

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 applicable federal or 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

Choice of law provisions are a mechanism for eliminating uncertainty and can prevent potential disputes regarding the law that governs a particular transaction. Choice of law provisions might be simple or complex. For example, the provision may simply select one state's labor, discrimination, and similar laws to govern all disputes that may arise out of the transaction. Or, the drafters could establish a completely new set of such laws through negotiation and collaboration to address every aspect of the HIE transaction. Alternatively, the provision may simply establish which state's (i.e., the responding state or the requesting state's) laws apply in a given situation. And of course, there are a myriad of options that span across a spectrum that includes these various options.

If one state's laws are chosen to govern all transactions, another important issue that will need to be addressed include whether the law which is chosen is to remain static or if it will change as the chosen state's laws are amended. The choice of law provision could adopt an implicit or explicit

modification of the applicable law if the underlying state's law is subsequently modified.

Pros

A choice of law provision will protect the justified expectations of the parties and make it possible for them to foretell with accuracy what will be their rights and liabilities in a given situation. This is even more true if one state's laws are selected, as there would be a complete and coherent set of norms that apply. In other words, rather than assimilating norms and provisions from various sources, a "single source" approach would bring with it a unitary and integrated set of laws to the table.

Regardless of whether a single state's laws are chosen, or if multiple states' laws are assimilated into a new framework, the selection could focus on state laws that have already been interpreted by the courts, thereby allowing a greater degree of certainty about what those laws mean.

By establishing a choice of laws provision, each party would be presumably be precluded from later arguing (or litigating) that the law of its own state is to apply. Without such a clause, the parties will need to be aware of the panoply of problems they are creating by having no legal norms and no means of defined, adequate redress for the affected parties.

Cons

Increased time for negotiation and development of an appropriate choice of laws provision, particularly given each state's interest in protecting the health information of its citizens.

LENGTH OF TIME REQUIRED TO FORMULATE

Discussion

Deciding which laws should apply and drafting the appropriate language will obviously lengthen the negotiation and drafting processes and could delay agreement as the interested parties would need to come to decisions on a whole new set of issues. Because every state has its own health care laws, and often laws governing confidentiality and other HIE-related issues, this may be an extensive process.

Pros

Spending additional time on the "front end" establishing the applicable choice of laws will likely lead to less time on the "back end" deciding which laws apply to a given dispute.

Cons

Writing a choice of laws provision might raise additional issues that the drafting committee or participating states may prefer to keep closed for the sake of getting the compact, model act, or uniform law finished.

IMPLEMENTATION REQUIREMENTS

Discussion

Establishing a choice of law provision will first require a survey or research of the possible candidates for the applicable law, followed by negotiation and drafting by the stakeholders as they create the choice of law provision. Such a survey may be less necessary if the choice of laws provision simply establishes that the requesting state's (or responding state's) law applies in all circumstances.

Pros

With a properly defined choice of laws provision, future disputes can be resolved more expeditiously by the courts, or through a defined dispute resolution process.

Cons

Increased negotiation or drafting time, as this may be a major point of discussion while attempting to reach consensus among the stakeholder communities as to the appropriate guidelines for the HIE transaction.

IMPACT ON STAKEHOLDER COMMUNITIES

Discussion

While no precedent was found directly on point, choice of law provisions may prove to be a prudent consideration but ultimately insufficient means to eliminate the existing barriers associated with interstate electronic information exchange.

Pros

- **Some Recognition by Courts** - Choice of law provisions have been granted some deference by courts. Therefore, their inclusion may generally offer stakeholders support in their decision-making and enhance their ability to predict the outcome of potential dispute(s).
- **Reduced Litigation** - Creating explicit provisions may allow stakeholders to reduce any unnecessary and time and expenses associated with litigating procedural matters.

Cons

- **Inconsistent Judicial Interpretation, Remaining Fear of Liability and Deterred Uptake** - Absent explicit, statutory action, judicial interpretation of choice of law provisions could remain uncertain enough to deter stakeholders from exchanging health information electronically across state lines – for fear of liability.
- **Disparate Burden and Professional Ethics** – Such uncertainty make be especially problematic for some stakeholders. Smaller health care providers, for example, might be deterred by the potential time and expenses they might occur by exchanging the information as provided for. The health care provider may also be deterred by the focus such provision may take away from the actual provision of health care. Consumers might be even less able to represent themselves adequately should a conflict arise. The likelihood that many consumers would be less informed in negotiating such terms also increases the risk that contractual choice of law provisions would be overturned.

