

Navigating Through the Land of RHIOs

By William Bernstein and Robert Belfort

Almost as soon as the term regional health information organization (RHIO) entered the health care industry's lexicon, questions about the legal obstacles to community-wide data sharing began to percolate to the surface. Much of this commentary has suggested that a substantial change in applicable laws and regulations will be necessary to pave the way for RHIOs.

This has created uncertainty in many communities as to whether it is prudent to invest resources in RHIO planning and development. Early efforts in a few communities suggest, however, that legal problems can be minimized if the RHIO's founders are willing to treat the project as a true joint venture involving major community stakeholders and establish appropriate compliance safeguards.

Fraud-and-abuse laws

While adoption of electronic medical records and other health information technology by physicians is essential to the success of RHIOs, physicians often lack the economic incentives and/or the financial resources to invest in these items. To the extent other health care organizations subsidize physicians' acquisitions of technology items and services, the Stark law and anti-kickback statutes are potentially implicated.

In assessing fraud-and-abuse concerns, it is important to recognize that early-stage RHIO projects are often driven by a range of community stakeholders. Generally, investments made through RHIOs by health plans and employers do not raise significant fraud-and-abuse issues because, unlike hospitals, health plans and employers typically do not receive patient referrals from physicians.

Moreover, even if hospitals play a central role in the governance and financing of a RHIO, fraud-and-abuse problems can be minimized by channeling subsidies to physicians through the RHIO itself. For example, if a RHIO is governed by representatives of several local hospitals, health plans and major employers, its governing body could decide that each participating institution should contribute a specified sum of money; the RHIO, in turn, would use the funds to pay subsidies to physicians. If the RHIO adopts objective criteria for the distribution of subsidies and no hospital has the ability to funnel its contribution to particular physicians, Stark and anti-kickback requirements should be satisfied.

Antitrust laws

Health care payers have expressed understandable concern over whether they may coordinate physician "pay-for-use" and "pay-for-performance" programs without running afoul of the antitrust laws. As is the case with satisfying the fraud-and-abuse laws, establishing standardized physician incentives without violating the antitrust statutes is likely to require that substantial authority over the design and administration of the incentive program be vested centrally with a broad-based RHIO.

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Ideally, the RHIO will be comprised of a wide range of health industry and community stakeholders, the majority of which are not health care payers. If this is the case -- and special safeguards are established to ensure that the RHIO does not function as a mere pass-through vehicle for local payers to fix prices -- the RHIO should be in a strong position to argue that its actions cannot be attributed to the health plans for antitrust purposes.

HIPAA

As a threshold matter, compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) becomes greatly simplified if the RHIO's members accept the basic principle that patients will provide authorization to have their records integrated into the RHIO. It is true that an authorization process may pose challenges on an operational level. However, in addition to simplifying HIPAA compliance, an authorization system will likely be necessary to comply with various state privacy laws -- for risk management purposes and to generate broad-based community buy-in for the project. As a result, HIPAA should not impose substantially greater restrictions than the RHIO's members would otherwise be likely to adopt for other reasons.

Guidance from the government

Although existing laws should not impede the efforts of communities to create RHIOs, the government can accelerate RHIO development by establishing a clear regulatory framework for these entities. Among other things, government should establish a federal definition of the term "RHIO," a certification process and a range of benefits (such as grants and reimbursement enhancements) that flow to entities receiving certification.

Ongoing challenges

As communities seek to develop RHIOs, they are likely to find that the greatest challenges do not involve regulatory compliance but rather project financing and governance. Coordinating the activities of a wide range of stakeholders is daunting. In addition, communities are still grappling with how to make RHIOs self-sustaining economic enterprises. Therefore, while RHIOs need to be cognizant of the regulatory compliance process, their main focus should be on resolving complex governance and financing issues.

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