

# Minnesota Privacy and Security Project Legal Working Group Meeting

## Summary of Responses to Consent-Related Questions

### Introduction

This document provides a high-level summary of the Legal Work Group's responses to questions 14-20 of the discussion document, titled, "Consent-Related Issues/Questions for Health Information Exchange." The responses differed greatly based on two different interpretations of Minnesota Statutes § 144.335. To help clarify the responses, we identify the two interpretations as:

- **Interpretation 1:** This view of Minnesota Statutes § 144.335, Subd. 3a holds that health care providers should obtain patients' general consent to release records to other providers for treatment purposes as a matter of course. This consent does not expire and is sufficient for the health care provider to release health records to other providers when the other providers represent that they are treating a patient.
- **Interpretation 2:** This view of Minnesota Statutes § 144.335, Subd. 3a holds that a general patient consent to release health records, which does not expire, is only applicable to the release of health records for the continuity of care. All other patient consents expire in one year and that there is no way for a patient to consent, until revocation, to the release of health records to any provider currently treating the patient.

### Responses to Questions

1. **Fine Clinic needs Patient X's consent to provide Good Hospital Patient X's health record. What are the barriers to Patient X providing consent at Good Hospital and sending Patient X's consent electronically to Fine Clinic?**

#### Interpretation 1:

When the patient is first seen at Fine Clinic, Fine Clinic obtains the patient's consent to release records to other health care providers for "current treatment" purposes. Under Minnesota Statutes § 144.335, this consent does not expire.

#### Interpretation 2:

The patient would need to sign consent at Good Hospital and get the patient's consent back to Fine Clinic. Fine Clinic would need to verify the consent and after review of the consent documentation, provide a mechanism for accessing the records.

2. **What changes to current Minnesota law would be necessary to allow Patient X to consent to allow Fine Clinic to release his health records to any health care provider until the consent is revoked?**

#### Interpretation 1:

No changes to Minnesota law are required in order for a patient to consent to allow Fine Clinic to release records to other providers, as long as the providers receiving the records needed the records for treating the patient.

#### Interpretation 2:

Minn. Stat. § 144.335 would need to be changed to eliminate the one-year restriction and change the wording

to indicate that patients have the option to grant consent until they specifically revoke it.

**3. If Patient X is at Good Hospital and it is an emergency, what changes to current Minnesota law would be needed to require Fine Clinic to accept that the situation is an emergency and provide Good Hospital the relevant portions of Patient X's health record?**

Interpretation 1:

Generally, Fine Clinic should obtain patients' consent to release records to other providers for treatment purposes as a matter of course, as part of the "face sheet" the patient fills out when visiting Fine Clinic, so the release will be done with patient consent.

Other:

The only change is that might need to be spelled out in the law is that the sending facility is not held responsible for releasing records if they are told it is an emergency.

Minn. Stat. § 144.335 would need to be amended to provide a definition of what constitutes an emergency and what a provider would need to do to establish that an emergency exists. The statute would also need to be amended to state that once the criteria for establishing an emergency have been met, the provider holding the medical record would be required to release the record.

The Clinic should be able to rely on the Hospital's verbal or electronic representation that the records are needed for emergency treatment and the patient's consent cannot be obtained.

**4. What liability concerns do you see for Fine Clinic in either Questions 2 or 3?**

Interpretation 1:

The liability for Fine Clinic would be fairly limited in both instances. Most patients expect that providers should be able to share medical record information for treatment purposes, particularly in emergency situations. As long as the requesting provider indicates to Fine Clinic that it is treating the patient and as long as Fine Clinic has obtained the patient's consent to release to other providers for treatment purposes, Fine Clinic would have a very good defense.

Other - Question 2: Consent Valid for Any Provider until Revoked

The patient may come back and say that Fine clinic didn't inform them that the authorization was to release records to many different providers.

Other - Question 3: Release Required in Emergency:

Fine clinic would need to be exempt from wrongdoing if Good hospital misrepresented the situation as an emergency.

Fine Clinic may release the record in contested "emergency" situation

If the provider holding the medical record is required to release the record, the statute would probably need to hold both of the parties, requester and provider, potentially liable for improper release, dependent on where the improper action occurred.

**5. If health records are required to be released in an emergency, what documentation should be required to provide to the disclosing organization?**

The Hospital does not need to provide any documentation to the Clinic under current Minnesota law.

Currently there is not a requirement for documentation that the situation is an emergency. In general, verbal or electronic confirmation from Good that it's an emergency should be adequate.

The documentation requirements would depend on what is determined by statute as the criteria for establishing an emergency.

**6. Does all of the potential liability for inappropriate disclosure of health records reside with the disclosing organization? What changes would be necessary to redistribute the potential liability to more fairly onto those who may disclose inappropriately and those that make inappropriate requests or access?**

Currently, the entity holding the health records is responsible for ensuring that they are released in compliance with the law.

It is appropriate that the liability for inappropriate or unauthorized disclosures of health information lies with the organization that maintains the requested records. The law should be changed in an attempt to redistribute liability to requestors who request information inappropriately.

Health care providers should expect to be able to reasonable rely in good faith on the representation of other providers who need the information and should not have liability for doing so. Good faith assumes and includes no actual knowledge to the contrary. The representations should either be that there is proper authorization or that there is a legitimate need.

Minnesota could emulate other states and include a provision in state statute that provides a cause of action based on an inappropriate request for a medical record. (Example: Colorado; Uniform Health-Care Information Act).

**7. Assuming that Patient X wants to share his data with other providers, what changes to the current consent requirements would permit Patient X to give health care providers easier access to his information?**

Interpretation 2:

Removal of the one year expiration.

Interpretation 1:

The following changes to Minnesota Statutes § 144.335 would help clarify that providers can obtain a one-time consent from patients that does not expire and that permits the provider to release health records to other providers for treatment purposes. These changes would help ensure that providers do not need to obtain additional consents in order to share information with future providers treating the patient. These proposed changes would not increase liability or privacy concerns. Patients who are concerned about the release of particular records to other providers for treatment purposes do not need to sign the general consent permitting the release of records to future providers for treatment purposes. In that case, the provider who held the records would need a specific consent from the patient in order to release the records to future providers for treatment purposes.

**Subd. 3a. Patient consent to release of records; liability.**

(a) A provider, or a person who receives health records from a provider, may not release a patient's health records to a person without a signed and

dated consent from the patient or the patient's legally authorized representative authorizing the release, unless the release is specifically authorized by law. 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.

(b) This subdivision does not prohibit the release of health records:

- (1) for a medical emergency when the provider is unable to obtain the patient's consent due to the patient's condition or the nature of the medical emergency; or
- (2) to other providers within related health care entities when necessary for the ~~current~~ treatment of the patient.

(c) Notwithstanding paragraph (a), if a patient explicitly gives informed consent to the release of health records for the purposes and pursuant to the restrictions in clauses (1) and (2), the consent does not expire after one year for:

- (1) the release of health records to a provider for the purpose of treating ~~who is being advised or consulted with in connection with the current treatment of~~ the patient;