

CONSENT 2 – POLICY OPTIONS COLLABORATIVE

CHOICE OF LAW PROVISION – OHIO ANALYSIS

INTRODUCTION

One focus of the Consent 2 – Policy Options Collaborative is to explore the viability of four options that states could enact to resolve barriers to the exchange, including electronic, of protected health information (PHI) among states that have conflicting state laws governing consent to use or disclose PHI. These barriers can be summarized as the civil or criminal liability that may accrue to health information exchange (HIE) organizations or healthcare providers for using or disclosing PHI in contravention of state consent laws.

This analysis addresses whether a “choice of law provision” could eliminate these barriers. A choice of law provision is a provision that states could adopt to specify which state law governs consent when PHI is requested to be exchanged between states with conflicting laws on whether and what consent is needed for such exchange.

A **choice of law provision** may be a **clause** in a contract which specifies which law (i.e. the law of which state) will be applied to resolve any disputes arising under the contract. It may also be a statute or codified preference for which state’s laws apply to a given circumstance (usually it is the enacting state’s laws). It may also be a codified general preference for the application of a particular state’s laws.

DEFINITIONS/ASSUMPTIONS

To ensure consistency in the analysis of the four options, the collaborative has adopted a uniform set of definitions and assumptions.

Definitions:

- Authentication – means the method or methods to verify the identity of a person or entity authorized to access PHI.
- Authorization – means the level of access an individual or entity has to PHI and includes a management component—an individual or individuals must be designated to authorize access and manage access once access is approved.
- Consent – means the patient’s signed approval for the use or disclosure of PHI, which may also be referred to as an “authorization” or “permission” under HIPAA or other state laws.
- Health - is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.¹
- Health care - is the prevention, treatment, and management of illness and the preservation of mental and physical well being through the services offered by the [medical](#), [nursing](#), and [allied health](#) professions.²

¹ World Health Organization, www.who.int/about/definition/en/

² Wikipedia definition, http://en.wikipedia.org/wiki/Health_care

- Health information exchange (HIE) – The electronic movement of health-related information among organizations according to nationally recognized standards.
- Requesting state – the state that is requesting medical information.
- Responding state – the state that has received the request for medical information and is responding.
- Protected health information (PHI) – is individually identifiable health information that is transmitted by, or maintained in, electronic media or any other form or medium. This information must relate to 1) the past, present, or future physical or mental health, or condition of an individual; 2) provision of health care to an individual; or 3) payment for the provision of health care to an individual. If the information identifies or provides a reasonable basis to believe it can be used to identify an individual, it is considered individually identifiable health information.

Assumptions: The purpose of these assumptions is to lay the framework for the analysis effort.

- For purposes of this initiative HIE represents the processes involved in the exchange of consent as defined by the Office of the National Coordinator and is not intended to represent a specific entity.
- The record holder of the responding state may release and have access to the patient's record in conformance with federal and state consent laws for the release PHI.
- The **responding state** and the **requesting state** will have an agreement that addresses:
 - The exchange of data regarding persons authorized to access PHI
 - The authentication of users
- The **responding state** has more stringent consent requirements for the release of PHI than the patient's **requesting state**. *[Assuming the reverse would not be relevant to this analysis in that the patient's PHI would not be available for exchange unless the patient had already executed the required - more expansive - consent.]*

PROCESS FOR DEVELOPING THE OPTION

Discussion

Pros

Cons

LENGTH OF TIME REQUIRED TO FORMULATE

Discussion

Pros

Cons

IMPLEMENTATION REQUIREMENTS

Discussion

Pros

Cons

IMPACT ON STAKEHOLDER COMMUNITIES

Discussion

Positive Impact

Negative Impact

FEASIBILITY

Discussion

Arguments For Feasibility

Arguments Against Feasibility

DOES THE OPTION ADDRESS LIABILITY CONCERNS

Discussion

Pros

Cons

RAMIFICATIONS OF ACCEPTANCE/REJECTION

Discussion

Acceptance

Rejection

CONFLICTS WITH STATE OR FEDERAL LAWS

Discussion

Pros

Cons

LEGAL FRAMEWORK/RULES OF ENGAGEMENT

Discussion

Pros

Cons

PROCESS FOR WITHDRAWAL

Discussion

Pros

Cons

STATE RESPONSIBILITIES

Discussion

Pros

Cons

STATE'S RIGHTS

Discussion

Pros

Cons

ENFORCEMENT

Discussion

Pros

Cons

OTHER CONSIDERATIONS

CONCLUSION