



Ropes & Gray LLP

Meeting the Challenges of Building ACOs: Ropes & Gray's Expertise and Experience

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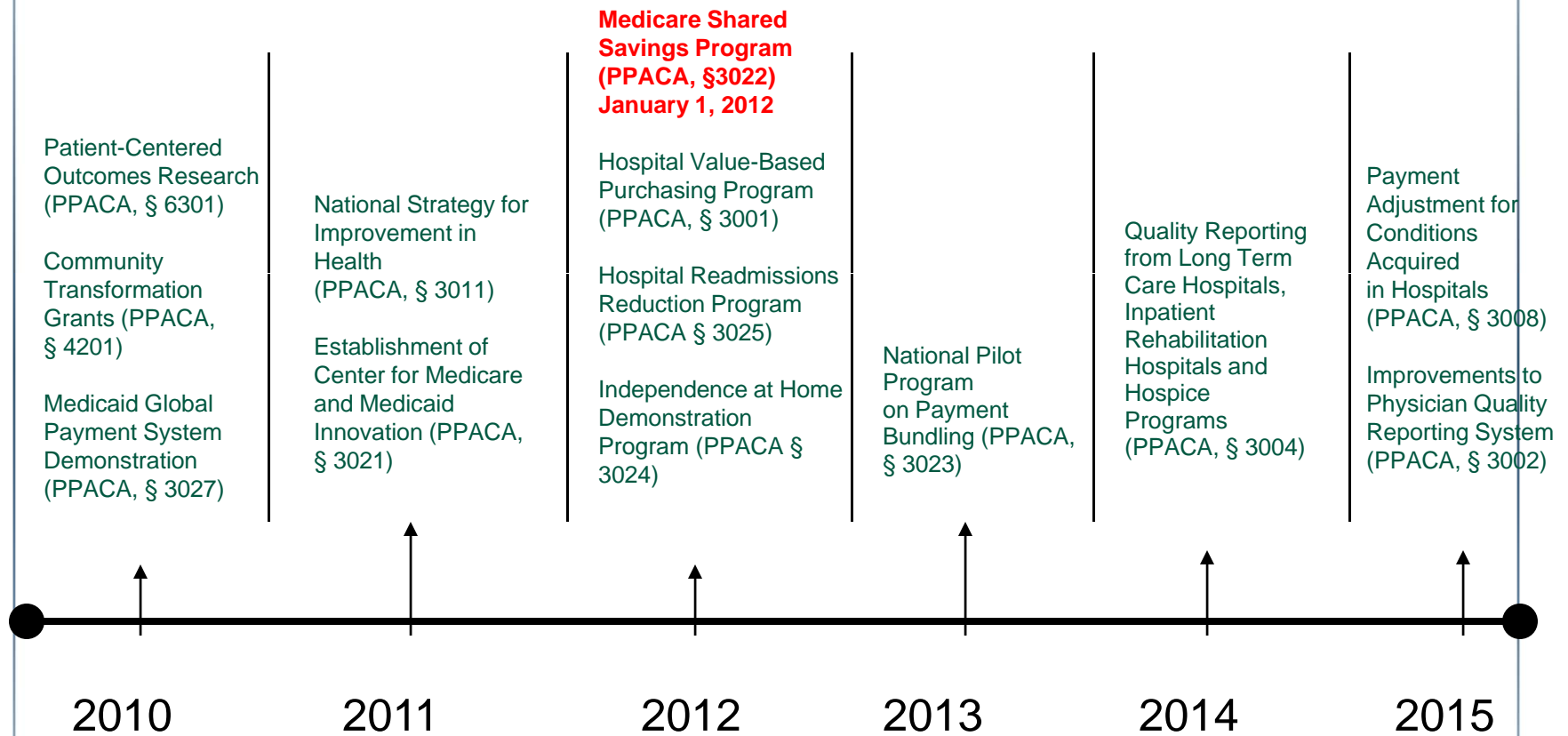
The Accountable Care Organization Model

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The Accountable Care Organization (ACO) Model