FEASIBILITY

Discussion

Choice of law provisions generally are contractual. In the absence of contractual provisions, courts apply conflict of law principles to determine which forum's law applies. A state could enact a uniform choice of law statute, as has been done with the Uniform Commercial Code, to govern health information exchange.

Arguments for Feasibility

Enacting a uniform statute to standardize the choice of law is the subject of separate inquiry. However it is feasible but would require an undetermined amount of time for participating states to enact legislation. Regarding existing practices to address choice of law in contracts, or to resolve matters where contracts fail to address the issue, there is no feasibility issue since the status quo would continue and is well governed by decades of court rulings and probably adoption in every state of the Restatement (Second) of Conflict of Laws.

Arguments against Feasibility

Enacting a uniform statute to standardize the choice of law is the subject of separate inquiry but would require an undetermined but probably lengthy amount of time for participating states to enact legislation. For example, the Uniform Commercial Code took approximately 20 years before it was adopted with some states declining to adopt some provisions (see www.answers.com/topic/uniform-commercial-code).

Other arguments against feasibility include the cost, delay and uncertainty of Ohio's choice of law practices as they can be expected to apply to interstate health information exchange. In cases of disputes between or among parties, existing case law permits a party to litigate the issue and sometimes prevail for reasons more related to the forum in which the litigation is initiated than the strict application of choice of law principles or contractual language to the matter at hand.

DOES THE OPTION ADDRESS LIABILITY CONCERNS

Discussion

Choice of law provisions are routinely used in contracts involving parties located in more than one state in order to specify which state's law applies in the event of contractual dispute. Such clauses are often but not always upheld by judges. For reasons described below, resolution of interstate health information exchange liability concerns by use of choice of law clauses in contracts or other written instruments cannot be recommended unless state legislatures provide clear guidance through uniform statutory enactments (including participation in a multi-state compact).

States have adopted choice of law statutes to provide greater certainty to parties and reviewing courts. For example, R.C. 1304.85 addresses bank fund transfers:

“(A) All of the following apply unless the affected parties otherwise agree or division (C) of this section applies:

(1) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.

(2) The rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary's bank is located.

(3) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.

(B) If the parties described in division (A) of this section have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

(C)(1) A funds-transfer system rule may select the law of a particular jurisdiction to govern either of the following:

(a) The rights and obligations between participating banks regarding payment orders transmitted or processed through the system;

(b) The rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system.

(2) A choice of law made pursuant to division (C)(1)(a) of this section is binding on participating banks. A choice of law made pursuant to division (C)(1)(b) of this section is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to division (C)(1) of this section may govern, whether or not that law bears a reasonable relation to the matter in issue.

(D) In the event of inconsistency between an agreement under division (B) of this section and a choice-of-law rule under division (C) of this section, the agreement under division (B) of this section prevails.

(E) If a funds transfer is made by use of more than one funds-transfer system and there is inconsistency between choice-of-law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue."

Another Ohio example can be found in R.C. 1305.15 regarding choice of law for letters of credit.

Pros

Choice of law clauses are well understood and allow contracting parties to easily modify the provision as circumstances dictate. Choice of law provisions and considerations are so commonly used that a Google search resulted in more than 6 million hits. As probably is the case with all other states, the Ohio Supreme Court has adopted the Restatement (Second) of Conflict of Laws as the principles governing resolution of choice of law disputes in cases where the parties to a contract have not specified the controlling forum (*Ohayon v. Safetco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 747 N.E.2d 206 (Ohio 2001)).

Cons

Unless legislatures adopt uniform language, relying on choice of law provisions in contracts and agreements (e.g., consent for HIE disclosure) would cause too much uncertainty and not satisfactorily resolve liability concerns. One can imagine that a party/entity active in health information exchange would need to know, or be able to determine, the applicable law in each of 50 states.

Where parties have not specified which state's law controls, the guidance provided by the Restatement (Second) of Conflict of Laws provides too many opportunities to reach different conclusions on the same fact pattern. Section 188 provides that, in the absence of an effective choice of law by the parties, their rights and duties under the contract are determined by the law of the state that, with respect to that issue, has "the most significant relationship to the transaction and the parties" (Restatement at 575, Section 188(1)). Section 188(2)(a) through (d) more specifically provides that courts should consider the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the domicile, residence, nationality, place of incorporation, and place of business of the parties.

