

Minnesota Privacy and Security Project
Legal Work Group

Documentation of Privacy/Security Issues in the Exchange of Health Information
DRAFT DOCUMENT SUBJECT TO REVISION

Consent Related Issues					
Issue	Legal Framework	Barriers to Exchange	Consumer Benefit	Privacy Principle Addressed	Potential Solutions
<p>Definition of “Related Health Care Entities” Under M.S. § 144.335, Subd. 3a, (b), 2 – Health care providers may release records to other providers within related health care entities when necessary for the current treatment of the patient.</p> <p>Minnesota Statutes do not define “Related Health Care Entities” and different organizations have varying interpretations for related health care entities.</p>	M.S. 144.335, Subd. 3a, (b), 2	<p>If the meaning of “related health care entities” is defined very narrowly, then a health care provider must have a signed and dated patient consent in order to release health records for treatment.</p> <p>The need for a signed consent can be a barrier to the exchange of information for a variety of reasons:</p> <ul style="list-style-type: none"> • The patient is not available to provide a consent when it is determined that a consent is needed; • The patient is unable to consent, and the person/representative able to consent is unavailable; • The information is needed urgently and there is not sufficient time to obtain a valid consent under M.S. 144.335. 		Individual Participation and Control	HIPAA provides a model for sharing health information for treatment purposes.
<p>Definition of “Health Record” Under M.S. § 144.335, Subd. 3a, (a), a provider may not release a patient's health records without a signed and dated consent. However, Minnesota Statutes do not define “Health Record.”</p>	M.S. 144.335, Subd. 3a	<p>When “health record” is taken to mean all health information, Minnesota Statutes require a signed and dated patient consent in order to release health records for treatment.</p> <p>The need for a signed consent can be a barrier to the exchange of information for a variety of reasons:</p>		Individual Participation and Control	HIPAA provides a model for sharing health information for treatment purposes.

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		<ul style="list-style-type: none"> The patient is not available to provide a consent when it is determined that a consent is needed; The patient is unable to consent, and the person/representative able to consent is unavailable; and The information is needed urgently and there is not sufficient time to obtain a valid consent under M.S. 144.335. 			
Definition of “Current Treatment” Under M.S. § 144.335, Subd. 3a, (b), 2 – Health care providers are not prohibited from releasing records to other providers within related health care entities when necessary for the current treatment of the patient. However, Minnesota Statutes do not define “Current Treatment.”	M.S. 144.335, Subd. 3a, (b), 2	Leaving the definition of current treatment open to provider interpretation means that there can be varying interpretations regarding the need for written consent. The need for a signed consent can be a barrier to the exchange of information for a variety of reasons: <ul style="list-style-type: none"> The patient is not available to provide a consent when it is determined that a consent is needed; The patient is unable to consent, and the person/representative able to consent is unavailable; and The information is needed urgently and there is not sufficient time to obtain a valid consent under M.S. 144.335. 		Individual Participation and Control	HIPAA provides a model for sharing health information for treatment purposes.
The Need For Written Consent The need for a written consent can be burdensome in a couple of respects: 1) An appropriate written consent form must be obtained from the patient; and 2) The written consent form must be maintained in an electronic form consistent with other portions	M.S. 144.335, Subd. 3a	The need for a written consent form may be a barrier to the exchange of health information in a number of ways. First, it may be inconsistent with other electronic ways of interacting with the patient and the electronic health record. For example, patients might be able to give their consent online or over the phone using a mechanism that is not a written form.		Openness and Transparency Individual Participation and Control	HIPAA provides a model for sharing health information for treatment purposes

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of the EHR.		Second, it can be a barrier in that the written consent needs to be scanned and added to the electronic health record. This creates an additional burden of tracking and linking the consents (and other documents) to the electronic health record.			
<p>One-Year Time Limit on Consents. M.S. § 144.335, Subd. 3a, states that, “Except as provided in paragraph (c) or (d), a consent is valid for one year or for a lesser period specified in the consent or for a different period provided by law.”</p> <p>This one-year time limit may serve as a barrier to exchanging health information because consents have expired.</p>	M.S. 144.335, Subd. 3a	Consents that automatically expire can be a barrier to the exchange of information, because it may be difficult to renew the consent.		Individual Participation and Control	
<p>Minor Consent It can be difficult to know what constitute proper consent for a minor under M.S. § 144.343.</p> <p>HIPAA left this issue to the states and there is a need for additional guidance in this area.</p>					
<p>Parental Consent When can a parent give consent? Does custody control?</p>					The MN Government Data Practices Act may serve as a model for this issue.