- **The Accountable Care Organization (ACO) Model**
 - Relatively new idea originating from various demonstration projects
 - Patient Protection and Affordable Care Act (PPACA) promotes development of ACOs by providing financial incentives through Medicare's Shared Savings Program - beginning on January 1, 2012
 - Currently limited to Medicare and Medicaid programs but expected to spread to the private sector
- **What are ACOs?**
 - Entities willing to be accountable for the quality, cost and overall care of the patient population assigned to them
 - Eligible to receive cost savings in exchange for meeting specific organizational and quality performance standards
- **Permissible ACO structures:**
 - Practitioners
 - Practitioners in a group practice arrangement
 - Networks of practices
 - Hospital and physician partnerships or joint venture arrangements
 - Hospitals and their employed physicians
 - Other groups deemed appropriate by CMS

ACO Timelines





Our Expertise

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Our Expertise

- Accountable Care requires multiple competencies:
 - Skills in such core areas as leadership, governance and the management of risks, talent, clinical care and health information
- Our Health Care Practice understands industry challenges:
 - Over four decades of experience with health care delivery system innovation
 - National practice of over 60 health care lawyers with the resources of a thousand-lawyer firm behind us
 - Structured to offer an approach to guiding clients as they adopt Accountable Care delivery systems that mirrors the competencies and characteristics required to succeed in Accountable Care:
 - Team-oriented, interdisciplinary, flexible, solutions-oriented
- Our decades of experience have taught us that:
 - There is no single template or right answer
 - Clients must make choices and take action under the pressure of cost containment, capital demands and complex relationships
- In ACO development , the expertise of lifelong practitioners and coordinated guidance of a multi-specialty legal team are critical



**Our Track Record In Health Care Delivery
Innovation and Health Care Reform**

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Our Track Record In Health Care Delivery Innovation and Health Care Reform

- **Ropes & Gray has been at the center of care delivery innovation and health care reform for three decades:**
 - **Members of the Committee created by Governor Michael Dukakis to formulate Massachusetts' First Universal Health Care Bill**
 - **Counsel to the Jackson Hole Group, the creator of managed competition**
 - **Counsel to the Foundation for Accountability, an organization dedicated to creating quality transparency for consumers**
 - **Counsel to The Leapfrog Group, an employer driven organization devoted to improving quality, safety and efficiency in the delivery of health care services**
 - **Counsel to Care Focused Purchasing, an organization of multiple payors devoted to improving transparency**
 - **Member of the creation team for Prometheus, the leader in formulating and testing payments based on episodes of illness**
 - **Advised leadership of the Massachusetts House of Representatives in the formulation of Massachusetts Second Universal Health Care Bill**

Our Track Record In Health Care Delivery Innovation and Health Care Reform (cont'd)

- From its founding in 1980, counsel to the National Association of Public Hospitals & Health Systems (NAPH) on health policy issues of concern to safety net providers, including delivery system and payment reforms
 - On behalf of NAPH, Ropes & Gray attorneys developed the concept of Community-Based Coordinated Care Networks (adopted in PPACA) to provide integrated care to low income populations
- Principal member of the Hospital Quality Alliance
- Participant in the study on Accountable Care Organizations and value based purchasing being conducted by the Government Accountability Office in response to a Senate Finance Committee request



**Key Operational and Legal Challenges Facing ACOs:
With Which We Can Help**

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Key Operational Challenges

- Devising methodologies to allocate global, episode-of-illness and bonus payments among ACO participants while avoiding hospital subsidies and paybacks interpretable as illegal payments
- Achieving financial and clinical integration of physicians and hospitals sufficient to allow for single signature contracting with payors
- Creating provider networks that are not considered to be market dominant
- Avoiding specialist domination of the physician component of the ACO
- Aligning government and commercial insurer payment methodologies
- Creating limited provider networks acceptable to consumers
- Creating quality and efficiency criteria that are legally compliant
- Creating access to specialty providers (cancer centers, pediatric hospitals, rehabilitation hospitals and long-term care hospitals)
- Continuing to build the HIT highway with maximum interconnectivity for all participants while satisfying privacy and security requirements
- Using the ACO structure to engage with chronic care and end-of-life patients
- Meeting state insurance reserve and capital requirements
- Accessing the capital finance markets
- Creating benefit programs for the ACO
- Assisting payors in devising performance incentive payments to the ACO and its participating providers, including shared savings programs

Legal Challenges

ACO development teams will need legal advisors who can marshal the expertise of lifelong practitioners to solve very difficult legal issues and remove barriers to ACO development.



