Using Legislation and Policy to Promote Shared Decision Making and Utilization of Decision Aids
Harvard Law School • April 18, 2018
Thaddeus Mason Pope, JD, PhD

“healthcare purchasers . . . should be committed to SDM”

BUT

“Promise remains elusive”

Too few clinicians use PDAs
This talk

How law pushes PDA use

Not just inertia

Active opposition

Nudge

Medicine

Law
Humility

“comprehensive strategy required to promote wider uptake of SDM”
Coulter - World Psychiatry 16:2 - June 2017

law

“framing SDM as a part of . . . patient rights . . . bolster . . . culture change”

Roadmap

4 parts
Part 1: Payment tools

Part 2: Liability tools

Part 3: Mandate tools
Part 4

Need for certification

Payment Tools

CMS

Centers for Medicare & Medicaid Services

Other insurers

Medicare

Medicare 20.0%
Medicaid 24.8%
VA 11.0%
Insurance 9.7%
Out of pocket 1.5%
Other 33.0%
PDA use = “condition for payment”

No PDA

Logic

Medicare only pays “medical necessary”

“Medically necessity” not a purely clinical determination

Unwanted

Not med. necc.
Screening for Lung Cancer with Low Dose Computed Tomography

1st requirement of SDM for Medicare coverage

National Coverage Determination
Feb. 5, 2015
CAG-00439N
Before
CT scan

“must receive
. . . SDM visit”

“include . . .
one or more
decision aids”
Coding & Billing

G0296 SDM
G0297 CT scan

2

Percutaneous Left Atrial Appendage Closure Therapy

National Coverage Determination
Feb. 8, 2016

CAG-00445N

LAA = source for blood clots that can cause strokes
Thin blood with anticoagulant medication

Before implantation

“formal SDM interaction . . . evidence-based decision tool”
“with an independent non-interventional physician”

3

Implantable Cardioverter Defibrillators

National Coverage Determination
Feb. 15, 2018

Delivers electric shock to restore normal heartbeat
Before implantation

“formal SDM encounter must occur”

“evidence-based decision tool”

Original

SDM with an “independent” clinician

457 hospitals settle for $250 million
BUT

“delay potentially lifesaving ICD”

4

Quality measure for PFP (e.g. ACO)

Direct Decision Support Model
  Canceled Feb. 2018
  Too burdensome

Shared Decision Making Model
  Canceled Nov. 2017
  Not enough ACO interest
Payment Tools
State Level
5 examples

1

2010

Comprehensive primary care liked to wellness, prevention, self-management, and community services
Certification requires
“participants are given the opportunity to fully engage in . . . **shared decision-making**”

Minn. Admin. 4764.0010 to 4764.0040

Mass. Law 6D § 14 (certify med homes)

Mass. Law 6D § 14 (certify ACOs)
ACO cert. 5.206(1) 2018

Green Mountain Care Board

Medicaid cover advance care planning

SENATE, No. 1891
STATE OF NEW JERSEY
218th LEGISLATURE
INTRODUCED FEBRUARY 15, 2018

Sponsored by:
Senator TROY SINGLETON
District 7 (Burlington)

Medicaid cover advance care planning
“Advance care planning shall consist . . . SDM . . . decision aids”

That’s federal and state payment tools

Liability Tools

PDA as shield

2 examples
1

Safe harbor for using PDA

2

De facto safe harbor

Reactions of Potential Jurors to a Hypothetical Malpractice Suit Alleging Failure to Perform a Prostate-Specific Antigen Test

Michael J. Barry, Pamela H. Wescott, Ellen J. Reifler, Yuchaio Chang, and Benjamin W. Moulton

summer 2008
Malpractice premium discounts

That’s PDA as shield

PDA as sword

Contrast WA

Texas Medical Disclosure Panel
Could use PDAs instead of “forms”

Enhanced malpractice protection for using PDA

No form→ presumption that violated duty

Summary of liability tools

Expanded malpractice exposure for NOT using PDA
We looked at Payment tools
Liability tools

Mandate Tools

Statement of Principles on the Role of Governments in Regulating the Patient-Physician Relationship

Legislative Interference with the Patient-Physician Relationship
Steven E. Weinberger, M.D., Hal C. Lawrence III, M.D., Douglas E. Henley, M.D., Emol R. Alden, M.D., and David B. Hoyt, M.D.
“Mandated standardized written information for patients”

Still focused on **disclosure**

Could use PDAs instead of MSWI

Need for Certification
Growing use of legal tools

Problem 1

Ineffective

“SDM”

Plugged in to statutes & regulations

2 problems
BUT

Not always defined

Agency in charge is CMS

LDCT

"not requiring . . .
. a specific instrument . . .
practitioners may select"

Doctor choice
LAAC

“variable understanding . . . regarding the concept of SDM”

Problem 2

Rare

Obstacle
PDAs widely varying quality

Cannot attach legal consequences

Assure PDA quality

Conclusion

Have tools – payment, liability, mandate

Certification is “key” to toolbox


