Minnesota Department of Health June 7, 2007

Minnesota Health Records Act – HF 1078

Background

Under the Minnesota e-Health Advisory Committee's direction, the Minnesota Privacy and Security Project (MPSP) conducted a systematic and comprehensive review of current laws and practices to identify and address the most significant privacy and security barriers to the electronic exchange of health information.

Minnesota's patient consent requirements were identified as a major privacy and security impediment to the electronic exchange of health information, because:

- Health care providers cannot agree on "when" and "how" patient consent is required to exchange patients' health information.
- Minnesota's patient consent requirements were designed for paper-based exchanges of information and are not conducive to a real-time, automated electronic exchange of information.

The MPSP convened privacy advocates and health care industry representatives to identify the cause of the barriers, propose solutions, and analyze the advantages and disadvantages of potential solutions.

Reasons for the Barriers

Through a series of public meetings from May 2006 through October 2006, the MPSP identified specific ways that the patient consent requirements impede the electronic exchange of health information. These barriers can be grouped into three general causes:

- **Undefined terms and ambiguous concepts** that are used in Minnesota's patient consent requirements in Minnesota Statutes § 144.335.
- **Difficulties in determining** the appropriate application of Minnesota's patient **consent requirements to new concepts in the electronic exchange of health information** that do not have an analogous concept in a paper-based exchange.
- The **need to update Minnesota's patient consent requirements to allow mechanisms that facilitate the electronic exchange** of patients' information while respecting the patients' ability and wishes for controlling their information.

Generating Solutions for Barriers

Between October 2006, and January 2007, the MPSP convened privacy advocates and health care industry representatives to identify and analyze potential solutions to the barriers. The group was charged with:

- Identifying options to address barriers;
- Documenting the advantages and disadvantages of each option; and
- Connecting related options.

Some of the identified solutions placed a higher value on patient privacy, while other solutions placed a higher value on operational ease of implementation. **In general, the group did not reach consensus around a set of best solutions.**

Criteria for Evaluating Solutions

Because the group did not reach consensus, MDH developed the following criteria for selecting between solutions that address privacy and security concerns related to the implementation of Minnesota's patient consent requirements:

- Solutions should maintain or strengthen patients' privacy or control over their health records.
- Solutions should improve patient care.
- Solutions should facilitate electronic, real time, automated exchange of health information.
- Solutions should not place an undue administrative burden on the health care industry.
- Solutions should increase the clarity and uniform understanding of the statutory language and consent requirements.

Major Modifications and Clarifications in HF 1078

1. **Define the term "Health Record." (Lines 347.22-347.25)** This modification clarifies what information is under patients' control and will make Minnesota Statutes more consistent with Federal regulations.
2. **Define the term "Medical Emergency." (Lines 347.31-347.34)** This modification clarifies when the medical emergency exception to patient consent is applicable.
3. **Define the term "Related Health Care Entity." (Lines 348.21-348.23)** This modification clarifies when the related health care entity exception to patient consent is applicable.
4. **Clarify the meaning of the term "Current Treatment" in M.S. § 144.293, Subd. 6 (1) – previously 144.335, Subd. 3a (c)(1). (Line 351.31)** This modification clarifies which of two interpretations currently used by providers is the appropriate interpretation for this statute. The modification resolved differences between health care providers on "when" and "how" patient consent is needed**.**
5. **Add an exception to patient consent for long term care providers when health information is needed, but it is impossible to obtain because the patient is physically or mentally unable to provide consent. (Lines 351.20-351.26)** This modification is related to the term "Related Health Care Entity." Some long term care providers have been using an expanded definition of "Related Health Care Entity" to obtain health records when a resident has had a medical emergency. This change ensures that long term care facilities have the appropriate information to deliver patient care.
6. **Introduce and define the concept and term "Record Locator Service." (Lines 348.18-348.20)** This modification is a new concept needed to facilitate the electronic exchange of health information. A record locator service functions as an index or card catalog for patient records; the record locator service stores sufficient identifying information to uniquely identify each patient and provides pointers to the locations of patients' health information. The record locator service only contains the identifying information necessary to assist providers in finding the location of all pertinent health information; it does not contain the patients' clinical data.
7. **Introduce and define the concept and term "Identifying Information." (Lines 347.26-347.28)** This modification is a new concept needed to clarify what patient-identifying information may be included in a record locator service.
8. **Clarify the appropriate application of the patient consent requirements to a record locator service. (Lines 352.9-353.2 and 357.1-357.5)** These modifications clarify:
   - Providers may construct a record locator service without patient consent.
   - Providers must obtain patient consent to access patients' information in a record locator service.
   - Only providers may access patient information in a record locator service.
   - MDH cannot access or receive information from a Record Locator Service.
   - Providers must provide patients the opportunity to completely opt-out of the record locator service as part of the consent process.
   - A record locator service must maintain an audit log of who accessed patient information.
   - A record locator service is liable for inappropriate disclosures of patient information.
9. **Introduce the ability for a health care provider to rely on another provider's representation of having obtained patient consent, including a framework that places responsibilities on both the requesting and disclosing providers for assuring the appropriateness of requests and disclosures. (Lines 351.1-351.2, 353.8-353.30, and 356.27)** This modification facilitates the electronic exchange of patients' health information by providing a mechanism for patients to provide consent through the treating/requesting provider at the point of service. That is, the patient consent requirements would allow the disclosing provider to automatically and electronically exchange patients' health information to the requesting/treating provider based on the requesting provider's representation of having obtained the patient's consent. This modification clarifies:
   - Only a provider may request a patient's health record using a representation of having obtained patient consent.
   - A provider may release a patient's information to another provider using a representation of having obtained patient consent.
   - The provider releasing health records to another provider using a representation of having obtained patient consent must document: a) the requesting provider; b) the patient; c) the records requested; and d) the date of the request.
   - Both the requesting provider and the disclosing provider have responsibilities when requesting or disclosing a patient's health records using a consent or a representation.
10. **Requires the Commissioner of Health to develop a form that may be used by patients to access health records. This form must be accepted by providers as a legally enforceable request (Lines 350.22-350.25)**
11. **Recodify Minnesota Statutes § 144.335 to make the requirements easier to understand for patients and health care providers**. This recodification will make it easier for patients to understand their rights under the Statutes and for health care providers to understand their responsibilities. New Law: M.S. § 144.291 – 144.298.