Legal Challenges (cont'd)

- **Myriad provider issues and accompanying legal challenges**
 - **Reallocation of risk dollars/cross-subsidization: Stark; anti-kickback; Civil Monetary Penalty; tax exemption**
 - **Connectivity and EMR: HIPAA; HITECH; Red Flag and state privacy and data breach laws; Stark; anti-kickback; tax**
 - **Network standards and referral restrictions: Stark; anti-kickback; Civil Monetary Penalty; antitrust**
 - **Consumer directed care, public reporting: risk management; malpractice**
 - **Performance-based credentialing: medical staff; antitrust; reporting requirements**
 - **Network formation and contracting: antitrust**
 - **Role of the board: fiduciary obligations**
- **Coordinated guidance of multi-specialty legal team is critical at all stages.**
- **We are well positioned and structured to advise our clients effectively on both operational and legal issues associated with ACOs.**



**The Requirements for a Successful ACO and
Our Experience**

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The Requirements for Successful ACO Development

Our work with developing ACOs has allowed us to identify the following features as necessary both to satisfy Medicare's ACO requirements and to succeed in fashioning ACO arrangements be successful with commercial plans. Examples of our relevant experience are listed next to each feature.

Integrated Care:

- **Promoting selective, scalable, high-performing provider networks that combine different categories of providers and different care settings and that rely on evidence-based best practices, processes for quality improvement and clear action steps for improving performance.**
 - Counsel to financially and clinically integrated, multi-hospital system comprised of Catholic and non-sectarian hospitals. Clinical integration based on hospitals' adoption of multiple clinical care protocols, benchmarks to test and verify improvements in quality and penalties for failure to achieve quality and efficiency standards.
 - Advised several Massachusetts hospital and physician groups, including specialty providers, in developing their integrated care strategies to respond to Massachusetts payment reform initiatives promoting ACOs and to commercial payor ACO initiatives involving risk-sharing against both quality and efficiency/cost standards.

The Requirements for Successful ACO Development (cont'd)

The Medical Home:

- **Establishing a patient-centered care model.**
 - Counsel to pioneer disease management company since its founding. Assisted in creating effective management of chronic care from business and clinical perspective (close coordination among payors, physicians and other providers, and patients) and legal perspective (creation of organizational structures compliant with reimbursement laws as well as improper inducement, privacy, licensing, and corporate practice laws). Through careful and thorough contracting, defined relative scopes of authority and measurement and payment systems.

- **Managing utilization of services.**
 - Assisted company in creation of program to reduce occurrence of sepsis in inpatient settings by establishing clinical protocols and provider reward systems funded by hospital cost savings.

The Requirements for Successful ACO Development (cont'd)

Financial Integration:

- **Establishing structures and processes needed to implement and administer payment methodologies (fees and bonuses) and to manage financial risk.**
 - Assisted company in creation of value-based purchasing program to facilitate quality and efficiency improvements. Program structured on bonus system scoring hospitals on compliance with protocols. Maximum rewards for hospitals improving quality while containing costs.
 - Advised Medicare Advantage plans, capitated provider groups, and support organizations on risk-adjusted payment methodologies including health status and severity adjustment as well as on documentation requirements.
 - Advised capitated provider groups in disputes over the achievement of quality and efficiency for performance measures.
 - Advised major hospital network on its economic integration program, risk pools, and penalty and performance reward programs in light of national quality, patient satisfaction and efficiency measures.