When disputes inevitably arise, parties would be able to challenge the validity of the contractual choice of law provision on various grounds (e.g., public policy, unfair bargaining position, renvoi) and, even when the challenge is not technically appropriate, history demonstrates that courts would sometimes rule in favor of the challenger. Non-meritorious challenges, even though unsuccessful, would also cause expense and delay. An example of a party challenging the choice of law—resulting in expenses and delayed resolution—is *Scanlon v. Pfaller*, 2006 WL 1064051 (Ohio App. 12 Dist. 2006).

These reasons compel a recommendation not to rely on choice of law provisions to facilitate HIE unless legislatures in the affected states have enacted uniform statutes that provide certainty and satisfy liability concerns.

RAMIFICATIONS OF ACCEPTANCE/REJECTION

Discussion

Based on research of pertinent data bases for Ohio cases and statutes, no information was found regarding the treatment of PHI for choice of law purposes. As such, noted below are some key questions that will be necessary to address.

- How is PHI to be characterized?
- Is it to be treated as tangible or intangible?
- Should the choice of law rule for treatment of PHI be the place from where the records are being transferred or the domicile of the patient at the time of the transfer?

Acceptance

Typically, the utilization of a formal choice of law provision noted by statute or included in a contract affords predictability, efficiency, and uniformity in the adjudication process by the courts. Of note, contract choice of law provisions also maintain the intent of the parties, regarding contemplated considerations if litigation should arise (e.g., choice of forum, location, nature of information). Courts have rendered added weight for choice of law contract provisions. *Schulke Radio Productions, Ltd. v.*

Midwestern Broadcasting Co. (1983), 6 Ohio St.3d 436, 438, 453 N.E.2d 683.

Although there are notable benefits with the utilization of formal choice of law provisions, there can be some challenges with them, as well. Specifically, there could be conflicting choice of law provisions among the states involved in a case as to which state's choice of laws should govern the subject matter. The law that would apply would be determined by the court on a case by case basis. Uniformity and predictability would be compromised. Also, given the complexities of the exchange of PHI, personal and political sensitivities, regarding patient confidentiality and security, could be issues. With these potential issues, there arguably is a greater likelihood that patients adversely affected by a choice of law statute will file lawsuits, resulting in an increase in litigation costs (time and expense). Lastly, without a uniform choice of law statute, lack of certainty and predictability will exist. To continue to move forward without any change is not a logical option for Ohio.

Rejection

Absent a formal choice of law mechanism or a mechanism that would offer more certainty and predictability, the courts would be required to determine which of the state's choice of law rules would be applicable based on a common law analysis. This could be a very time consuming process as it is subject to judicial interpretation. In Ohio, there are several approaches a court could choose in selecting which state's choice of law rules would govern, including identification of the state that has had the most significant relationship to the subject matter. *Bobb Chevrolet, Inc. v. Jack's Used Cars, L.L.C.*, (2002) 148 Ohio App.3d 97, 100-101, 772 N.E.2d 171.

CONFLICTS WITH STATE OR FEDERAL LAWS

Discussion:

A contractual choice of law provision, presumably in an agreement between a health care provider and a patient, may conflict with specific Ohio statutes. For example, by statute, Ohio restricts access to certain mental health records and to certain records regarding AIDS and HIV tests. Ohio Rev. Code §5122.3; Ohio Rev. Code §3701.243. These laws were enacted to protect the privacy of Ohio citizens with regard to information that could be particularly sensitive or damaging. In light of this, if an Ohio patient were to sign an agreement with a provider that the less protective laws of another state apply to the transfer of records, the courts would need to determine if the patient is able to waive the statutory protections and whether, in the particular situation, the patient effectively did waive those protections. Specifically, under Ohio law, a person may waive rights and privileges conferred by statute, if the waiver does not violate public policy. *Hess v. Akron* (1937), 132 Ohio St. 305

A statutory choice of law provision, on the other hand, would presumably address the effect it has on specific Ohio medical records protections, thus avoiding the potential conflict with other state laws.

Currently, federal regulations apply regarding access to records pertaining to drug and alcohol treatment from an entity receiving any type of federal assistance. 42 C.F.R. Part 2. Because the access restrictions are tied to the entities continued federal assistance, neither contractual nor state statutory choice of law provisions will supersede the federal restrictions.

Pros:

Cons:

Interstate access to medical records will continue to be impeded by conflicting requirements. Specifically, two states may each have statutes applying its own laws, rather than the laws of the other state. In these situations, choice of law provisions will make the process for interstate access to medical information less certain, and therefore more difficult.

