

Missouri Comments on
SUGGESTED PRINCIPLES APPLICABLE TO
AN NAIC GUIDELINE FOR IMPLEMENTATION OF
MEDICAL PROFESSIONAL LIABILITY CLOSED CLAIM REPORTING

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I am concerned that the statement of principles arbitrarily restricts the scope of the model in a way that would greatly limit the analytical utility of data collected pursuant to it. Below are my responses to the statement of principles produced by Washington. I hope that these comments will lead to a fruitful discussion of how to fully implement the model in a way that will be most useful for regulators and analysts.

1. The guideline cannot require reporting of data elements that are not required by the model law.

BK: Disagree, though this statement of principle is somewhat ambiguous. Obviously the guidelines can't require data elements that would exceed the authority granted by the model. However, the data elements that might fall under the model's purview clearly extend beyond those expressly enumerated in Section 5. Section 5 clearly indicates that the list of data elements *is not intended to be exhaustive*. Namely, Section 5M authorizes states to collect "Any other closed claim data the commissioner determines to be necessary to accomplish the purpose of this Act and requires by adopting a rule." As such, the guidelines can clearly specify data elements that are "not required" by the model, at least in-as-much as the phrase "not required" is intended to mean "not listed."

When drafting the model, the issues group seemed to agree that the model law should not itself be a comprehensive "data call," but rather simply a tool to confer upon adopting states certain legal authorities. It was never intended, in my mind, to limit such authority to the specific data elements listed in the model. Otherwise, what possible purpose would Section 5M serve?

The purpose of the model is expansive: "This Act is intended to ensure the availability of close claim **data necessary for a thorough analysis and understanding** of issues associated with medical professional liability claims, in order to support the establishment and maintenance of sound public policy [emphasis added]." The model's grant of authority to collect a data element derives from whether the element is reasonably necessary to effectuate this broad purpose.

- 2. The guideline cannot say that certain data required by the model law will not be collected (e.g., estimated economic and noneconomic damages).**

BK: Agreed. The guidelines should incorporate economic and noneconomic damages, and all other elements required by the model.

- 3. The guideline cannot give the regulator responsibility for creating data that is the responsibility of the reporting entity under the model law. For example, allocation of economic and noneconomic damages by a regulator merely opens the regulator to charges that he or she manipulated data to validate a particular conclusion or conclusions.**

BK: Disagree. I don't agree that the effect of the current draft(s) is to "give the regulator responsibility for creating data..." The proposed additional data elements simply afford a much more sophisticated analysis of the data than would be possible in their absence. This does not constitute "creating data," if I understand what is intended by the term.

Secondly, I don't believe our purpose ought to be to try to immunize regulators from hypothetical criticisms that might be made at some point in the future (criticism is largely inevitable in my experience). Rather, our primary purpose should be to maximize the analytical utility of the data, tempered with other goals such as cost. Most of the comments we've received have insisted that noneconomic damages as reported by carriers simply are not useful or meaningful, cannot be taken at face value, and *therefore fail to effectuate the purposes of the model*. I agree with this view.

While the model specifies the collection of economic and noneconomic damages, this does not preclude also providing regulators and analysts some means of evaluating the reasonability of those estimates and performing more complex and revealing statistical analyses. Data on the nature of the injury and actual economic costs incurred by the injured party go a long way towards accomplishing these purposes. Such information should be readily available to carriers, so that the cost of reporting should be minimal.

Example: Estimates of lost wages, incurred medical costs, and other economic losses are essential to evaluate the impact of a cap on noneconomic damages. The simple reason is that a cap cannot constrain indemnity payments *until potential compensation surpasses economic damages by an amount greater than the cap*. Absent information about economic losses incurred by the injured party, there is no identifiable method to evaluate the potential impact of caps on bargaining and settlement of cases in the absence of a court judgment. With such information, powerful analytical tools such as game theory can be used to meaningfully model how caps might incentivize bargaining processes and impact ultimate settlement amounts.

Lastly, the insistence that model somehow precludes analyses that involve transformations of the data as reported (i.e. "creating data") runs contrary to the model's express purpose. In fact, taken at face value, a prohibition against "creating data" would preclude pretty much all statistical techniques. Simply calculating average is an act of "creating data." In crafting the guidelines, our model should be the scientific method as commonly understood: any

analysis should thoroughly document the methodology, and make data available so that others may subject the results to replication or refutation. Regulators should welcome methodological criticism from all quarters – that is the very core of the scientific method and necessary for the production of increasingly valid understanding over time.

- 4. Because some states will need to adopt rules to implement the model law, requirements for reporting data must be distinct from internal insurance department processes and procedures to store and analyze the data.**

BK: Agreed.

- 5. The guideline should be consistent with the NAIC's commitment to modernization. The NAIC is moving toward on-line services, and the guidelines should anticipate that data will be entered into a portal by reporting entities. Coding of data and paper reporting by reporting entities should not be considered best practices.**

BK: Disagree (with the qualification following the first sentence). Electronic reporting mechanisms consist of more than entering data into a portal. In Missouri, we anticipate having carriers submit entire datasets electronically (in an Excel spreadsheet, say). The guidelines should reference “electronic transfer” broadly enough to encompass a variety of electronic transfer mechanisms that may be in use among the states. Generally, it has been our experience that specifying specific transfer or storage media is poor practice, and such specifications can quickly become obsolete.

Standardized codes are intended to bring efficiency to the reporting process, facilitate the pooling of data, and reduce the burden on reporting entities that must report in multiple jurisdictions. Such standardization would seem to conform to the NAIC's commitment to modernization rather than run counter to it.

- 6. The guideline should recognize that data should not be segmented into buckets that are so small that they are useless for analysis.**

BK: Disagree. Collecting data in finer categories allows significant flexibility. For example, ZIP codes are generally too small to produce statistically credible data. However, it is quite useful to collect data by ZIP code since it would allow the data to be subsequently aggregated in ways most useful for a given analytical task. The principle should not be whether a category would contain few elements, but rather whether segments can be combined in different ways that are useful. An instructive case is the increasing prevalence among insurers of using zip codes as the building blocks for rating territories.

I would strongly encourage the issue group members to take an expansive view of our mission, and it may be worthwhile to reflect upon the genesis of this project. During the last market downturn, policymakers and analysts at all governmental levels recognized that the

regulatory and surveillance capacities of the states were sorely lacking. The GAO reported that the lack of data was so serious that virtually no meaningful analysis into the causes of the crisis was possible. They further encouraged Congress to intervene if the states failed to act. There is much at stake in getting this right.