

Liability-Related Issues/Questions for Health Information Exchange

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The issue of organizational risk and liability concerns associated with the disclosure of health information has been identified as a barrier to increased electronic exchange of health information. Both the Variations Work Group and the Legal Work Group have stated that exchanging data through interoperable electronic health records raises a number of liability concerns for your organizations.

This document is intended to help the Legal Work Group explore these issues and to:

- clarify the sources of organizational risk;
- determine if the liability is appropriately shared by all parties involved in the exchange of information (i.e., discloser and receiver); and
- investigate if changes in Minnesota law could further enable the appropriate exchange of health information by ensuring that all parties in an exchange are responsible for its appropriateness.

Sources of Liability

1. Disclosures of patient medical records that are inappropriate or unauthorized and access to patient medical records that are inappropriate or unauthorized are a source of risk for organizations. We would like to confirm that sources of liability/risk are:
 - The Office of Civil Rights at the U.S. Department of Health and Human Services
 - State regulators
 - State licensing boards
 - Credentialing bodies
 - Litigation by patients or their representatives following a disclosure or access
 - Bad publicity through any type of news media
 - Loss of patient privacy and/or confidence

Are these sources correct? Are there others?

Changes to Minnesota Law

2. Assume that it is possible to change Minnesota law to distribute responsibility/liability among all of the licensed/registered actors involved in the exchange of a patient's health records. What should that modified Minnesota law address?

Intersection of Liability and Patient Consent

3. The Work Group has detailed how Minnesota's patient consent requirements relate to the electronic exchange of health information through a RHIO or Health Information Network (HIN). In this exercise we look at the intersection of liability concerns and patient consent to release health records.

Please consider the following short scenario, which is intended to help us think about the situation where both the patient's consent and health information can be electronically

exchanged between health care organizations. The exchange may be part of a HIN, or may be between two health care entities that frequently need to exchange data. In reflecting on the scenario's questions, please try to identify the liability/organizational risk that your organization would like addressed.

Scenario

Patient A is at Fine Clinic. Six months ago, Patient A had a procedure at Good Hospital. Good Hospital and Fine Clinic are not affiliated or related entities. Fine Clinic needs records from Good Hospital to provide care to Patient A.

- **Assume Minnesota law has been changed** to permit Good Hospital to release records to Fine Clinic based on Fine Clinic's representation that they have an authorization/consent from Patient A
- Patient A has signed an authorization/consent at Fine Clinic and checked the box so that Good Hospital has permission to release records to Fine Clinic.

Questions for Consideration

- A. How does Good Hospital know that Patient A's consent has all the elements of a valid consent (e.g., all elements required for a valid HIPAA authorization are present and have been completed)?
- B. Should a standardized, statutory or rule-based authorization/consent form (whether paper-based or electronic) be created that could be used to ensure that Patient A's consent has all required elements?
- C. How should the content of Patient A's authorization/consent be communicated to Good Hospital?
- D. Should there be a national standardized format for Fine Clinic and Good Hospital to electronically exchange the data elements of Patient A's consent (e.g., patient demographics, date of authorization, data included in authorization, duration of authorization, etc)?
- E. If national standards do not exist, should Minnesota develop a standard state format for exchanging consent information?
- F. Given our discussion of Item 2 above, should the law be changed to shift liability (some or all) to Fine Clinic to address its responsibility vis-à-vis the authorization/consent? If the answer is "yes," how should the shift be made? Are there other actors who should also bear some of the responsibility?
- G. What additional opportunities exist in the electronic environment for Good Hospital to authenticate the validity of Patient A's consent?
- H. Can the authorization/consent form be drafted to avoid problems with alteration? *See Swarthout v. Mutual Service Life Ins. Co.*, 632 NW2d 741 (Minn. Ct. App. 2001) where employees of the insurance company added clinic names and record descriptions to a signed consent form and obtained medical records without the patient's knowledge. How should similar issues with "check the box" forms addressed?
- I. Should a standardized authorization/consent form be created that specifically authorizes electronic exchange of health information?