LEGAL FRAMEWORK/RULES OF ENGAGEMENT

Discussion

Refers to determination of which jurisdiction's law to apply when parties and/or events related to a claim cross state boundaries. Choice of law rules, and standards – e.g. to apply law of forum where key elements of claim occurred, of forum with most significant interest, of forum with “better law”, or of forum with most significant contacts - and analyses of these standards in a given claim vary by state and by area of law. Parties can specify choice of law to be applied to a transaction or claim, though there is no guaranty that court will follow that choice if it perceives a compelling reason to do otherwise. There is a distinction between application of procedural rules (usu. apply those of forum state) and substantive rules, though each may have significant impact on outcome.

Ohio Revised Code (ORC) § 2307.39 specifically permits parties' choice of law in contract, agreement or undertaking except as otherwise limited. That section specifies that it does not apply to an agreement for labor, personal services or to a consumer transaction. ORC § 1301.05 adopts UCC 1-105 and allows for parties' designation of choice of law if the designated state bears a reasonable relation to the transaction. Absent such designation, UCC provisions apply.

Pros

Status quo/current state of the law is known; allows parties to choose forum/gives parties more flexibility

Cons

Not wholly predictable or consistent within state or across states; even if specified by parties; no guaranty that the parties' choice will be implemented/followed by courts; courts and attorneys applying laws of a different state may lack expertise in interpretation and application of that state's laws

PROCESS FOR WITHDRAWAL

Discussion:

If choice of law is specified by parties to a transaction or claim, withdrawal would need to be in accordance with the rules relating to the transaction or claim, either as specified in agreement or by common law. This element is not applicable to non-party/state law determinants about choice of law other than withdrawal from statute re: choice of law would be by legislative enactment.

Pros:

To extent specified by parties, within parties' control

Cons:

Length of time; uncertainty

STATE RESPONSIBILITIES

Discussion:

Generally, states have only the responsibility to enforce its own laws. For this reason, courts will often go to great length to avoid applying or interpreting foreign laws. Conversely, courts will, on occasion, make significant efforts to apply the laws of their jurisdiction. These inclinations are motivated by preferences and familiarity rather than formal legal theories. Nevertheless, the expression of this preference is effectively a choice of law.

Pros:

The ambiguities created by the current state of affairs does allow for some flexibility to address unexpected circumstances without having to formally amend fixed or codified terms.

Cons:

This being the present state of affairs, choosing this option continues the present uncertainty.

STATE'S RIGHTS

Discussion

States prefer to apply their own law and, as a result, sometimes go to great lengths to apply their own law.

Pros

Statutory choice of law provisions or preferences preserve the rights of the state to govern the policies affecting the medical privacy of its citizens.

Cons

By preserving each state's right to implement its own policies regarding access to medical records, choice of law mechanisms do not effectively address the barriers to interstate access created by differing laws.

ENFORCEMENT

Discussion:

Enforcement is often a predetermined matter set forth in the terms of the agreement or transaction. Unless otherwise prohibited by law or judicially determined to be inequitable, courts will enforce the

predetermined choice. However, when a choice is not made, or when the choice is unclear, courts will use a number of principles to determine the applicable law; e.g., substantive vs. procedural distinction, “center of gravity”, renvoi, etc.

Pros:

Establishing which state’s laws will govern the agreement or transaction adds predictability to the Parties’ relationship.

Cons:

The failure to clearly establish a choice of law often leads to additional litigation prior to reaching the merits of the underlying dispute. Even when specified, courts may find the predetermined choice of law inapplicable; thus, while occasionally appropriate or necessary to further justice or judicial efficiency, contractual specificity does not necessarily remove the present uncertainty.

OTHER CONSIDERATIONS

CONCLUSION

Choice of law is a legal concept that underlies all interstate transactions regardless of what is being transacted. As such, “choice of law” is not, in and of itself, an option for HIE. Instead, choice of law is a necessary discussion point for the remaining true options. The failure to conceptually address choice of law would only serve to perpetuate the current ambiguities in interstate HIE; thereby, seriously undermining any attempt to standard interstate HIE. Accordingly, the Legal Working Group formally concludes that regardless of the option ultimately pursued (Model Law, Uniform Law, or Interstate Compact), “choice of law” must be a specific discussion point on any agenda and the concept must be specifically addressed within the text of the Model Law, Uniform Law, or Interstate Compact.