Consumer Acceptance					
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<p>Realistic and Clear Security Measures Any type of electronic health records that permit the sharing of health information need to have realistic and clear security measures to provide assurance to patients that their information is being protected. In addition, there needs to be clear requirements for dealing with any breaches of the system, including notifying patients who may be impacted by the breach.</p>		<p>The true utility and benefits of exchanging health information can only be realized when consumers trust and accept the sharing of the information. Patients will only accept and trust a system if they believe that their information is being protected using appropriate security measures and that they will be notified if the security system fails and their information is breached.</p>		<p>Security Safeguards and Controls</p> <p>Remedies</p>	
<p>Need for Effective Sanctions There needs to be effective sanctions for individuals that violate the privacy and security of electronic health information.</p>		<p>A lack of consumer acceptance will be a barrier to the exchange of electronic health information unless consumers believe that anyone violating the privacy and security of the health information can and will be sanctioned.</p>		<p>Accountability and Oversight</p> <p>Remedies</p>	<p>Provide a private right of action</p>
<p>Information Should Be Compartmentalized And Shared Only As Relevant Much of the information contained in a medical record or EHR may not be relevant for a particular visit. Consequently, there needs to be a mechanism to ensure that all shared information is relevant to the visit. That is, we should be sharing the minimum necessary information.</p>		<p>While most consumers and patients are willing to allow their health care providers to share health information necessary to treat them, they are sensitive to sharing health information not relevant to their current treatment. Consumer acceptance will require that the information shared can be limited to information relevant to the purpose for sharing.</p>		<p>Purpose Specification and Minimization</p>	
<p>How Are Consumers And Patients Informed About The Uses And Disclosures Of Their Information? Many consumers feel that they are not fully aware of what is being done with their health information and who might have access to it. Is there a more effective way than the HIPAA</p>		<p>Consumers are concerned about who has access to their health information and the purpose for that access. Many consumers also feel that they are not fully aware of who has access and why they have access. Consequently, many consumers are reluctant to allow sharing of their health information without a better understanding of the access to and uses of their</p>		<p>Openness and Transparency</p> <p>Purpose Specification and Minimization</p>	

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Notice of Privacy Practices to educate patients about the uses and disclosures of health information?		health records.		Individual Participation and Control	
Can The Relevant Data Practices Laws Be Located In One Location? Currently, data practices law related to the use and disclosure of health information is contained in many different sections of Minnesota Statutes and Rules. This makes awareness and understanding of the various laws difficult for both consumers and the health care industry.					

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What is a “Medical Record” What is the medical record when there is an inter-connected Electronic Health Record? Does the concept of a distributed electronic health record require us to re-think what we mean when we say “medical record?”					
Who Owns A Medical Record In A Networked Environment Of EHRs?					
What Does A Printed EHR Look Like? When all of a patient’s health information is contained in an electronic health record, what is the printed record that is provided to a patient requesting their health information?		This issue may not be a barrier to the exchange of information, but it may be a barrier to a patient’s ability to access their health information. Specifically, the ability to be provided the information in an understandable written format.		Individual Participation and Control Data Integrity and Quality	

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<p>Clarify The Ability To Charge For Providing A Patient A Copy Of Their Health Information. When a patient's health information is contained in an electronic health record, what does it mean to make a "copy of the health record," and what is an appropriate charge for providing the information.</p>	M.S. 144.335, Subd. 5				
<p>How To Accommodate Patient Requested Restrictions. How does an organization operationally address patient requested restrictions related to their health information in a networked electronic health record environment?</p>		<p>Patient requested restrictions related to the use or disclosure of health information can be complex and difficult to accommodate. How can agreed upon restrictions be documented and communicated when sharing health information through an electronic health record? Also, how can a patient and an organization releasing records be sure that the receiving organization will abide by the restrictions?</p> <p>If an organization receiving health information cannot conform to the restrictions placed on the health information, other organizations will not be willing or able to share information.</p>		<p>Purpose Specification and Minimization</p> <p>Individual Participation and Control</p>	
<p>How Can Consumers Exercise Their Rights? If a consumer's health information is located in electronic health records distributed across many organizations capable of sharing the information, does this provide an opportunity for improving the consumer's ability to exercise their patient rights?</p>			<p>Is it possible to establish one-stop service across organizations that have established the ability to share and exchange health information? For example, can a patient initiate a request for access to all of their sharable health records through one of the organizations sharing and exchanging health information?</p> <p>Similarly, can a patient initiate a request to amend their health information across a network of inter-connected EHRs through just one of the organizations in</p>	<p>Individual Participation and Control</p> <p>Data Integrity and Quality</p>	

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			the network?		
<p>Does Minnesota Statute Use An Appropriate Definition Of Health Care Provider?</p> <p>Is the term “Health Care Providers” appropriately defined to ensure that those with a need to access health information are able to access the information and also, that those who are able to access health information are required to protect the information.</p> <p>There was a specific question about social service agencies on this point.</p>					

Additional topics and issues that were raised, but not yet integrated into the table:

- If a provider has records from another provider, is that part of the medical record that must be disclosed to patients – patient rights
- There was a discussion about Minnesota consent and chemical dependency treatment consent, although the issue needs to be further clarified in order to add it to the table.
- There was also discussion about whether there are other conditions similar to chemical dependency where additional privacy protections would be appropriate (i.e. AIDS, mental health)
- 72A HMO Statutes
- Interoperability of EHR systems
- Economics of EHRs - Anti-Kickback, Stark, Etc.