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# A Market Solution for Malpractice

By RONEN AVRAHAM MARCH 28, 2011

Austin, Tex.

IT'S been a year since health care reform was signed into law, and since then both Republicans and Democrats have been trying to address one item it left out: medical malpractice reform. In last month's budget proposal, the Obama administration offered a solution: a plan to encourage evidence-based medicine by limiting the malpractice liability of doctors who follow clinical practice guidelines — in effect, granting them immunity.

Doctors love this proposal, and patients should too: When doctors follow good guidelines they are less likely to order too many or too few tests or to prescribe the wrong treatment.

Unfortunately, the proposal will not achieve the noble goal of providing quality care at a reasonable cost because the current guidelines, written by nonprofit medical groups and for-profit insurance companies, are not good enough.

First, they often conflict with one another. Recommendations for when and how frequently to give women mammograms, for instance, notoriously vary depending on which group is giving them.

In addition, there are conflicts of interest. Guidelines produced by insurance companies sometimes put their interests first. Malpractice insurers, for example, may recommend yearly mammograms, even if they are not necessary, because they bear the costs of lawsuits for late diagnoses of breast cancer — and not the costs or

health risks of the extra mammograms. Moreover, the nonprofit groups behind many other guidelines have traditionally depended on pharmaceutical and medical device companies to finance their work. Last year, the Council of Medical Specialty Societies issued a new code of conduct seeking to stop these industries from sponsoring the development of guidelines, but there are still too many loopholes, and thousands of guidelines produced before the reform are still in circulation.

Most troubling of all is that the groups behind the guidelines bear no liability for producing bad ones. No matter how poor the care they prescribe, it is the doctors who depend on them who are punished.

Mr. Obama's proposal to limit the liability of doctors who follow these flawed guidelines (included in a \$250-million plan for overhauling states' malpractice systems) is clearly not the way to better care. Immunity is a good idea. It's just that we need to create the incentives necessary for the production of optimal guidelines first.

This is no secret — last week the Institute of Medicine put out a report listing new standards for promulgating guidelines. I was a consultant on the report, which goes a long way toward improving the system, but I worry about the extent to which these standards will be followed. I have a different proposal for improving the guidelines:

Instead of nonprofit groups producing free guidelines, or insurance companies producing ones that serve their own interests, the government should require health care providers to buy or license guidelines from what I call private regulators, for-profit companies with expertise in evidence-based medicine. Doctors would have immunity from malpractice cases if they followed the guidelines. However, the private regulators themselves would be liable if their guidelines were found to deviate from optimal care.

The profit-seeking forces of the market on the one hand and legal accountability on the other would help private regulators strike the right balance between patient safety and cost of care. Private regulators would discourage the overuse of expensive medical procedures because doctors, under pressure from insurance companies to keep costs low, would be unlikely to invest in guidelines recommending unnecessary

procedures. But if the guideline-makers failed to recommend an appropriate procedure, they'd be held responsible for the patient's health.

Just as they can now, doctors could deviate from the guidelines when required. Their discretion and autonomy would be preserved. But in most cases, when guidelines apply, doctors could follow them without having to worry about being held liable, and more important, about getting bad advice.

Such a system may not be too far off: medicine is already moving toward for-profit guidelines. UpToDate, First Consult and eMedicine are just a few new databases compiled by for-profit companies in the business of making technical, evidence-based medicine more accessible to doctors. This is certainly exciting, but to provide doctors with the peace of mind they deserve, these companies need to be held accountable for the advice they give.

Almost every other product Americans encounter is subject to laws that guarantee that the producer suffers when its product is subpar. There's no reason medical guidelines should be any different. With the proper incentives, these private regulators could help President Obama carry out the health care reform he signed into law a year ago.

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