The Requirements for Successful ACO Development (cont'd)

Creation of Legal Structures:

- **Creating formal legal structure allowing coordination of operations among participating providers.**
 - Served as transactional counsel to major West Coast hospital in creation of medical foundation. Transaction involved development and implementation of modified service delivery methods and compensation structures through agreements among hospital, large multi-specialty medical group, affiliated university and management company. Alignment established by agreements sets groundwork for participation in Medicare's shared savings program and future governmental and private reimbursement programs based on collective accountability for costs and care.
 - Counsel to nonprofit, tax-exempt organization in structuring ACO as new nonprofit, tax-exempt entity with hospital system's parent organization acting as parent organization with limited reserved powers with respect to the ACO. ACO's board comprised of equal representation from hospital system and participating physicians.
 - Served as transaction counsel to health care system in formation of ACO comprised of multiple hospitals, physicians employed by a physician organization that comprised part of the system (PO) and physician members of medical staff not employed by the PO. ACO structured as limited liability company whose members are system's parent entity and newly formed physician organization. Physician organization structured as LLC. Drafted all organizational documents, including LLC operating agreements and agreements between PHO and PO, between PHO and participating hospitals and between PO and participating physicians.

The Requirements for Successful ACO Development (cont'd)

Governance:

- **Instituting a board and management leadership structure.**
 - Conduct numerous training workshops for hospital boards and management on their fiduciary duties to improve and maintain quality. Workshops focus on use of quality dashboards allowing board to maintain appropriate oversight of management's and providers' efforts, and increasing requirements imposed on boards and management to fulfill their legal obligations.

Information Management:

- **Establishing the HIT capabilities and compliance programs to satisfy reporting requirements, population management, care coordination and monitoring, managing and reporting performance and efficiency indicators.**
 - Assisted numerous clients in obtaining and implementing electronic health records for their own clinical use and to provide to members of their medical staffs. Also assisted hospitals in qualifying for “meaningful use” payments.

The Requirements for Successful ACO Development (cont'd)

Data Sharing for Quality Improvement and Cost Reduction:

- **Measuring and reporting care results at the individual provider level under programs designed to promote price transparency and comparability in improvements of cost and quality.**
 - Served as general counsel to collaborative effort of over 50 national employers and seven health plans to capture and access data derived from patient care to measure physician and hospital efficiency and quality as part of an initiative to demonstrate feasible methods of data aggregation and measures deployment.
 - On behalf of coalition of purchaser entities, payors and providers, obtained precedential business review letter from U. S. Department of Justice permitting establishment of information exchange program providing data on relative costs and resource efficiency of more than 300 California hospitals. DOJ determined that proposed information exchange may reduce health care costs by improving competition among hundreds of California hospitals and facilitating more informed purchasing decisions by group purchasers of health care services.

The Requirements for Successful ACO Development (cont'd)

Operational Management:

- **Creating effective contractual relationships with payors, including Medicare, Medicaid, commercial payors and employers to leverage capabilities and performance**
 - **Currently assisting two academic medical centers in working with their states to develop ACO programs within their states' Medicaid programs through state plan amendments and demonstration projects. Programs would leverage disproportionate share hospital funding and other supplemental Medicaid payments to support ACOs. Programs are being developed under existing state Medicaid authority (including a federal Section 1115 waiver).**
 - **Advise employers on the nature and design of their group health benefits and assist them in developing innovative ways to provide cost-effective comprehensive coverage. Regularly advise clients on most effective way to establish wellness programs and build relationships with payers and providers that will support their overall benefits objectives. Guided academic medical center and provider clients through analysis of how their delivery systems can provide care to their employees. Advised clients in evaluations of whether they, as employers, can establish direct relationships with providers to better manage their health benefit programs and employee productivity.**

The Requirements for Successful ACO Development (cont'd)

Integrated Clinical and Financial Management:

- **Creating innovative approaches for health plans to respond to the increased focus on value and to manage clinical and administrative costs consistent with the new medical loss ratios required by federal and state law.**
 - Advised health plan on provider performance incentive program based on hospitals' and physicians' joint satisfaction of quality and efficiency targets. Program has helped provider collaboration across the delivery system when treating enrollees and led to more cost-effective care.
 - Advising fully integrated HMO in expanding its provider network using ACO structure to include out-of-network providers. ACO network will build on HMO's existing information technology and administrative infrastructure to accommodate physicians maintaining agreements with payors outside the system. Initiative designed to attract employers seeking broader provider network and to serve as strategy for geographic growth.