finalizing patient education and consent forms; and developing outreach strategies to policymakers, the media, and the community.

Future:

Common Good completed all key planning activities, which could serve as the foundation for a possible demonstration phase in the future. However, since the commencement of this grant, many changes have occurred in the focus and direction of medical malpractice and liability landscape in New York. For example, the Foundation supported a grant to the Greater New York Hospital Association to educate and train hospital systems regarding a judge-assisted medication model developed by the New York City Health and Hospitals Corporation. This model has considerably shortened the medical claims adjudication period and resulted in tangible savings. New York State also applied and received a five-year, $3 million Federal grant to expand and enhance this model to five hospitals in New York City and other courts in Brooklyn and Queens. The Foundation then provided a grant to the New York State Unified Court System to replicate the model in upstate New York with two major hospital systems as partners.

Medical liability reform also played a central role in negotiations on the New York State Budget for 2011–2012, and ultimately a neurological infant fund was enacted to make awards to families with neurologically impaired children. This fund would only change the way awards are paid, preserving the relevance of arbitration.

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BACKGROUND INFORMATION:

ABOUT THE GRANTEE

Founded in 2002, the Common Good Institute, Inc. is a nonprofit, nonpartisan legal reform coalition dedicated to developing practical and innovative solutions to reform the United States legal system. Common Good has three focus areas: **1)** developing a reliable system of medical justice; **2)** proposing education reforms that would restore freedom and authority to teachers and principals; and **3)** establishing boundaries for disputes in litigation.

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